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ANTI – CORRUPTION INITIATIVES, GOOD GOVERNANCE AND HUMAN RIGHTS: THE REPUBLIC OF MACEDONIA

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Abstract

In fighting corruption, good governance efforts rely on principles such as accountability, transparency and participation to shape anti-corruption measures. Initiatives may include establishing institutions such as anti-corruption commissions, creating mechanisms of information sharing, and monitoring governments' use of public funds and implementation of policies. Good governance and human rights are mutually reinforcing. Human rights principles provide a set of values to guide the work of governments and other political and social actors. They also provide a set of performance standards against which these actors can be held accountable. Moreover, human rights principles inform the content of good governance efforts: they may inform the development of legislative frameworks, policies, programmers, budgetary allocations and other measures. Corruption is recognized as a serious crime in the EU, which is reflected in its many anti-corruption instruments covering existing member states. Countries wishing to join still face considerable systemic corruption issues in their public institutions. In Macedonia as one of these countries the most significant human rights problems stemmed from pervasive corruption and from the government's failure to respect fully the rule of law.

This article introduces anti-corruption work, good governance, and attempts to identify the various levels of relationship between that work and human rights with particular reference to Macedonia as an EU candidate country.

Keywords: *corruption, anti-corruption instruments, good governance, impact of corruption on human rights, Macedonia.*

1. Introduction

Fighting corruption is a global concern because corruption is found in both rich and poor countries, and evidence shows that it hurts poor people disproportionately. It contributes to instability, poverty and is a dominant factor driving fragile countries towards state failure[1].

Every year $1 trillion is paid in bribes while an estimated $2.6 trillion are stolen annually through corruption – a sum equivalent to more than 5 per cent of the global GDP. In developing countries, according to the United Nations Development Programme, funds lost to corruption are estimated at 10 times the amount of official development assistance[2].

The 2017 joint international campaign focuses on corruption as one of the biggest impediments to achieving the Sustainable Development Goals (SDGs). To mark the 2017 International Anti-Corruption Day (IACD), UNODC has developed a wide-ranging campaign focused on different SDGs and on how tackling corruption is vital to achieving them[3].

Corporate corruption scandals unearthed in recent years have provided further impetus to the anti-corruption movement[4].

What exactly is corruption? How are "offering", "promising" and "giving" a bribe treated under the law? Different countries have different answers to these

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[1] Governments, the private sector, non-governmental organizations, the media and citizens around the world are joining forces to fight this crime. The United Nations Development Programme (UNDP) and the United Nations Office on Drugs and Crime(UNODC) are at the forefront of these efforts. See International Anti-Corruption Day 9 December: http://www.un.org/en/events/anticorruptionday.

[2] Corruption is a serious crime that can undermine social and economic development in all societies. No country, region or community is immune. This year UNODC and UNDP have developed a joint global campaign, focusing on how corruption affects education, health, justice, democracy, prosperity and development. See United Nations Campaign: http://www.anticorruptionday.org/actagainstcorruption/en/about-the-campaign/index.html.

[3] Ibid. On 9 December each year, the world celebrates International Anti-Corruption Day. The fact that such a symbolic day exists (and immediately precedes Human Rights Day on 10 December) reflects the international community's increased recognition of the importance of anti-corruption measures. Various factors have contributed to this, including the heightened awareness of the concrete impact of corruption. Attention has turned, for example, to: the financing of terrorist acts; the covering up of narcotics trafficking; and the impediments to the effective use of aid for economic growth and development caused by corrupt practices. See, eg, UNCAC Preamble para 2: 'Concerned also about the links between corruption and other forms of crime, in particular organized crime and economic crime, including money-laundering'.

[4] Well-known examples include the corruption allegations against BAE Systems and Siemens: R (Corner House Research) v Director of the Serious Fraud Office [2009] 1 AC 756 ('BAE Case'); United States v Siemens Aktiengesellschaft (Plea Agreement) (DC, No 1:08-CR-00367-RJL, 6 January 2009) ('Siemens Plea Agreement').

questions, by definition as well as interpretation[5]. Corruption here will be understood to mean abuse of public office for private gain, which involves, for instance, public officials accepting bribes, unwarranted commissions or 'kickbacks' around processes of public procurement and service[6].

The fight against corruption is central to the struggle for human rights. Corruption has always greased the wheels of the exploitation and injustice which characterize our world. From violent ethnic cleansing to institutionalized racism, political actors have abused their entrusted powers to focus on gains for the few at great cost for the many[7]. Human rights strengthen good governance frameworks. They require: going beyond the ratification of human rights treaties, integrating human rights effectively in legislation and State policy and practice; establishing the promotion of justice as the aim of the rule of law; understanding that the credibility of democracy depends on the effectiveness of its response to people's political, social and economic demands; promoting checks and balances between formal and informal institutions of governance; effecting necessary social changes, particularly regarding gender equality and cultural diversity; generating political will and public participation and awareness; and responding to key challenges for human rights and good governance, such as corruption and violent conflict[8].

Moreover, Human rights require a conducive and enabling environment, in particular appropriate regulations, institutions and procedures framing the actions of the State. Human rights provide a set of performance standards against which Governments and other actors can be held accountable. At the same time, good governance policies should empower individuals to live with dignity and freedom. Although human rights empower people, they cannot be respected and protected in a sustainable manner without good governance. In addition to relevant laws, political, managerial and administrative processes and institutions are needed to respond to the rights and needs of populations. There is no single model for good governance. Institutions and processes evolve over time[9].

The success of the democratization and the establishment of a functioning State will depend on the existence of functioning institutions of pluralistic democracy and market economy in the Republic of Macedonia as well as other West Balkans States concerned. The effectiveness of local reform efforts and international technical and financial assistance requires the quality of public service and must be based on the best practices of good governance. As corruption is the negation of the Rule of Law and an impediment to efficient law enforcement and effective functioning of public institutions, non-governmental institutions need to find a common platform with the institutions of the state to work to prevent it. Reducing corruption requires not only the relevant institution-building measures but also creating the social preconditions for establishing the Rule of Law. In this context it is of decisive importance to foster a democratic political culture based on trust and respect of government institutions, transparency and openness of the activities of the administration, and an orientation towards stability and predictability. This task has become all the more pressing in the Republic of Macedonia.

2. The International Legal Framework Against Corruption

Corruption is the abuse of public or private office for personal gain[10]. The costs of corruption for economic, political and social development are becoming increasingly evident. But many of the most convincing arguments in support of the fight against corruption are little known to the public and remain unused in political debates. This brief provides evidence that reveals the true cost and to explain why governments and business must prioritise the fight against corruption[11].

International anti-corruption conventions play a key role in the global fight for integrity by: bringing the fight against corruption to the political forefront, setting

[5] Corruption is the abuse of power for private gain. Corruption takes many forms, such as bribery, trading in influence, abuse of functions, but can also hide behind nepotism, conflicts of interest, or revolving doors between the public and the private sectors. Its effects are serious and widespread. Corruption constitutes a threat to security, as an enabler for crime and terrorism. It acts as a drag on economic growth, by creating business uncertainty, slowing processes, and imposing additional costs. The abuse of entrusted power for private gain. corruption can be classified as grand, petty and political, depending on the amounts of money lost and the sector where it occurs. See Transparency International at: https://wwwtransparency.org/glossary/term/cprruption.

[6] See Observe:r http://oecdobserver.org/news/archivestory.php/aid/2163/Defining_corruption.html.

[7] See, The Global corruption Barometer (20070) : https://www.transparency.org/research/gcb/gcb_2007.

[8] Ibid.

[9] Governance refers to mechanisms, institutions and processes through which authority is exercised in the conduct of public affairs. The concept of good governance emerged in the late 1980s to address failures in development policies due to governance concerns, including failure to respect human rights. The concepts of good governance and human rights are mutually reinforcing, both being based on core principles of participation, accountability, transparency and State responsibility. See HRBA Portal: http://hrbaportal.org/faq/what-is-the-relationship-between-human-rights-and-good-governance.

[10] It could be the multinational company that pays a bribe to win the public contract to build the local highway, despite proposing a sub-standard offer. It could be the politician redirecting public investments to his hometown rather than to the region most in need. It could be the public official embezzling funds for school renovations to build his private villa. It could be the manager recruiting an ill-suited friend for a high-level position. Or, it could be the local official demanding bribes from ordinary citizens to get access to a new water pipe. At the end of the day, those hurt most by corruption are the world's weakest and most vulnerable. See, The rationale for fighting corruption at: https://www.oecd.org/cleangovbiz/49693613.pdf.

[11] Ibid.

legally binding standards and principles by which signatory states can be held to account, fostering both the domestic action and international co-operation needed to tackle the many facets of corruption.

Although they may be similar in substance, conventions can vary considerably depending on their signatories and specific obligations. Regarding their geographic scope, some aspire to a global coverage, while others have a regional focus. They may provide for different types of obligations, whether it is concrete recommendations for action along with sophisticated review processes, or more general political commitments as a basis for specific steps to be taken[12].

From the preceding brief summary of the international anti-corruption movement's evolution, it is clear that the Organization of Economic Cooperation and Development (OECD) Convention was a catalyst for further action[13]. The Convention have a global impact. It reduce the supply side of corruption as the OECD countries are the home states of most international companies. It is important on the demand-side, strengthening domestic anti-corruption efforts in developing countries and in those countries in transition in Central and Eastern Europe[14].

This Convention deals with what, in the law of some countries, is called "active corruption" or "active bribery", meaning the offence committed by the person who promises or gives the bribe, as contrasted with "passive bribery", the offence committed by the official who receives the bribe[15]. This Convention seeks to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a Party's legal system[16].

It should be noted that Bribery in international business subverts world trade and investment. Bribery often leads to a misallocation of scarce public resources. Sometimes public officials are bribed to support non-essential projects thereby[17]. The rot may result from foreign contractors doing dirty deals with local administrators[18] that enrich them both.

The OECD has been a global leader in the fight against corruption for many years. Along with other intergovernmental organizations, OECD has helped to create a panoply of international instruments that seek to limit corruption. And yet corruption continues. This is, in part, the inspiration for launching CleanGovBiz. This initiative supports governments, business and civil society to build integrity and fight corruption. It draws together existing anti-corruption tools, reinforces their implementation, improves co-ordination among relevant players and monitors progress towards integrity[19].

The first global agreement comprehensively addressing corruption is the United Nations Convention against Corruption (UNCAC)[20]. The high number of signatories and ratifications reflects the broad international consensus on the UNCAC. This consensus was not only shared among states, but also

[12] See, https://www.oecd.org/cleangovbiz/internationalconventions.htm#global.

[13] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, opened for signature 17 December 1997, [1999] ATS 21 (entered into force 15 February 1999) ('OECD Convention').

[14] Public knowledge of the critical issues under discussion within the OECD needs to be increased. In defining and describing those issues, the public can note that finally governments are moving to curb corruption. An inadequate Convention forces the question to OECD governments: how much global business bribery is the international community willing to tolerate ? See, OECD Anti-Corruption Convention Leaves Critical Question Still Open, at: https://www.transparency.org /news/pressrelease /oecd_anti_corruption_convention_leaves_critical_ questions_still_open.

[15] The Convention does not utilize the term "active bribery" simply to avoid it being misread by the non-technical reader as implying that the briber has taken the initiative and the recipient is a passive victim. In fact, in a number of situations, the recipient will have induced or pressured the briber and will have been, in that sense, the more active.

[16] See also the Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions Adopted by the Council on 26 November 2009; Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Adopted by the Council on 25 May 2009; Recommendation of the Council on Bribery and Officially Supported Export Credits Adopted by the Council on 14 December 2006; Recommendation of the Council for Development Co-operation Actors on Managing the Risk of Corruption 16 November 2016; and OECD Guidelines for Multinational Enterprises – Section VII.

[17] For example in many developing countries. further postponing construction of vital rural clinics and sanitation systems. Sometimes important infrastructure, such as roads and railways, is constructed but then collapses. Bribery can enable corrupt authoritarian regimes to stay in office. And there is frequently a link between high levels of official corruption and widespread human rights abuse. Or, corporate bribery of officials can contribute to the collapse of fragile institutions of democracy. And, at worst, the collapse of such institutions can spark the forceful overthrow of governments, so unleashing a fresh cycle of military rule, repression and corruption. See Ibid. Supra 17.

[18] For example, purchasing poor quality equipment at inflated prices.

[19] The CleanGovBiz Toolkit is being developed on the basis of the important standards embodied in international conventions to help put these standards into practice. In order to "walk the talk" o these conventions, the Toolkit proposes concrete priority measures, guidance on their implementation and examples of good practices in the multiple policy areas concerned. These conventions have been signed and ratified by states which in turn provides the necessary political legitimacy for applying the CleanGovBiz guidance. Political momentum is building to intensify the fight against corruption. Citizens are no longer willing to bear the burden of corrupt political and economic elites, as shown by the uprising in the Arab world. The tight budget constraints deriving from the crisis and the emerging corruption cases in a number of countries are increasing pressure on decision makers to act. CleanGovBiz provides governments, businesses and civil society with guidance and access to practical tools to face this challenge. See at: https://www.oecd.org/cleangovbiz/about/.

[20] UN General Assembly Resolution UNGA, on 31 October 2016 and was opened for signature in Merida, Mexico, on 9-11 December 2003. The Convention entered into force two years later, on 14 December 2005.

among the international private sector and civil society[21].

Substantive Highlights of the Convention include:

- Prevention[22] which means that the corruption can be prosecuted after the fact, but first and foremost, it requires prevention. An entire chapter of the Convention is dedicated to prevention, with measures directed at both the public and private sectors[23];
- The Convention requires countries to establish criminal and other offences to cover a wide range of acts of corruption, if these are not already crimes under domestic law[24];
- Countries agreed to cooperate with one another in every aspect of the fight against corruption, including prevention, investigation, and the prosecution of offenders[25]; and
- In a major breakthrough, countries agreed on asset-recovery, which is stated explicitly as "a fundamental principle of the Convention[26]…".

The UNCAC does not specify what conditions need to be met in order for anti-corruption bodies to be considered independent. Clarification can be found in an OECD study, which states that structural and operational autonomy, along with a clear legal basis and mandate for anti-corruption body, are all important elements in achieving independence[27].

The EU started off with modest anti-corruption instruments that mainly tackled the misdirection of EU funds in 1995. However, the EU broadened its focus over the course of time, with the final step being a comprehensive two-year review process of member states' general anti-corruption achievements. The results of a 2012 EU Corruption Barometer underlined that even in the EU, the fight against corruption is far from won.1[28] The Treaty on the Functioning of the EU recognizes corruption as a "euro-crime", listing it among the particularly serious crimes with a cross-border dimension for which minimum rules on the definition of criminal offences and sanctions may be established[29]. With the adoption of the Stockholm Program,[30] the Commission has been given a political mandate to measure efforts in the fight against corruption and to develop a comprehensive EU anti-corruption policy, in close cooperation with the Council of Europe Group of States against Corruption (GRECO)[31] .

The EU Anti-Corruption Report, published in 2014[32], demonstrated that the nature and scope of corruption vary from one EU country to another and that the effectiveness of anti-corruption policies is quite different. The Report also showed that corruption deserves greater attention in all EU countries.

Since then, the EU Anti-Corruption Report has served as the basis for dialogue with national authorities while also informing broader debates across Europe. All EU countries have designated a national contact point to facilitate information exchange on anti-corruption policy. Together with the anti-corruption experience-sharing programme launched by the Commission in 2015[33], these efforts have encouraged

[21] By ratifying treaties, states make an explicit and legally binding commitment to abide by and give effect to the normative principles espoused in them. However, there is no guarantee that states will institute the legal protections necessary to secure their international obligations, especially because the institutional characteristics, monitoring mechanisms and substantive content of these treaties vary greatly.

[22] Article 6 of the Convention.

[23] These include model preventive policies, such as the establishment of anticorruption bodies and enhanced transparency in the financing of election campaigns and political parties. States must endeavour to ensure that their public services are subject to safeguards that promote efficiency, transparency and recruitment based on merit. Once recruited, public servants should be subject to codes of conduct, requirements for financial and other disclosures, and appropriate disciplinary measures.

[24] In some cases, States are legally obliged to establish offences; in other cases, in order to take into account differences in domestic law, they are required to consider doing so. The Convention goes beyond previous instruments of this kind, criminalizing not only basic forms of corruption such as bribery and the embezzlement of public funds, but also trading in influence and the concealment and "laundering" of the proceeds of corruption. Offences committed in support of corruption, including money laundering and obstructing justice, are also dealt with. Convention offences also deal with the problematic areas of private-sector corruption. See Article 43 of the Convention.

[25] Countries are bound by the Convention to render specific forms of mutual legal assistance in gathering and transferring evidence for use in court, to extradite offenders. Countries are also required to undertake measures which will support the tracing, freezing, seizure and confiscation of the proceeds of corruption. Ibid.

[26] Article 51 of the Convention.

[27] Anti-Corruption Network for Eastern Europe and Central Asia, 'Specialized Anti-Corruption Institutions: Review of Models' (Report, Organizations for Economic Co-Operation and Development, 2008), 10, pp. 24-7. See also, UN Doc. CAC/COSP/IRG/2012/CRP.8 (22 June 2012); UN Doc CAC/COSP/2009/15 (1 December 2009) 3.; UN Doc CAC/COSP/IRG/1/1/1 Add. 3 (9 January 2012); UN Doc CAC/COSP/IRG/1/1/1/Add..4 (16 January 2012); UN Doc CAC/COSP/IRG/1/1/1 Add.5 (31 January 2012); UN Doc CAC/COSP/IRG/1/1/1 Add. 6 (23 March 2012) and UN Doc CAC/COSP/IRG/2012/CRP. 4 (18 Lune 2012).

[28] See European Commission, 'Commission Fights Corruption: A Stronger Commitment for Greater Results' (Press Release, IP/11/678, 6 June 2011) ; European Commission, 'Commission Steps Up Efforts to Forge a Comprehensive Anti-Corruption Policy at EU Level' (Press Release, MEMO 11/376, 6 June 2011) ; European Commission, 'Frequently Asked Questions: How Corruption is Tackled at the EU Level' (Press Release, MEMO 12/105, 15 February 2012) .

[29] See the Treaty on the Functioning the EU (TFEU) Article 83.1.

[30] See THE STOCKHOLM PROGRAMME — AN OPEN AND SECURE EUROPE SERVING AND PROTECTING CITIZENS (2010/C 115/01).

[31] It is in the common interest to ensure that all Member States have effective anti-corruption policies and the EU supports the Member States in pursuing this work. See REPORT FROM THE COMMISSION TO THE COUNCIL on the modalities of European Union participation in the Council of Europe Group of States against Corruption (GRECO), COM/2011/0307.

[32] See, European Commission, Brussels, 3.2.2014, COM(2014) 38.

[33] European Commission Anti-Corruption Report at: https://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report_en.

national authorities to better implement laws and policies against corruption.

The Commission's anti-corruption efforts are centred around the following main pillars: mainstreaming anti-corruption provisions in EU horizontal and sectorial legislation and policy; monitoring performances in the fight against corruption by Member States; supporting the implementation of anti-corruption measures at national level via funding, technical assistance and experience-sharing; improving the quantitative evidence base for anti-corruption policy[34]. One tool to help anti-corruption efforts is ensuring a common high standard of legislation, either specifically on corruption, or incorporating anti-corruption elements in other sectoral legislation.

Specific anti-corruption acquis includes the 1997 Convention on fighting corruption involving officials of the EU or officials of Member States[35] and the 2003 Framework Decision on combating corruption in the private sector[36] aims to criminalise both active and passive bribery.

The Council of Europe (CoE) , which aims to defend and promote pluralistic democracy, human rights and the rule of law, has played a pioneering role in the fight against corruption as it represents a danger for the core values cited. The Criminal Law Convention on Corruption states that corruption endangers the rule of law, democracy and human rights; it poses a threat to good governance, a fair and social justice system, distorts the competitive map, puts a brake on economic development and endangers the stability of democratic institutions and the moral foundations of society.

On 6 November 1997, the Committee of Ministers of the CoE adopted the Twenty Guiding Principles for the Fight against Corruption[37]. These guidelines set out a broad spectrum of anti-corruption measures, such as limiting immunity for corruption charges, denying tax deductibility for bribes, ensuring free media and preventing the shielding of legal persons from liability.

The Criminal Law Convention was adopted by CoE in early 1999[38] and an Additional Protocol to the Criminal Law Convention on Corruption was adopted in May 2003[39]. The Criminal Law Convention aims to harmonise the definition of a certain type of corruption, namely that of public officials. Such harmonisation, as stated by the Explanatory Report that accompanied the Criminal Law Convention,[40] would more easily allow for the requirement of dual criminality to be met by the states parties.

The Civil Law Convention on Corruption ('Civil Law Convention') was adopted on 4 November 1999 and entered into force four years later[41]. It focuses on effective civil remedies for any damage caused by corrupt acts. Both the Criminal Law Convention and the Civil Law Convention are open for signature by non-European countries[42].

The CoE's anti-corruption efforts have received substantial attention mainly because of the anti-corruption implementation mechanism. The CoE established GRECO on 1 May 1999[43]. Its function is to monitor compliance with the Council's anti-corruption standards[44], serving as a platform for both the exchange of best practices and peer pressure[45]. States that are not members of the CoE can become members of GRECO[46] and states that become parties to the Criminal Law Convention or the Civil Law Convention automatically become members[47].

3. Anti-Corruption Measures, Good Governance and Human Rights

There is no single and exhaustive definition of "good governance," nor is there a delimitation of its

[34] Ibid.

[35] Council Act of 26 May 1997 drawing up the Convention made on the basis of Article K.3 (2)(c) of the Treaty on European Union, on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union [Official Journal C 195 of 25 June 1997].

[36] Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector. See also: 1st Protocol to the PIF Convention of 27 September 1996 (in force since 17 October 2002); Protocol of 19 June 1997 to the PIF Convention (in force since May 2009); Convention on Fighting Corruption involving Officials of the EU or Officials of the Member States, 1997 (entered into force on 28 September 2005); EACN, Council Decision 2008/852/JHA, of 24 October 2008 on a contact point network against corruption; EU Anti-Corruption Package (follow- up the Stockholm Programme, adopted on 16 June 2011; and Directive 2004/18 on the coordination of procedures for award of public work contracts, public supply contracts and public service contracts.

[37] Committee of Ministers, Council of Europe, Resolution (97)24 on the Twenty Guiding Principles for the Fight against Corruption (6 November 1997).

[38] See, Criminal Law Convention on Corruption, Strasbourg, 27.I.1999, *European Treaty Series - No. 173.*

[39] Additional Protocol to the Criminal Law Convention, opened for signature 15 May 2003, ETS No 191 (entered into force on 1 February 2005) ('Additional Protocol').

[40] Council of Europe, Criminal Law Convention on Corruption: Explanatory Report, [21]–[22] .

[41] Civil Law Convention on Corruption, opened for signature 4 November 1999, ETS No 174 (entered into force 1 November 2003).

[42] In addition to these treaties, the CoE has issued several soft law instruments. One of them is the recommendation on codes of conduct for public officials, adopted on 11 May 2000 (See Committee of Ministers, Council of Europe, Recommendation No R 2000(10) of the Committee of Ministers to Member States on Codes of Conduct for Public Officials (11 May 2000). On 8 April 2003, the Committee of Ministers adopted a recommendation on common rules against corruption in the funding of political parties and electoral campaigns (See, Recommendation Rec(2003)4); Council of Ministers Recommendation Rec(2003)4; and Council of Ministers Recommendation No R (2000) 10.

[43] Committee of Ministers, Council of Europe, Resolution 99(5) Establishing the Group of States against Corruption (GRECO) (1 May 1999).

[44] Ibid art. 2.

[45] Ibid art. 1.

[46] Ibid art 4(2).

[47] Criminal Law Convention art 24; Civil Law Convention art 14.

scope, that commands universal acceptance[48]. Depending on the context and the overriding objective sought, good governance has been said at various times to encompass: full respect of human rights, the rule of law, effective participation, multi-actor partnerships, political pluralism, transparent and accountable processes and institutions, an efficient and effective public sector, legitimacy, access to knowledge, information and education, political empowerment of people, equity, sustainability, and attitudes and values that foster responsibility, solidarity and tolerance.

However, there is a significant degree of consensus that good governance relates to political and institutional processes and outcomes that are deemed necessary to achieve the goals of development[49]. The key question is: are the institutions of governance effectively guaranteeing the right to health, adequate housing, sufficient food, quality education, fair justice and personal security?

The concept of good governance has been clarified by the work of the former Commission on Human Rights,[50] identified the key attributes of good governance: transparency, responsibility, accountability, participation, responsiveness (to the needs of the people)[51].

In fighting corruption, good governance efforts rely on principles such as accountability, transparency and participation to shape anti-corruption measures. Initiatives may include establishing institutions such as anti-corruption commissions, creating mechanisms of information sharing, and monitoring governments' use of public funds and implementation of policies[52].

At the Warsaw Summit in June 2016[53] Heads of State and Government agreed that corruption and poor governance are security challenges that undermine democracy, the rule of law and economic development, erode public trust and have a negative impact on operational effectiveness.

Improved governance requires an integrated, long-term strategy built upon cooperation between government and citizens. It involves both participation and institutions. The Rule of Law, Accountability, and Transparency are technical and legal issues at some levels, but also interactive to produce government that is legitimate, effective, and widely supported by citizens, as well as a civil society that is strong, open, and capable of playing a positive role in politics and government[54]. Good governance involves far more than the power of the state or the strength of political will. The rule of law, transparency, and accountability are not merely technical questions of administrative procedure or institutional design[55]. They are outcomes of democratizing processes driven not only by committed leadershiut also by the participation of, and contention among, groups and interests in society—processes that are most effective when sustained and restrained by legitimate, effective institutions[56].

There is no doubt that the goals for good governance are: Legitimate, effective, responsive institutions and policies; understandable processes and outcomes[57]; transparency[58]; incentives to sustain good governance for leaders[59]; vertical accountability[60]; and horizontal accountability and leaders, and among segments of government[61] .

The human rights issues primarily concern the relationship between the state and its citizens. The economic development mainly depends on good governance and equitable. Now, these days, is what good governance is to ensure the political and economic development. There are two aspects of good governance, about the legitimacy of a political aspect and a technical aspect that is related to the capacity. Democratic governance and state capacity inextricably linked together. Good governance as an ideal principle refers to the effective user friendly laws that benefit those who live in the territory. Good governance and basic human rights standards should be defined by economic criteria and management. Relationship between human rights and good governance is the way

[48] The term is used with great flexibility; this is an advantage, but also a source of some difficulty at the operational level.

[49] It has been said that good governance is the process whereby public institutions conduct public affairs, manage public resources and guarantee the realization of human rights in a manner essentially free of abuse and corruption, and with due regard for the rule of law. The true test of "good" governance is the degree to which it delivers on the promise of human rights: civil, cultural, economic, political and social rights.

[50] UN Commission on Human Rights, resolution No. 2000/64. By linking good governance to sustainable human development, emphasizing principles such as accountability, participation and the enjoyment of human rights, and rejecting prescriptive approaches to development assistance, the resolution stands as an implicit endorsement of the rights-based approach to development.

[51] Resolution 2000/64 expressly linked good governance to an enabling environment conducive to the enjoyment of human rights and "prompting growth and sustainable human development." In underscoring the importance of development cooperation for securing good governance in countries in need of external support, the resolution recognized the value of partnership approaches to development cooperation and the inappropriateness of prescriptive approaches.

[52] See, SELDI.net: http://seldi.net/history/summary/anti-corruptiongood-governance.

[53] See, Warsaw Summit Communique, Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Warsaw 8-9 July 2016, at: https://www.nato.int/cps/en/natohq/official_texts_133169.htm.

[54] Good Governance: Rule of Law, Transparency, and Accountability by Michael Johnston Department of Political Science, Colgate University, at: http://unpan1.un.org/intradoc/groups/public/documents/un/unpan010193.pdf.

[55] See, UN Millennium Development Goals (MDG): http://www.un.org/millenniumgoals/

[56] Ibid. Supra 56.

[57] With visible results in citizens' lives --with clear standards for success or failure --with clear lines of responsibility and accountability.

[58] Openness from above --participation and scrutiny from below --honesty from all.

[59] The opportunity to take credit --for citizens: a credible chance for justice and a better life --for neighboring societies: sharing insights, experiences, expertise, values.

[60] Government that answers to citizens --citizens who accept and abide by laws and policies.

[61] Access to information --the right to be consulted --the power to check excesses and abuses.

in which human rights can be seen as good corporate governance reform policies[62].

Finally, corruption compromises States' ability to fulfil their obligation to promote, respect and protect the human rights of individuals within their jurisdictions. Human rights are indivisible and interdependent, and the consequences of corrupt governance are multiple and touch on all human rights — civil, political, economic, social and cultural rights, as well as the right to development[63].

4. EU Enlargement: The Republic of Macedonia

Corruption is recognized as a serious crime in the EU, which is reflected in its many anti-corruption instruments covering existing member states. Countries wishing to join still face considerable systemic corruption issues in their public institutions[64].

Corruption affects citizens in very basic aspects of their everyday life in various ways. It has a negative impact: on citizens' everyday life[65]; on a political level[66]; and on economic development[67].

Macedonia is the 90 least corrupt nation out of 175 countries, according to the 2016 Corruption Perceptions Index reported by Transparency International. Corruption Rank in Macedonia averaged 79.20 from 1999 until 2016, reaching an all time high of 106 in 2003 and a record low of 62 in 2010[68].

Corruption and inefficient bureaucracy are challenges companies may face when doing business in Macedonia. There is a high risk of corruption in most of the country's sectors. Private businesses frequently complain about burdensome administrative processes that create operational delays and opportunities for corruption. Public procurement, the customs administration, and the building and construction sectors are some of the areas where corruption and bribery are most prevalent. The primary legal framework regulating corruption and bribery in Macedonia is contained in the Law on prevention of Corruption[69] and the Crime Code,[70] which make individuals and companies criminally liable for corrupt practices[71].

As a final point, concerning the fight against corruption, the country has some level of preparation. Corruption remains prevalent in many areas and continues to be a serious problem. The legislative and institutional framework has been developed. However, the structural shortcomings of the State Commission for Prevention of Corruption and political interference in its work have minimized the impact of past efforts. There is still a need to establish a convincing track record, especially on high level corruption cases. In the fight against organised crime, the country has reached some level of preparation. The legislative framework is broadly in line with European standards and strategies have been elaborated. However, the law enforcement capacity to investigate financial crimes and confiscate assets needs to be developed further[72].

Conclusion

The case for combating corruption is that "it is a force which drives poverty, inequality, dysfunctional democracy and global insecurity". These words, from one of the world's foremost experts on countering corruption over the past thirty years, speak to all of us,

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[62] See Relationship between good governance and Human rights Masoomeh Mostafavi Azad University, 2012, at: file:///C:/Users/e.andreevska.SEEU/Downloads/SSRN-id2136129.pdf.

[63] In recent years, a number of relevant UN bodies and mechanisms have acknowledged the negative effects of corruption on the protection of human rights and on development. UN human rights bodies and mechanisms (i.e., Human Rights Council, its Special Rapporteurs, and the Universal Periodic Review mechanism, as well as human rights Treaty Bodies) are increasingly mindful of the negative impact of corruption on the enjoyment of human rights, and have addressed issues of corruption and human rights on numerous occasions.

[64] Between September 2012 and February 2013, more than 6,000 people were interviewed in the Western Balkans on their views of corruption levels in their country/territory and their governments' efforts to fight corruption. The survey shows that: 44% of people surveyed in the enlargement region believe that corruption has increased in their country over the past 2 years. Perceptions of increase in corruption levels are particularly high in Bosnia and Herzegovina and Albania with 65% and 66% respectively of people surveyed. Political parties, the judiciary and medical sectors are perceived as the most corrupt institutions across the region. See, EU ENLARGEMENT FACTSHEET, at: https://ec.europa.eu/neighbourhood-enlargement/.

[65] It affects their trust in the legal system and public administration; it deprives them from the health services they are entitled to get when bribing doctors is a common way to be helped faster it affects the quality of education and professional standards if a diploma can be bought instead of honestly obtained.

[66] It fosters a system where not the public interest, but the interests of individuals or groups are better served. Gaps in legislation allow corruption to spread it causes, distortions in elections, and it undermines democratic values which are indispensible for EU enlargement.

[67] It scares off foreign investors, it prevents the free market to grass root; it causes skilled people to leave the country to seek for better opportunities abroad.

[68] See, Macedonia Corruption Rank 1999-2018, at: https://tradingeconomics.com/macedonia/corruption-rank. It should be noted that **e**very government that has been in power in Macedonia since independence has declared the fight against corruption a priority. However, according to observers, the actions of the government have been rather superficial. Although progress has been made in establishing the legal and institutional framework for fighting corruption, implementation of anti-corruption laws and independent handling of corruption cases by the relevant supervisory bodies and courts remains a major challenge. See, Transparency International, at: https://knowledgehub.transparency.org/helpdesk/former-yugoslav-republic-of-macedonia-overview-of-political-corruption.

[69] See at: http://rai-see.org/wp-content/uploads/2015/06/LAW_ON_PREVENTION_OF_CORRUPTION.pdf.

[70] See at: http://unpan1.un.org/intradoc/groups/public/documents/untc/unpan016120.pdf.

[71] Facilitation are prohibited, and gifts may be considered illegal depending on their value or intent. Insufficient implementation of legislation and ineffective law enforcement impede the fight against corruption and public officials continue to act with impunity

[72] See, European Commission Doc. SWD(2016) 362 final, Brussels, 9.11.2016.

in nations rich and poor, who wish to see a more prosperous and secure global future. National anti-corruption strategies and plans are a component of realizing this desire.

There is no silver bullet for fighting corruption,[73]but effective law enforcement is essential to ensure the corrupt are punished and break the cycle of impunity, or freedom from punishment or loss[74]. Moreover, reforms focussing on improving financial management and strengthening the role of auditing agencies have in many countries achieved greater impact than public sector reforms on curbing corruption[75]. Countries successful at curbing corruption have a long tradition of government openness, freedom of the press, transparency and access to information.[76] Also, strengthening citizens demand for anti-corruption and empowering them to hold government accountable is a sustainable approach that helps to build mutual trust between citizens and government[77]. Finally, without access to the international financial system, corrupt public officials throughout the world would not be able to launder and hide the proceeds of looted state assets[78].

The concept of corruption and ideas on the proper functioning of political systems are exceedingly specific socially and culturally. Therefore, the existing anti-corruption consensus is problematic. It is necessary to learn more about the ambiguities of the term in its local translations. The anti-corruption campaign has to understand much more precisely which types of corruption emerge in different contexts and, even more basically, what corruption actually means in a given context. It appears to be crucial that activities aimed at overcoming corruption consider the extreme cultural variations in the concept of corruption and its related implications[79].

References

- 1st Protocol to the PIF Convention of 27 September 1996
- Additional Protocol to the Criminal Law Convention, opened for signature 15 May 2003, ETS No 191
- Anti-Corruption Network for Eastern Europe and Central Asia, 'Specialized Anti-Corruption Institutions: Review of Models
- Civil Law Convention on Corruption, opened for signature 4 November 1999, ETS No 174 (entered into force 1 November 2003)
- Committee of Ministers, Council of Europe, Recommendation No R 2000(10) of the Committee of Ministers to Member States on Codes of Conduct for Public Officials (11 May 2000)
- Committee of Ministers, Council of Europe, Resolution (97)24 on the Twenty Guiding Principles for the Fight against Corruption (6 November 1997)
- Committee of Ministers, Council of Europe, Resolution 99(5) Establishing the Group of States against Corruption (GRECO) (1 May 1999)
- Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, opened for signature 17 December 1997, [1999] ATS 21
- Convention on Fighting Corruption involving Officials of the EU or Officials of the Member States, 1997
- Council Act of 26 May 1997, Official Journal C 195 of 25 June 1997
- Council Framework Decision 2003/568/JHA
- Council of Europe, Criminal Law Convention on Corruption: Explanatory Report, [21]–[22]
- Criminal Law Convention on Corruption, Strasbourg, 27.I.1999, *European Treaty Series - No. 173*
- Directive 2004/18 on the coordination of procedures for award of public work contracts, public supply contracts and public service contracts
- EACN, Council Decision 2008/852/JHA
- EU ENLARGEMENT FACTSHEET, https://ec.europa.eu/neighbourhood-enlargement/
- EU Enlargement Fasheet: at: https://ec.europa.eu/neighbourhood-enlargement/
- European Commission Anti-Corruption Report, https://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report_en

[73] Many countries have made significant progress in curbing corruption, however practitioners are always on the lookout for solutions and evidence of impact.

[74] Successful enforcement approaches are supported by a strong legal framework, law enforcement branches and an independent and effective court system. Civil society can support the process with initiatives such as Transparency International's Unmask the Corrupt campaign. See, Unmask the Corrupt, at: https://unmaskthecorrupt.org/

[75] One such reform is the disclosure of budget information, which prevents waste and misappropriation of resources.

[76] Access to information increases the responsiveness of government bodies, while simultaneously having a positive effect on the levels of public participation in a country.

[77] For example, community monitoring initiatives have in some cases contributed to the detection of corruption, reduced leakages of funds, and improved the quantity and quality of public services.

[78] The European Union recently approved the 4th Anti-Money Laundering Directive, which requires EU member-states to create registers of the beneficial owners of companies established within their borders. See, Transparency International, How to stop Corruption: 5 Key Ingredients, at: https://www.transparency.org/news/feature/how_to_stop_corruption_5_key_ingredients.

[79] See, GIGA Research Programme: Power, Norms and Governance in International Relations, f work in progress prior to publicaton to encourage the exchange of ideas and academic debate. Inclusion of a paper in the Working Papers series does not constitute publication and should not limit publication in any other venue. Copyright remains with the authors.
GIGA Research Programme: Power, Norms and Governance in International Relations, Contextualizing Conceptions of Corruption: Challenges for the International Anti-corruption Campaign, at: http://repec.giga-hamburg.de/pdf/giga_09_wp115_gephart.pdf.

- European Commission Doc. SWD(2016) 362 final, Brussels, 9.11.2016
- European Commission, 'Commission Fights Corruption: A Stronger Commitment for Greater Results' (Press Release, IP/11/678, 6 June 2011)
- European Commission, 'Commission Steps Up Efforts to Forge a Comprehensive Anti-Corruption Policy at EU Level' (Press Release, MEMO 11/376, 6 June 2011)
- European Commission, 'Frequently Asked Questions: How Corruption is Tackled at the EU Level' (Press Release, MEMO 12/105, 15 February 2012)
- European Commission, Doc. COM(2014) 38, Brussels, 3.2.2014
- GIGA Research Programme: Power, Norms and Governance in International Relations, Contextualizing Conceptions of Corruption: Challenges for the International Anti-corruption Campaign, http://repec.giga-hamburg.de/pdf/giga_09_wp115_gephart.pdf
- Good Governance: Rule of Law, Transparency, and Accountability by Michael Johnston Department of Political Science, Colgate University, http://unpan1.un.org/intradoc/groups/ public/documents/un/ unpan010193.pdf
- Good Governance: Rule of Law, Transparency, and Accountability by Michael Johnston Department of Political Science, Colgate University, http://unpan1.un.org/intradoc/groups/public/documents/un/unpan 010193.pdf
- HRBA Portal: http://hrbaportal.org/faq/what-is-the-relationship-between-human-rights-and-good-governance
- International Anti-Corruption Day 9 December:http://www.un.org/en/events/anticorruptionday
- Macedonia Corruption Rank 1999-2018, https://tradingeconomics.com/macedonia/corruption-rank
- N Doc. CAC/COSP/IRG/2012/CRP.8 (22 June 2012)
- OECD Anti-Corruption Convention Leaves Critical Question Still Open, https://www.transparency.org /news /pressrelease/ oecd_anti_corruption_convention_leaves_critical_questions_still_open
- OECD Guidelines for Multinational Enterprises – Section VII
- Protocol of 19 June 1997 to the PIF Convention
- R (Corner House Research) v Director of the Serious Fraud Office [2009] 1 AC 756 ('BAE Case')
- Recommendation of the Council for Development Co-operation Actors on Managing the Risk of Corruption 16 November 2016
- Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions Adopted by the Council on 26 November 2009
- Recommendation of the Council on Bribery and Officially Supported Export Credits Adopted by the Council on 14 December 2006
- Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Adopted by the Council on 25 May 2009
- Recommendation Rec(2003)4); Council of Ministers Recommendation Rec(2003)4; and Council of Ministers Recommendation No R (2000) 10
- Relationship between good governance and Human rights MasoomehMostafavi Azad University, 2012, at: file:///C:/Users/e.andreevska.SEEU/Downloads/SSRN-id2136129.pdf
- Relationship between good governance and Human rights MasoomehMostafavi Azad University, 2012,file:///C:/Users/e.andreevska.SEEU/Downloads/SSRN-id2136129.pdf
- Report from the Commission to the Council on the modalities of European Union participation in the Council of Europe Group of States against Corruption (GRECO), COM/2011/0307
- SELDI.net: http://seldi.net/history/summary/anti-corruptiongood-governance
- The Global corruption Barometer (20070): https://www.transparency.org/research/gcb/gcb_2007
- The rationale for fighting corruption at: https://www.oecd.org/cleangovbiz/49693613.pdf
- The Stockholm Programme — an open and Secure Europe Serving and Protecting Citizens (2010/C 115/01)
- The Treaty on the Functioning the EU
- Transparency International, How to stop Corruption: 5 Key Ingredients, https://www.transparency.org/news/feature/how_to_stop_corruption_5_key_ingredients
- Transparency International, https://knowledgehub.transparency.org/helpdesk/former-yugoslav-republic-of-macedonia-overview-of-political-corruption
- Transparency International: https://www.transparency.org/glossary/term/corruption
- UN Commission on Human Rights, resolution No. 2000/64
- UN Doc CAC/COSP/2009/15 (1 December 2009) 3.
- UN Doc CAC/COSP/IRG/1/1/1 Add. 3 (9 January 2012)
- UN Doc CAC/COSP/IRG/1/1/1 Add. 6 (23 March 2012)
- UN Doc CAC/COSP/IRG/1/1/1 Add.5 (31 January 2012)
- UN Doc CAC/COSP/IRG/1/1/1/Add..4 (16 January 2012)
- UN Doc CAC/COSP/IRG/2012/CRP. 4 (18 Lune 2012)
- UN General Assembly Resolution UNGA, on 31 October 2016
- UN Millennium Development Goals (MDG): http://www.un.org/millenniumgoals
- UN Millennium Development Goals (MDG): http://www.un.org/millenniumgoals/.
- UNCAC Preamble para 2: 'Concerned also about the links between corruption and other forms of crime, in particular organized crime and economic crime, including money-laundering'

- United Nations Campaign: http://www.anticorruptionday.org/actagainstcorruption/en/about-the-campaign/index.html
- United States v Siemens Aktiengesellschaft (Plea Agreement) (DC, No 1:08-CR-00367-RJL, 6 January 2009) ('Siemens Plea Agreement')
- Unmask the Corrupt, https://unmaskthecorrupt.org
- Warsaw Summit Communique, Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Warsaw 8-9 July 2016, https://www.nato.int/cps/en /natohq/ official_texts_133169.htm
- Warsaw Summit Communique, Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Warsaw 8-9 July 2016, https://www.nato.int/cps/en/natohq/ official_texts_133169.htm
- http://rai-see.org/wp content/uploads/2015/06/LAW_ON_PREVENTION_OF_CORRUPTION.pdf.
- http://unpan1.un.org/intradoc/groups/public/documents/untc/unpan016120.pdf
- https://www.oecd.org/cleangovbiz/about/
- https://www.oecd.org/cleangovbiz/internationalconventions.htm/global

A SHORT PRESENTATION OF THE PRELIMINARY CHAMBER AS THE PHASE IN THE CRIMINAL PROCEEDINGS

Denisa BARBU[*]

Abstract

The current Code of Criminal Procedure brings important changes to some of the institutions of the old code of criminal procedure, but it also establishes a number of new institutions that did not exist in our criminal law. Based on these considerations, we have appreciated that at this time, in view of the consolidation of the legislation in the field, it is useful to design a work that examines the competence of the preliminary chamber judge. The paper follows the new configuration of the institutions, especially the one concerning the preliminary chamber judge. The criminal trial knows the preliminary chamber phase, usually, located after the criminal investigation phase and before the trial phase.

The Preliminary Chamber judge is not a training judge as provided for in the Romanian inter-war criminal law or in the French criminal proceedings, and has no competence in collecting evidence, discovering the offender or its participants, or analysing the merits of the accusation or in bringing the defendants to justice. Even if the Preliminary Chamber judge does not verify the merits of the evidence or the trial, its role is as important as the role of the court, since its rulings on the lawfulness of the prosecution can have a significant reflex on the settlement criminal proceedings, given that the basis of any criminal proceedings is the probation.

Keywords: *jurisdiction, Preliminary chamber, Criminal investigation, competence, comparative analysis.*

1. Introduction

The criminal proceedings are not confused with the judicial activity in criminal matters, as the parties, the lawyer, the trial subjects (the suspect and the injured person), as well as other procedural subjects (finding bodies, witnesses, experts, etc.) [1] participate with the criminal justice bodies. The Preliminary Chamber seeks to resolve issues relating to the jurisdiction and lawfulness of the court's referral, as well as the lawfulness of taking the evidence and the execution of acts by the criminal investigation bodies, ensuring that the case is resolved in a speedy manner[2].

2. Content

From this definition it follows that the Preliminary Chamber judge has the following powers: it checks the lawfulness of the referral ordered by the prosecutor, verifies the lawfulness of the administration of the evidence and the execution of the procedural acts by the criminal prosecution bodies, solves the complaints against the non-court solutions (classification)[3] or non-pursuing[4]; resolves other express requests provided by law[5].

The Preliminary Chamber judge may also order the measure of provisional prescription for medical treatment[6], precautionary measures[7], and other intrinsic attributions to the conduct of criminal proceedings[8].

The analysis of the lawfulness of the concluding sentences of the computer search, we consider that it falls within the competence of the preliminary chamber judge[9].

Beyond the substantive changes, the preliminary camera procedure is placed historically in the succession of the institution of the indictment chamber provided by art. 279 C.C.P. 1936, which had the power to order the referral of the defendant to the Court of Jurists, when there is evidence and solid evidence against the defendant[10].

At the moment, the Preliminary Chamber procedure has a different philosophy than the institution of the preparatory meeting provided in Art. 269-279 C.C.P. which was in force between 1953-1957 and abrogated by the Decree no. 473 of 20th September 1957, in which an analysis was made of both the merits of the referral and of the lawfulness of the criminal investigation or its completeness. This procedure was non-public, but the prosecutor and, exceptionally, the

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[1] Denisa Barbu, *Drept procesual penal. Partea generală*, Ed. Lumen, Iași, 2016, p.13.

[2] M. Udroiu, s.a., *Codul de procedură penală. Comentariu pe articole,* Ed. C.H.Beck, București, 2015, p.196.

[3] Art. 318 C.C.P. was declared non-constitutional by Decision CCR no.23 din 20.01.2016 (O.M. No. 240 of 31 .01.2016).

[4] See art. 340-341 C.C.P.

[5] Maintaining the preventive measures**,** M. Udroiu, s.a., *op. cit.*, p.197.

[6] Art. 245 para 1 C.C.P.

[7] Art. 249 C.C.P.

[8] See the atribution of the judge of rights and freedoms, N. Volonciu, s.a., *Noul Cod de procedura penala comentat,* Hamangiu, Bucuresti, 2014, p. 131.

[9] M. Udroiu ș.a., *op. cit.*, p. 490.

[10] M. Udroiu, Sinteze și grile, Procedura penală. Partea specială, C.H.Beck, București, 2016, p.147.

accused could participate if the court deems it necessary. As a result, the prosecution of the accused falls within the jurisdiction of the judge who participates in the proceedings of the preparatory hearing and, at the preparatory hearing, the court could order the return of the case for completion or restoration of the criminal prosecution, if the provisions of procedural steps were not complete which guarantee the establishment of the truth or the classification of the case and the termination of the criminal proceedings, if it was aware of the existence of one of the reasons for preventing the commencement or prosecution of the case. [11]

The comparative law analysis reveals that although the source of inspiration for the Chamber of the Preliminary Chamber is found in the German[12] and Italian Penal Procedure Code, the national procedure of the preliminary chamber resulting from the modification of the NCPP through LPANCPP shows little similarities with the institution of the Preliminary Chamber provided by art. 199-204 of the Code of German Penal Procedure, respectively with the institution of the preliminary hearing *(udienza preliminare)* provided by art. 418-425 of the Italian Code of Criminal Procedure.

In the German criminal proceedings, the proceedings before the judge, after the indictment is made and before the commencement of the trial is non-public but contradictory with the prosecutor's participation and the defendant's summoning; this preliminary procedure leads either to a solution to commence a trial or a solution to close the case; (if there are sufficient grounds to believe that the person who has been convicted has committed an offense of which he is accused) has no right to verify the lawfulness of the criminal proceedings or evidence administered during the criminal prosecution, may administer evidence, can hear the defendant.

In the Italian criminal procedural law the preliminary hearing procedure before the judge is non-public, but contradictory with the prosecutor's participation and the summoning of the defendant and injured person; the preliminary hearing shall not be limited to verifying the legality of criminal acts or evidence administered during the criminal prosecution, the judge may also check whether the accusation is well founded, administer evidence, hear the defendant or analyse the complete character of the prosecution and order completion of the criminal prosecution.

The procedure of the preliminary chamber is a new phase of the criminal trial[13] (and not a stage of the trial phase) in which the preliminary chamber judge carries out a precisely determined objective, namely analyses the lawfulness of the administration of evidence, the referral of the court by indictment and the acts performed by to the criminal prosecution bodies, thus *preparing the next stage of the criminal trial for the purpose of achieving the purpose of the criminal trial*; the beginning of the judgment phase is the consequence of the judge's preliminary ruling; in the same regard, the Constitutional Court stated in Decision no. 641/2014 the following: "Thus, in the light of the procedural attributions entrusted to the Preliminary Chamber Judge, in the context of the separation of judicial functions according to the abovementioned Law, the Court concludes that it has the function of verifying the legality of the referral or non-adjudication, **and in the legislator's view, this new procedural institution does not belong to either criminal prosecution or judgment, being equivalent to a new phase of the criminal process**.

The procedure of the preliminary chamber was entrusted, according to art. 54 NCCP, to a judge - the preliminary chamber judge - which activity is circumscribed to the same material, personal and territorial jurisdiction of the court of which he is a party, conferring on this *new procedural procedure* a jurisdictional character. However, according to the jurisprudence of the Court of Justice, the Court notes that *„this action does not concern the merits of the case, and the procedural act exercised by him not quoting or postponing, in a positive or negative sense, the essential elements of the conflict report: deed, person and guilt."*

Within the time limit set by the Preliminary Chamber Judge, the defendant / injured party / civil party / civil responsible party can file requests and exceptions to invoke *the lack of competence of the prosecution bodies, the unlawfulness of the referral / notice* (for example, the failure to state the deed in the indictment), *the unlawful administration of the evidence of the evidence* (the unlawful conduct and

[11] M. Udroiu, *op. cit.*, p.147.

[12] The Commission for the elaboration of the new code set up within the Ministry of Justice has been advised by German experts and professors within IRZ (The German Foundation for International Legal Cooperation).

[13] It is well established in the doctrine that *the procedural stage* comprises a set of processing and procedural acts and measures, carried out in the order and in the forms prescribed by law, by the judicial authorities and the parties to the trial, fulfilling a limited objective in achieving the purpose of the criminal proceeding. The objective of a procedural phase is the preparation of the next procedural phase, until the final phase of the criminal process is reached". (Gr. Theodoru, *Tratat de procedură penală*, ed. 2, Hamangiu, București, 2012, p.544). For the purposes of the procedural stage of the preliminary chamber procedure is also the Decision no. 18/2014 of the Board of the High Court of Cassation and Justice, whereby the Supreme Court of Appeals was notified in the interest of the law (file no. 6/2014), stating the following: „In such a procedural circumstance, the suspension of the commencement of the trial, the appeal of the contestation results in the prolongation of the procedural stage of the preliminary chamber until the time of the settlement of the contestation stipulated in art. 347 of the NCCP and of the final remaining of the conviction on the appeal. Given that the case is in *the preliminary stage of the preliminary hearing* until the appeal is settled, the procedural provisions applicable in the matter of preventive measures up to the moment of resolving this appeal are the provisions of art. 348 of the same Code on Preventive Measures in the Preliminary Chamber Procedure, the provisions of Art. 207 on the verification of preventive measures in the preliminary procedure and the provisions of Art. 205 concerning the appeal against the decision ordering preventive measures in the preliminary-chamber procedure".

computer search in the absence of the defendant, with witnesses without the defendant's acknowledgment of the date of the hearing, etc.), *the illegality of the investigation, the making of procedural / procedural acts by criminal prosecution bodies* (for example, the unlawful prosecution of a criminal offense for an act for which criminal prosecution has not been initiated or extended); thus, the incidence of absolute or relative nullity, ie the exclusion of unlawfully or unfairly administered evidence, can be invoked[14].

In the motivation of the Constitutional Court Decision no. 641/2014 resulted that **the defendant or his lawyer may request the preliminary chamber judge to administer evidence[15]** in order to prove the unlawfulness of the criminal prosecution or the evidence administered; by amending the provisions of art. 345 par. (1) NCCP by Law no. 75/2016 stated that within the set timeframe the preliminary chamber judge shall settle the applications and exceptions made or the exceptions raised ex officio on the basis of the works and the material in the criminal investigation file **and any new documents submitted**. Taking into account the considerations of the **Constitutional Court Decision no. 641/2014, that limitation on the principle of the freedom of evidence in relation to the subject-matter of the preliminary-ruling chamber appears to be unconstitutional**; thus, by Law no. 75/2016 is attested, in other words, that the evidence of the provocation or pressure of the prosecuting authorities on witnesses / suspects or indicters to obtain statements in the desired sense of the accuser can be proved only by new documents[16].

Mainly, the Preliminary Chamber Judge can invoke ex officio the absolute nullity cases provided by art. 281 par. (1), e) and f) NCCP; there may be situations in which the Preliminary Chamber judge also invokes the absolute nullity provided in Art. 281 par. (1), a), b) or d) of the NCPP [for example, when the absolute nullity of the conclusion of the judge of rights and freedoms, whereby the issuance of the technical supervision mandate was ordered when the conclusion was issued by an incompatible judge, from a material or personal incompetent court (inferior to the appropriate one) in a procedure conducted without the prosecutor's participation].

The Preliminary Chamber judge cannot invoke ex officio the cases of relative nullity, which, according to Art. 282 para. (2) NCCPs may be invoked only in the course of criminal proceedings by the suspect, defendant, prosecutor, other parties or injured party.

The provisions of art. 344 para. (4) NCCP as amended by Law no. 75/2016 no longer refer to the need to communicate to the prosecutor the applications and exceptions made by the parties or the injured person or the communication between those participants of the requests and exceptions made; in the case of complex cases in which requests or exceptions are filed even at the time set for the controversial debate, the prosecutor, parties or procedural subjects may, however, request a time limit to specify their procedural position in relation to the claims and exceptions invoked[17].

The contradictory nature of the preliminary-stage phase is not primary, but a consequence of declaring unconstitutional procedural provisions governing the written and non-contradictory nature of the preliminary proceedings chamber.

The phase of the criminal proceedings in the preliminary-ruling procedure results, first, from the explicit regulation of this phase in a distinct title from that of the decision in the special part of the Code of Criminal Procedure.

Even if the Preliminary Chamber judge does not verify the merits of the evidence or the trial, its role is as important as the role of the court, since its rulings on the lawfulness of the prosecution can have a significant reflex on the settlement of the criminal proceedings, given that the basis of any criminal proceedings is the probation.

It should be noted that, in addition to proceedings in the preliminary chamber stage, the Criminal Procedure Code confers on the judge of preliminary chamber proceedings and derived competences[18] in the matter of special confiscation, total or partial dissolution of a document after the prosecutor has ordered a non-adjudication confirmation / refusal to reopen the criminal prosecution or to settle the complaint against the classification solutions, respectively to verify the legality and the validity of the decision to renounce the prosecution. For these derived competences, the legislator established its own procedural rules, the provisions of art. 342-347 C.C.P. not establishing the common law on them.

It must be pointed out that the Preliminary Chamber Judge has the same material, personal and territorial jurisdiction as that of the court of which it is a member, its functional competence being different.

The analysis carried out by the preliminary chamber judge has the effect, either of returning the case to the criminal prosecution phase by ordering the return of the case to the prosecutor's office with or without the resumption of the criminal prosecution or the passage of the case into the trial stage by the order of commencement of the trial.

It should be noted that the criminal proceedings do not go through the preliminary chamber phase if the court's request was made with an agreement on the recognition of guilt or if the judge of the preliminary

[14] Conform art. 342 C.C.P. and the following.

[15] Regarding the Constitutional Court Decision no. 641/2014 states that „the impossibility of a preliminary chamber judge *to administer new evidence or to request the filing of certain documents* (...) puts him in a position not to be able to clarify the factual situation, a matter which can be implicitly affected on the legal analysis" (s.n., M.U.).

[16] M. Udroiu, *op. cit*. p.165.

[17] Ibidem.

[18] M. Udroiu, *op. cit., Sinteze…*, p.149.

chamber ordered the commencement of the trial following the admission of the complaint against the order by which the prosecutor ordered the closing towards the defendant.

3. Conclusions

The provisions of art. 425 paragraph 7 point 2, b of C.C.P. are criticized in the formulation, as it limits the hypothesis of the abrogation of the judgment and the referral back only if it is found that there is a breach of the preliminary ruling procedure. We consider that the preliminary chamber judge invested with the trial of the contestation will not be able to overcome and will not be able to ignore other cases of illegality invoked and found, having the obligation to declare the nullity of the contested conviction in the cases provided by art. 281 C.C.P. and, as a consequence, to declare the admission of the appeal, the annulment of the contested judgment and the referral of the case to the Preliminary Chamber Judge, for the retrial.

We appreciate that by regulating the double degree of jurisdiction in this matter, the Romanian legislature provided a superior standard to that stipulated by art. 2 of the Additional Protocol no. 7 to the European Convention and, therefore, the procedural parties and subjects must be effectively granted the right to two degrees of jurisdiction. However, the above-mentioned deficiencies lead, in the absence of a referral case, to resolving requests and exceptions regarding the legality and loyalty of the first and last criminal investigation by the judicial control court, whose hierarchical control function is devoid of substance in the absence of an effective judgment at first instance.

References

- Barbu Denisa , *Drept procesual penal. Partea generală*, Ed. Lumen, Iaşi, 2016
- Udroiu M., s.a., Codul de procedură penală. Comentariu pe articole**,** Ed. C.H.Beck, Bucureşti, 2015
- Volonciu N., s.a., *Noul Cod de procedura penala comentat,* Hamangiu, Bucuresti, 2014
- Udroiu M., Sinteze şi grile, Procedura penală. Partea specială, C.H.Beck, Bucureşti, 2016

THE PRINCIPLES OF THE NATIONAL SYSTEM OF PROBATION

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Abstract

The principles of the national system of probation represent a series of rules with a wide applicability, which guide the overall functioning of the system and its components. Knowing these principles is particularly important for a more in-depth understanding of the national system of probation, because they are also meant to guide the process of interpretation and application of the rules with a narrower applicability and to constitute a basis for the functioning of the system in situations where there isn't a special provision.

The principles based on which is organized and functions the national system of probation are laid down in the Law no. 252/2013, and a part represents a transposition into our national law of the International Recommendations, among which those raised through the Recommendation CM/Rec(2010)1 of the Committee of Ministers to Member States with regard to the Council of Europe's Rules of Probation.

In our vision, the national system of probation is guided by the following principles: the principle of legality, the principle of observing judgments, the principle of respect for human rights and fundamental freedoms (with the three concrete components regarding respect for human dignity, respect for private and family life and non-discrimination), the principle of confidentiality and protection of personal data, the principle of case management, the principle of individualization of penalties, the principle of co-interest of the supervised person, the principle of multidisciplinary, the principle of observing the right to information and the principle of professionalism and integrity in the activity of the probation.

Keywords: *national system of probation, principles, International recommendations with regard to probation, legality and jurisdiction, respect for human rights, respect for dignity, non-discrimination in probation, privacy, multidisciplinary, case management, individualization, co-interest, the right to information, professionalism and integrity in probation.*

Introductory remarks

The principles of the national system of probation are a series of rules with a wide applicability, which guides the organization and overall functioning of the system and its components, rules which are also meant to guide the process of interpretation and application of the rules with a narrower applicability and to constitute a basis for the functioning of the system in situations where there isn't a special provision.

The principles after which is organized and operates the national system of probation are laid down in the Law no. 252/2013, which comprises a special chapter dedicated to these general rules[1]. The name of the chapter which we refer to might induce the idea that the principles it comprises only refers to the activity of the national system of probation, meaning on its functioning, but, in reality, they govern both the functioning, as well as the organization of the national system of probation, these two sides being, under this aspect, impossible to dissociate.

A series of the principles of the national system of probation represents a transposition into national law of the International recommendations, amongst which those raised through the Recommendation CM/Rec(2010)1 of the Committee of Ministers to Member States with regard to the Council of Europe's Rules of Probation.

1. Principle of legality

The principle in question is regulated by the article 6 of the Law no. 252/2013, according to which *the activity of the probation system is carried out observing the Law and the judicial decisions.*

As can be seen, in the same provision are indicated two principles: principle of legality and principle of observing judgments. Their conjunctive mention is normal, if the close connection between them is taken into account, a relationship of interdependence, being unable to imagine observing judgments, which are meant to interpret and apply the law, outside the principle of legality.

As in the case of the other systems which contribute to delivering of justice, the judicial system and the penitentiary system, for example, the national system of probation is crossed by the principle of legality, according to which the organization and functioning of all its elements must be carried out only in strict observance of the laws.

As a matter of fact, in agreement with some of the well-known professors in criminal execution law[2], we notice that the principle of legality crosses, as is natural, the entire discipline of execution of penalties and non-custodial measures, and so of those which make up the content of the probation.

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[1] See Chapter II of the Law no. 253/2013, with the marginal name *The principles of the probation system' activity.*

[2] I. Chiș, A.B. Chiș, The execution of the criminal sanctions, Editura Universul Juridic, Bucharest 2015, p. 195.

Although the provision from Article 6 of Law no. 252/2013 expressly mentions only the activity of the national system of probation, and sets it within the limits of legality, is self-evident that the principle of legality crosses not only the functioning, but also the organization of the national system of probation. We come to this conclusion from the title of the Law no. 252/2013 itself, which outlines the subject matter of the regulation as being not only the functioning, but also the organization of the national system of probation, and also an entire section of the Law[3], which comprises provisions relating strictly to the organization of the national system of probation.

The principle of legality in the organization and functioning of the national system of probation is a transposition of the principle of legality regulated through the provisions of Article 1(5) of the Constitution of Romania, according to which in Romania, the observance of the Constitution, of its supremacy and of the laws is mandatory.

The concept of *law* comprised in the name of the principle here in question must be interpreted in the widest sense and cannot be limited only to the homonyms normative acts, which emanates from the Parliament[4]. In the activity of the probation and in the organization of the probation system must be, of course, observed the normative acts of lower level than law or secondary, adopted in implementation and application of the laws. The law itself justifies this statement which, by references to some concrete components of the organization and functioning of the national system of probation, makes express references to the normative acts of lower level than the law, whose observance imposes it.

Thus, a category of secondary normative acts, important for the organization and functioning of the national system of probation, is represented by the Governmental Decisions by which are approved a series of regulations which establish, at the level of detail, the functioning of the components of the system. We recall, at this point of our exposure, the Government Decision No. 1079/2013 through which it was approved the Regulation implementing the provisions of Law no. 252/2013 regarding the organization and functioning of the probation system, a Regulation particularly important for the functioning of the national system of probation. References to compliance with the Regulation in question are frequent in the content of the Law no. 252/2013, including among them, by way of example, those of Article 34(4), which require compliance with the regulation as regards the structure and standard format of the evaluation report of the juvenile offender, and those of Article 115(7), requiring compliance with the Regulation as regards the conditions under which and the reasons for which National Probation Directorate may ask the judge delegated for execution of penalties to withdraw the empowerment of the community institutions.

Law no. 252/2013 requires that even in the organization and functioning of the national system of probation some of the normative acts placed, in the hierarchy, below Government Decisions, namely Ministerial Orders, to be observed. Thus, from the provisions of Article 120(3) of the law it results that the organization and functioning at the level of detail of the probation system, conditions and the procedure for the organization of competitions for employment leading positions in the National Probation Directorate, the activity of the Consultative Council attached to the National Probation Directorate, the conditions and the procedure for the organization of competitions to fill the positions of head of service and head office within the services and the probation offices are established by Orders of the Minister of Justice.

Obligation to comply with Government Decisions and Ministerial Orders in the organization and functioning of the national system of probation does not dilutes, does not empty the content the legality principle, because the source of the obligation in question is found in the law itself. In other words, compliance with the provisions comprised in Government Decisions and Ministerial Orders to which the law itself refers, only means respect for the law itself.

The principle of legality represents also a guarantee of quality in the organization and functioning of the national system of probation, through the imperative of observing the legal provisions, creating the necessary conditions for imposing particularly high standards.

These standards are not jeopardized by certain aspects of the organization and functioning of the national system of probation regulated by normative acts of lower level than the law, since these provisions contained in those normative acts cannot transgress legal norms.

With regard to this latter aspect we consider useful to invoke a situation in which it can be discussed of a transgression of the law by means of rules included in an act of a lower level than the law, a situation which is eloquent also in terms of practical functional aptitude, the operationalization of the principles of the national system of probation.

The situation we have is as follows: the Court renders a decision and postpones the application of the penalty or the suspension of the execution of penalty under supervision, imposing to the supervised person unpaid community work for the benefit of the community, and without complying with the provisions of Article 404 par. 2 and 3 of the Criminal Procedural Code omits to indicate the entities in the community within which unpaid community work for the benefit of the community is to be carried out. This omission

[3] See Title II of the Law no. 253/2013, with the marginal name - The organization of the probation system.
[4] According to article 76 par. (1) from the Romanian Constitution, the Parliament adopts constitutional laws, organic laws and ordinary laws.

constitutes an obstacle to the enforcement of the judgment, which, according to the provisions of Article 598(1)(c) of the Criminal Procedural Code, is a case of opposition to the enforcement of the judgment which is given in jurisdiction of the enforcement Court[5]. However, with regard to the omission of the Court to indicate the two institutions from the Community, the probation counselor has, in accordance with Article 14^{61} par. (8) of the Regulation for implementing the Law no. 252/2013, the possibility (and the obligation) to ask the judge delegated with the enforcement of the judgment, to designate an institution from the Community in which the work is to be carried out. This procedural means of removing the impediment to enforcement in question, easier, has been introduced by the Government Decision No. 603/2016, which amended and supplemented the Regulation for implementing the Law no. 252/2013.

Trying to draw a conclusion with regard to the case in question, we express our opinion that the transfer of the functional competences from the enforcement Court to the judge delegated with the enforcement, through a Government Decision, without denying the practical utility of this transfer, puts serious problems of legality in the activity of the national system of probation.

As we were saying, without having doubts regarding the usefulness of a procedure more flexible in cases such as those in question, we only suggest *for future enactment of laws*, in order to comply with the principle of legality, such procedures, involving a transfer of competences from the enforcement Court to the judge delegated with the enforcement, to be regulated by law, as planned, as a matter of fact, in a situation of the same category, consisting in the impossibility to work for the benefit of the Community in the two entities from the Community indicated in the judgment[6].

2. The principle of observing judgements

Taking into consideration that the most significant part of the probation activity is carried out after the judgement is rendered in the criminal trial, observing judgements is raised at the level of principle of the national system of probation. In the view of other authors, which, however, refer to a wider scope of research, concentrated to the execution of all sanctions and non-custodial measures, this principle is called the basis of enforcement[7].

Of course, the principle of observing judgements is closely linked to that of legality, from which it arises,

judicial decisions being only a materialization of the law enforcement.

The close link between the principle of legality and that of observing judgements is emphasized by the legislator also through their explicit consecration in the same article of the law, Article 6 of Law no. 252/2013.

The fact that the observing of law and judgments is put on the same level of importance in the probation activity is an approach which is perfectly justified from the legislator, starting from the idea that through judicial decisions it is been expressed the legality with reference to a specific case.

However, raising the observing of judgments at the level of a principle may lead to some difficult situations for the probation counselors in the hypotheses in which judgments become enforceable in a non-legal form.

To illustrate what we want to show at this point of our exposure, we exemplify with a judicial decision in which legal provisions have been breached in relation to the length of the supervision period in case of suspension of the execution of penalty under supervision[8].

So, in the criminal judgement in question, not appealed, the resulting penalties of 2 years and 8 months imprisonment has been suspended under supervision and a period of supervision of only 2 years has being imposed, by breaching the provisions of Article 92 (1) from the Criminal Code, according to which the duration of the suspension of the penalty under supervision constitutes period of supervision for the convicted person and it ranges between 2 and 4 years, without the possibility to be less than the duration of the penalty imposed.

Although the judge delegated with the enforcement has made opposition to the execution of the judgement, invoking the case provided for in Article 598(1)(c) of the Criminal Procedural Code, the Court rejected the opposition as groundless, with the reasoning that the establishment of a period of supervision such as the one in question, does not constitute either a doubt with regard to the judgment which is to be executed or an obstacle to the enforcement the judgement[9].

In such a case, after exhausting the procedural means the probation counselor and the judge delegated with the execution have at hand, if the illegality is not removed, the probation counselor which contributes to the enforcement in these conditions of the provisions of

[5] In this way we exemplify with the Criminal decision no. 7/2016 of the Filiași Court of First Instance, accessible on the free jurisprudence portal www.rolli.ro.

[6] According to art. 51 par. (2) of the Law no. 253/2013 on the execution of penalties, educational measures and other non-custodial measures imposed by the judicial bodies in the course of the criminal trial, if the execution of the work is no longer possible in any of the two community institutions mentioned in the judgment, the probation counselor refers the judge delegated with the execution, who will designate another institution in the community for the execution of the work

[7] I. Chiș, A.B. Chiș, *The execution of the criminal sanctions*, Editura Universul Juridic, Bucharest 2015, p. 195.

[8] Criminal decision no. 205/2016 of the Bihor Tribunal, non-appealed, unpublished.

[9] The opposition to the execution was rejected by the criminal decision no. 6/P/2017 of the Bihor Tribunal, non-appealed, accessible in the electronical database Lege5.

the judgment is defended by the principle of observing judgments.

3. The principle of respect for human rights and fundamental freedoms

The principle of respect for human rights and fundamental freedoms is expressly provided in the Article 3 of Law no. 252/2013, according to which *the activity of the probation system is carried out under conditions which ensure observance for human rights and fundamental freedoms, any restrain of them being possible only within the limits inherent in nature and content of the penalties and measures imposed by the judgment and under the conditions arising from the specific intervention, depending on the seriousness of the crime and the risk of committing any crimes.*

This principle is found, even if differently formulated, and in the Recommendation CM/Rec(2010)1 of the Committee of Ministers[10]. Also, this principle, as it is written in the Law no. 252/2013, includes another principle from the same international legal document, according to which in the implementation of any penalties or measures, the probation offices will not impose any burden or restriction of the rights of the offender greater than that provided by the judicial or administrative decision and imposed in each individual case by the seriousness of the offense or by the correctly assessed risks of re-offending[11].

Of course, the legislator has raised the obligation to respect for human rights and fundamental freedoms at the level of principle of the activity of the probation also due to the importance it has acquired, in the recent years, the jurisprudence of the European Court of Human Rights, especially for the institutions that have competences relating to the restriction of rights and freedoms in question.

The same importance of observing of human rights and fundamental freedoms is underlined by the fact that this obligation is raised to the rank of principle also through Article 6 of Law no. 253/2013 on the enforcement of penalties, educational measures and other non-custodial measures imposed by judicial bodies in the course of the criminal trial.

The general framework of human rights and fundamental freedoms is drawn by the provisions of the European Convention on fundamental human rights and freedoms and the additional Protocols to the Convention, but also by the jurisprudence of the European Court of Human Rights[12].

Specifically, the principle in question requires the probation counselor that, in the activity carried out in connection with the person subject to the supervision measures or voluntary obligations, to report itself always to the need for strict observance of human rights and fundamental freedoms.

A specific task in the exercise of which a concrete problem of respect for human rights and fundamental freedoms can be raised is that of granting permissions during the performance of the obligations referred to in Article 85(2)(e) and (f) or Article 101(2)(d) and (e) from the Criminal Code.

The task in question is governed by the provisions of Article 45 of Law no. 253/2013, text which provides, at the same time, also the cases in which the probation counselor may grant permissions such of those in question.

One of the cases which justifies granting of permissions during the performance of the obligations referred to in Article 85(2)(e) and (f), respectively in Article 101(2)(d) and (e) from the Criminal Code, is the one consisting in following a treatment or a medical intervention, which seeks to respect the most important of the fundamental rights, namely the right to life, as guaranteed by Article 2 of the same Convention.

This example of a mechanism to guarantee the observance of human rights and fundamental freedoms in the activity of the probation requires, of course, knowing the definitions and content of the rights in question, their nature, absolute or relative, the situations in which interferences of the authorities within the exercising these fundamental rights are justified[13].

As we will see in the following, given that some of the fundamental human rights are considered more important in the economy of the organization and functioning of the national system of probation, the legislator provides for special regulations with regard to them, right in the section dedicated to the principles of the activity of probation. Although they are structured in different articles, we are of the opinion that the rules in question are part of the regulations relating to the principle of the respect of human rights and fundamental freedoms.

From the point of view of legislative systematization this way of proceeding it is not the happiest, but approaching the obligations concerning compliance with some of the fundamental human rights in particular may be accepted in the light of the importance of the rights in question in the probation activity. We consider at this point of our exposure *the right to dignity, the right to private and family life and the right not to be subject to any form of discrimination.*

[10] According to the first thesis of the second basic principle set out in Recommendation CM / Rec (2010) 1 of the Committee of Ministers, the probation agencies will respect the human rights of offenders.

[11] See point no. 5 of the Recommendation CM / Rec (2010) 1 of the Committee of Ministers.

[12] The European Convention for the protection of Human Rights and Fundamental Freedoms was ratified by the Romanian Parliament by Law no. 30/1994, which expressly recognized the mandatory jurisdiction of the European Court of Human Rights.

[13] Without proposing to detail here these notions, we make our duty to point out a valuable source for the persons involved in the probation activity facing issues of human rights and fundamental freedoms: https://jurisprudentacedo.com, which provides free access to a significant number of European Court of Human Rights judgments, structured also according to the articles of the Convention.

3.1. Respect for human dignity

According to Article 4 first thesis of Law no. 252/2013, the activity of the probation system is carried out under conditions that respect the dignity of the person.

Dignity is one of the intrinsic values of the human being, the importance of which is emphasized and in that it is found among those inviolable values, absolute in the arsenal of values that form the basis of the acts of the international conventions on human rights.

Thus, human dignity is absolutely protected by the recognition of the right not to be subjected to torture, inhuman punishment or degrading treatment, by the provisions of Article 2 of the European Convention for the protection of human rights and fundamental freedoms.

As other authors have noticed[14], human dignity, as an indivisible and universal value, is placed at the foundation of the Charter of Fundamental Rights of the European Union[15], which strengthens, once more, the significance of this value in the heritage of common values of modern civilization.

Also, human dignity has to a place of honor among the supreme values of the Romanian Constitution[16].

In the matter of probation, dignity as a value associated to each person, gets also important operational valences, in that the observance by the probation counselor of the dignity of the supervised person is a condition *sine qua non*, a prerequisite for a successful social reintegration process.

Dignity requires respect, and respect shown by others is one of the most important sources from which the individual draws his own social profile.

In the probation activity to respect human dignity of the supervised person means treating it with respect, listening it carefully, empathizing up to a point with it, removing the inappropriate arguments in a neutral, elegant and convincingly logical way, highlighting the strong points and illustrating the harmfulness of the undesirable skills, not abusing its position of authority. In this way, the person subject to probation gets confidence in the probation counselor and in its own strengths, feels valued and is thus able to put greater efforts towards re-socialization.

Another aspect of respecting human dignity in probation is the valence of the reductive agent of the criminal stigma, an undesirable effect of criminal sanction[17]. This valence is translated into that, if treated with respect, the offender subjected to probation will look at himself with other eyes, but, at the same time, he will be seen otherwise by the other members of society.

Also, the person who has committed a crime and which is treated with dignity by a representative of the state authority tends to no longer feel wronged and "lets the guard down", being so, much more receptive to positive influences.

3.2. Respect for private life and family

According to Article 4 second thesis of Law no. 252/2013 the activity of the probation system is carried out under conditions that do not interfere with the exercise of the right to private life of the person more than is inherent to the nature and content of the intervention.

Like human dignity, also private and family life is one of the fundamental rights recognized as such by both international conventions in the field and by the Romanian Constitution.

Thus, according to Article 8 of the European Convention of Human Rights and Fundamental Freedoms, any person has the right to respect for his private and family life, his home or his correspondence, no interference by a public authority with the exercise of this right being allowed except when it is in accordance with the law and is a measure necessary in a democratic society for national security, public security, the country's economic well-being, the defense of order and the prevention of criminal acts, the protection of the health, morals, rights and freedoms of others.

In a more simplified form, article 7 of the Charter of Fundamental Rights of the European Union stipulates *that any person has the right to respect for his private and family life, home and communications secrecy*.

Finally, according to Article 26 of the Romanian Constitution, public authorities respect and protect intimate, family and private life, the natural person having the right to dispose of itself, unless it violates the rights and freedoms of others, public order or good morals.

A concrete manifestation in probation of the obligation to ensure compliance with the right to private and family life is represented by one of the cases in which may be granted to the permissions during the performance of the obligations referred to in Article 85(2)(e) and (f), respectively in Article 101(2)(d) and (e) Criminal Code and which, according to Article 45(1)(a) of Law no. 253/2013, consists in the attendance of the supervised person to the marriage, baptism or funeral of a family member, from among those referred to in Article 177 Criminal Code. In other words, establishing the case in question is just a mechanism that guarantees the observance of the right to private and family life.

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[14] I. Chiș, A.B. Chiș, The execution of the criminal sanctions, Editura Universul Juridic, Bucharest 2015, p. 196.

[15] The Charter of Fundamental Rights of the European Union, published in the Official Journal of the European Union no. C 83/403 has replaced, since the entry into force of the Treaty of Lisbon, the old Charter proclaimed on 7 December 2000.

[16] According to art. 1 par. (3) of the Constitution of 2003, Romania is a state of law, democratic and social, in which the human's dignity, citizens' rights and freedoms, the free development of human personality, justice and political pluralism are supreme values in the spirit of the democratic traditions of the Romanian people and of the ideals of the Revolution of December 1989 and are guaranteed.

[17] S. Poledna, in the *Probation Manual*, coordinated by V. Schiacu și R. Canton, Editura Euro Standard, Bucharest 2008, p. 28.

3.3. Non-discrimination

According to art. 5 of the Law no. 252/2013, within the probation system, any activity is carried out without any discrimination on grounds of race, nationality, ethnicity, language, religion, gender, sexual orientation, opinion or political affiliation, wealth, social origin, age, disability, non-contagious chronic disease or HIV / AIDS infection or on other circumstances of the same kind.

The principle according to which discrimination is forbidden within the probation represents an implementation into the Romanian legislation of the basic principle No. 6 of Recommendation R(2017)3 of the Committee of Ministers to the Member States relating to the European rules on sanctions and community measures.

The interdiction of discrimination is regulated in the European Convention of Human Rights and Fundamental Freedoms, which, by means of the provisions of Article 14 provides that the *exercise of the rights and freedoms recognized by the Convention should be ensured without any discrimination based, in particular, on sex, race, color, language, religion, political opinions or any other opinions, national or social origin, membership of a national minority, wealth, birth or any other situation.*

Also, the Charter of Fundamental Rights of the European Union expressly prohibits in Article 21, the discrimination of any kind, based on grounds such as sex, race, color, ethnic or social origin, genetic features, language, religion or beliefs, political opinions or of any other nature, membership of a national minority, wealth, birth, disability, age or sexual orientation, and as regards the scope of EU treaties, with the exception of special provisions, on the grounds of nationality.

In the Romanian Constitution interdiction of discrimination is dealt with in relation to the right to equality before the law and the authorities, enshrined in Article 16.

By comparing the internal provision from Article 5 of Law no. 252/2013 with the international regulations we will notice that the Romanian legislator offers a very wide range of protection against discrimination, providing most of the hypotheses in which supervised persons can find and which cannot constitute grounds for discrimination, but leaving, at the same time, open the list of such hypotheses.

In concrete terms, what is important in the activity of the probation counselor in relation with the prohibition of discrimination, is the understanding of the fact that this principle is violated when, without any reasonable and objective justification, a state applies different treatments to persons that are in similar situations or, on the contrary, does not apply a different treatment to persons who are in different sensitive situations[18].

An internal provision whose implementation could raise problems from the perspective of the discrimination on the grounds of religion, for example, is that of Article 45(1)(a) of Law no. 253/2013, which we have mentioned above and which gives the probation counselor the prerogative of granting permissions to the supervised person during the execution of certain obligations inherent in the status of the person subject to probation. According to the text in question, some cases which might justify granting the permissions are represented by the attendance of the supervised person at certain moments of religious significance in the life of family members, including baptism. How baptism is a mystery specific to Christian religion, we believe that a strict interpretation of the provisions in question could lead to an unjustified discriminatory situation between persons under supervision of Christian religion and those of other religions who do not know the mystery of baptism but know the equivalent spiritual practices. Therefore, in respect to the matter in question, we are of the opinion that the concept of "baptism" in Article 45(1)(a) of the Law no. 253/2013 should be interpreted in the widest sense, leading to the conclusion of the applicability and in the case of an equivalent spiritual practices, encountered in the context of the other religions than Christianity.

One further explanation we consider is needed at this point of our material, namely that the interdiction of discrimination does not mean applying the same treatment to any person, regardless of the situation. If many different situations associated with some persons do not give rise to differentiated treatments (e.g. the differences of race, nationality, ethnicity, language, religion, gender, sexual orientation, opinion or political affiliation, wealth, social origin, age, disability, non-contagious chronic disease or HIV/AIDS infection), there are also different situations which justify differentiated treatments. To exemplify this last statement is enough to keep in mind the differentiated situation of studies, in general, professional training, in particular, which can justify the choice of the probation counselor, on the basis of the prerogative provided for by in Article 50(1) of the Law no. 253/2013, of education or training courses or of professional qualification courses different after this criterion, without creating a situation of discrimination. Thus, we can say that discrimination is not equal to justified differentiation based on objective criteria, but only to the unjustified differentiation of such criteria.

4. The principle of confidentiality and the protection of personal data

According to Article 7 of Law no. 252/2013, the activity of the probation system is carried out observing the confidentiality and in compliance with the rules for the protection of personal data, as provided for by the applicable legal provisions.

[18] See, for example, the judgement from ECHR – Grand Chamber - Case Thlimmenos against Greece.

The two aspects of this principle, confidentiality and protection of personal data are intimately linked, but not to be confused.

By confidentiality in probation we have to understand that characteristic of the probation activity that makes it not exclusively intended for revealing. We cannot say, however, that the probation activity is a secret one, but it cannot be the subject of unhindered access of the public.

With regard to the public access to what means the activity of the probation, we can say that it is restricted from a legitimate reason, revealed also by other authors in this field[19], that of being in the interest of the reintegration of the supervised person to have a statute that is as close as possible to that of an individual who is not in conflict with the criminal law. In other words, it is desirable that in the eyes of the other members of the society, the supervised person to appear as an ordinary individual, without the stigma of the offender imprinted in a visible place, which would make him vulnerable and, thus, make difficult the process of social reintegration.

Of course, the confidentiality we are talking about doesn't mean hiding the fact that supervised person has committed a crime, but only that committing the offense is not displayed in public. Confidentiality in probation cannot be the opposite in situations that require protecting superior interests, such as the good functioning of various state bodies with responsibilities in the field of public safety.

As the activity of probation involves the cooperation of several entities, confidentiality knows and a limitation inherent to this cooperation, by virtue of which the necessary data must be the subject of an exchange between probation services, on the one hand, and the entities in the Community, in charge with the implementation of the probation, on the other hand. With regard to this the limitation of confidentiality, by Article 9 of Law no. 253/2013 it is provided a protection mechanism, according to which the natural and legal persons involved in the execution of penalties, educational measures and other non-custodial measures are obliged to observe the confidentiality and the rules for the protection of personal data, provided for by the relevant regulations.

A mechanism aimed to preserve confidentiality within the activity of probation is also that governed by the provisions of Article 53(3), final thesis of the Law no. 252/2013, which subjects to the agreement of the supervised person the request of any person to consult the content of the probation file. To highlight once more that the principle of confidentiality does not affect the activity of the state bodies with competences in the field of delivering justice and protecting public order, we highlight that the agreement of the supervised person is not necessary in order to facilitate the access to the probation file by the judge delegated with the enforcement, by the prosecutor and by the police, as it results from the provisions of Article 53(3), first thesis and paragraph (6) of the Law no. 252/2013.

Last but not least, in accordance with the provisions of Article 24 of the same law on the organization and functioning of the probation system, confidentiality cannot hinder the research activities in the field of probation, although confidentiality must also be observed and on this occasion.

With regard to the protection of personal data, it should be recalled that the National Probation Directorate and the subordinate services are personal data operators within the meaning of the Law no. 677/2001 for the protection of individuals with regard to the processing of personal data and free movement of such data, framing them, from the point of view of the functional competences they hold, in the category described in Article 2(5) of that law, that of operators carrying out activities involving the prevention, investigation and prosecution of criminal offenses and maintaining public order, as well as other activities carried out in the field of criminal law.

Framing National Probation Directorate and the subordinate services in the category of operators who carry out activities for the prevention, investigation and prosecution of criminal offenses and maintaining public order, as well as other activities carried out in the field of criminal law, although gives wider powers of processing, among which the right to the processing of certain data without the agreement of the person monitored, it does not mean that with regard to the processing of personal data, the Direction and the subordinate services are not kept to comply with the rules concerning the processing of personal data, drawn by the provisions of Articles 4, 5 and 6 of the Law no. 677/2001, according to which the processing should be carried out in good faith, in accordance with the conditions laid down by law, for determined purposes, explicit and legitimate, in adequate manners, relevant and not excessive in relation to the purpose of the processing, with accuracy and update, with storage in appropriate and safe forms.

5. Principle of case management

According to the provisions of Article 8 of Law no. 252/2013, the probation activity shall be conducted in compliance with the principles, values and methods of case management during the process of supervision. Of course, the principle concerns also the organization of national system of probation as regards the fulfillment of the main substantial competences to coordinate the supervision of the offenders.

Although the law requires that the institutions of the Community and other authorities and public institutions to also observe the principles, values and methods of case management, the probation counselors are the main actors to whom the institution of case management addresses to.

[19] I. Chiș, A.B. Chiș, *The execution of the criminal sanctions*, Editura Universul Juridic, Bucharest 2015, p. 199.

The meaning of case management is legally defined by means of the provisions of Article 14 let. (b) of Law no. 252/2013, according to which the case management means the process of coordinating all assessment activities of the supervised person, planning and conducting assistance and control interventions, monitoring the way of implementing the measures and obligations imposed by the judicial bodies, including by making use of internal potential of the person and integrating the contribution of the institutions within the Community.

Specific method of working in social assistance, by means of which it is intended to adapt the activity of providing social services to the complexity of the problems within this field, case management has also been implemented in correctional matters as a method by which to connect the activity of dealing with offenders with the activity of rendering justice and to provide a framework of rules to support the intervention rehabilitation[20].

In fact, case management in probation is a set of rules that guide the assessment activity of the supervised person, the activity of planning and carrying out the assistance and control interventions of the supervised person, monitoring of the implementation of the measures and the obligations imposed by the judicial bodies.

In addition to the regulatory function in concrete of the activities that compose the probation supervision process, case management has also the function of empowering the probation counselor to whom the task of supervision is assigned.

Case management begins with the appointment of the case manager, that is to say the probation counselor responsible for the process of supervising a person[21].

After this initial moment, all activities that comprise the process of supervision, convocation, initial and further evaluation of the person monitored, control of the person supervised and the way in which it fulfils the obligations arising from its statute of a person subject to probation, coordination and control of the activities carried out by the institutions within the Community with the person monitored, the relationship with the judicial bodies or of public order, with other entities designed to contribute in assisting the supervised person, shall be the responsibility of the counselor case manager and represents the manifestations of the case management.

In concrete terms, case management is manifested through the fulfillment by the probation counselor case manager of the tasks that are provided to it by the pertinent normative provisions such as: convocation of the person supervised (Article 51 of Law no. 253/2013); coordination of the process of supervision (Article 52 of the same law); direct control of compliance with the supervision measures (Article 56 of the same law); determination of the concrete content of the obligations of the probation (Article 58 of the same law); notification of the court responsible for the enforcement with the revocation of the alternative benefit to the execution of custodial penalties (Article 67 of the same law).

6. The principle of individualization

Article 9(1) of Law No 252/2013 regulates, as a matter of principle, the obligation of the probation counselor to adapt the intervention according to the individual characteristics, the needs of the person, the risk of committing crimes and the particular circumstances of each case.

The principle of individualization within the probation activity is a particular transposition of the more general principle of the individualization of criminal sanctions. From the point of view of the classification after the criterion of the body which has the responsibility to individualize, individualization in the activity of the probation is a form of the administrative individualization, which intervenes in the post-trial phase, in the execution phase of the criminal trial.

Because the probation measures are being carried out in the open community, from which the offender comes from, they differ fundamentally from the closed and harmful community of penitentiaries. We can say, by comparison with the penalties involving deprivation of liberty, the probation measures are being executed individually.

Although the execution of penalties involving deprivation of liberty also tends towards a more personalized individualization[22], the execution of the probation measures has a much deeper administrative personalization potential, which can go up to customization[23]. Even this customization up at the level of individual is considered in the doctrine to be able to greatly reduce the risk of re-offending[24].

In the normative acts governing the national system of probation we find numerous practical application of the principle of individualization.

[20] F. McNeill, P. Raynor și C. Trotter, *Offender Supervision – New directions in theory, research and practice*, Editura Willan Publishing, New York 2010, p. 344.

[21] According to art. 50 of Law no. 252/2013, upon receipt of the copy of the court decision ordering the supervision of a person by the probation office, the head of the service shall appoint a probation counseler case manager.

[22] In this respect, Art. 89 par. (4) of the Law no. 254/2013 on the execution of penalties and imprisonment measures, provides for the obligation, to draw up, after the period of quarantine and observation, established by the provisions of Art. 44, an *Individualized assessment and educational and therapeutic intervention plan*.

[23] In this respect, Art. 14^{46}-14^{50} of the Regulation for the application of the provisions of Law no. 252/2013 regarding the organization and functioning of the probation service, approved by the Government Decision no. 1.079 / 2013, modified and completed by the Government Decision no. 603/2016, provides for the obligation to draw up the *Supervision plan*.

[24] I. Chiș, *Non custiodial penalties of the XXI century*, Editura Wolters Kluwer, Bucharest 2009, p. 22.

Thus, an important application of the principle of individualization consists in the competence assigned to the probation counselor by Article 53(1) and Article 57(2) of the Law no. 253/2013 to establish, in concrete terms, on the basis of the initial assessment of the person supervised, the program or programs of social reintegration that must be followed, and also, where appropriate, the institution, respectively the institutions within the Community in which will take place, in the hypothesis the obligation to follow such programs was imposed by the judicial decision.

Another manifestation of the principle of individualization in the activity of the probation is the competence assigned to the probation counselor by Article 61(1) of the Law no. 252/2013 to establish, depending on the situation and needs of the person and according to the usefulness of the activities for the Community, in which of the two institutions in the Community referred to in the judgment of the Court is to be carried out the obligation to provide unpaid work for the benefit of the community.

7. The principle of co-interest of the supervised person

The principle of co-interest of the supervised person is regulated, firstly, by means of the provisions of Article 9(2) of the Law no. 252/2013, according to which, *in the course of the activity, the probation counselor aims to develop a positive relationship with the supervised person, for the purpose of involvement in its own process of rehabilitation.*

Secondly, the same principle is governed by the provisions of Article 11(1) of the same law, according to which the probation counselor shall inform the person with respect to the nature and content of the main acts carried out in the course of the probation and seeks *to obtain its consent with regard to the execution of the respective acts*.

The postponement of the application of the penalty, the suspension of the execution of penalty under supervision and the conditional release represent manifestations of the new vision of the Romanian legislator in what concerns the individualization of criminal sanctions, a part of the mechanism introduced by the Criminal Code in force in order to enable the court to choose the most appropriate form of criminal liability for the individual who has committed a crime provided by the criminal law.

Also, these new opportunities for judicial individualization of the sanction constitute, in principle, an alternative to imprisonment, as a consequence of the restorative current which crosses modern criminal laws and detaches them from the paradigm of criminal justice purely vindictive.

In the content of these new ways of individualization of the criminal sanction, instead of applying and executing the custodial sentence imposed, the offender is required to perform a series of obligations or to observe a range of interdictions which, together, are intended to ensure, primarily, achieving the desirability of re-educating and rendering the offender to the community.

The obligations and interdictions imposed are carried out within the community from which the offender comes from, which community is thus seen to be involved in the process of re-education and re-socialization of the offender.

Taking into consideration the component of co-interest of the Community in the process of reeducation and re-socialization of the offender, these modalities for the enforcement of obligations and interdictions alternative to imprisonment, in particular, are also called *sanctions or community measures*, in international normative acts, such as *the Recommendation R(2017)3 of the Committee of Ministers to the Member States relating to the European rules on sanctions and Community measures, abovementioned, which replaces Recommendation R(92)16 to the Committee of Ministers of the Member States relating to the European rules on penalties applied in the Community*.

A characteristic of community criminal sanctions is represented precisely by the co-interest of the offender in the process of re-education and re-socialization which, without this involvement of the main subject on which community levers should act, would remain an empty and without a chance process.

In order for the community sanctions to be successful, the offender must therefore be co-opted in the process of reeducation, he must express his adherence to the process of fulfilling the obligations and prohibitions that make up the content of community sanctions, adherence without which the re-socialization cannot take place

Thus, the Recommendation R(2017)3 of the Committee of Ministers to the Member States relating to the European rules on penalties and Community measures allocates a whole chapter to the consent and cooperation of the offender, Chapter V. In Article 56 of this chapter it is established that a sanction or a Community measure will be imposed only if it is known that the suspect or the offender is willing to cooperate and to observe the obligations and the specific conditions, and in Article 59 it is stated that the agreement of the suspect must be obtained even before imposing the penalties or Community measures.

Concluding, the agreement of the offender, followed by his cooperation in the process of enforcement of sanctions and Community measures is essential to ensure the favorable conditions in which reeducation and re-socialization will be accomplished, and represents, we can say, a substantive ground for the adoption of such alternatives to imprisonment.

The importance itself of this co-interest for the success of the process of reeducation and social reintegration has made the Romanian legislator to raise it to a principle of the national probation system.

Knowing the springs that have led to the raising of the level a principle of the co-interest of the

supervised person in the process of executing the probation measures is not only of theoretical importance, a good example to support this statement being the non-unitary practice of the courts in the matter of knowing if the prior consent of the defendant to work unpaid for community (in case of postponement of punishment) is mandatory or not.

This issue was submitted for analysis to the High Court of Cassation and Justice through the mechanism of resolving prior legal issues, regulated by the provisions of art. 475-477[1] Criminal Procedural Code.

As the Supreme Court dismissed as inadmissible the matter in question[25], the non-unitary practice on the issue to know whether the prior agreement of the defendant to provide unpaid work for the benefit of the community (in case of postponement of punishment) still remains, but it could, in our opinion, be stopped just on the basis of the principle of the co-interest of the supervised person, co-interest without which, as we said, execution of the probation measures in a manner which would lead to the reeducation and re-socialization, would not be possible.

In the relevant normative laws, we find concrete manifestations of the principle of co-interest of the supervised person in the process of implementation of the probation measures.

Thus, Article 55(1) of Law No 252/2013 provides that the monitoring plan shall be drawn up by the probation counselor case manager and *with the involvement of the supervised person*.

Also, according to the provisions of Article 14[45] of Regulation for the implementation of the Law no. 252/2013, with the occasion of informing the supervised person, carried out at the first meeting, it shall be made aware of the possibility of participating in certain activities and programs of reintegration during the period of supervision, *with its agreement*, explaining to it the practical arrangements in which it may be assisted in view of its social rehabilitation.

8. The principle of multidisciplinary

According to Article 10 of Law no. 252/2013, the probation counselor seeks the interdisciplinary approach of each case and coordinates the activities carried out in collaboration with the institutions from the Community in order to cover the needs of the person and maintain the safety level of the community.

The activity of the probation counselor is particularly complex and implies having knowledge and skills in various fields.

Given the fact that it has to work with tools such as the assessment interview, that it has to perform complex analyzes of the person's behavior, that he is in constant communication throughout the supervision process, the probation counselor must possess sound knowledge of psychology, sociology, but also criminology, in addition to the absolutely necessary legal background.

As a matter of fact, the different knowledge and the various and multiple perspectives of the activity of the probation staff are an essential part of working with the offenders in the Community, imperatively needed to ensure social education and reintegration, but also to maintain a climate of public safety. The multidisciplinary knowledge of the probation counselor is therefore necessary in the context of the complexity of the offender's needs and of the imperative of the risk management.

Multidisciplinary in the activity of the probation is highlighted by the fact that the specializations required alternatively to be appointed as probation counselor are multiple. Thus, according to the provisions of Article 20 of the Law no. 123/2006 on the statute of the probation staff, to be appointed as probation counselor a person must comply, inter alia, with the condition to be licensed in social assistance, psychology, sociology, pedagogy or law.

9. The principle of respecting the right to information

Compliance with the right to information of the person subject to probation was raised at the level of principle by means of the provisions of Article 11 of Law no. 252/2013, according to which the probation counselor shall inform the person, in a language or communication method that it understands, with regard to the nature and content of the main acts carried out in the course of the probation and seeks to obtain the consent with regard to the progress of the acts in question.

Informing the supervised person about the nature and content of the main acts carried out in the course of the probation is a prerequisite for co-interesting the person in its own process of reeducation and resocialization.

Concrete manifestations of the principle of informing the person subject to probation are found quite frequently in the relevant normative acts.

Thus, according to Article 52(a) of Law no. 252/2013, informing the person with regard to the process of supervision is a part of the coordination of this process by the probation counselor.

In accordance with Article 54 of the same law, during the first meeting, the probation counselor, case manager, informs the sentenced person with regard to the supervision measures and the obligations it has to execute and about the consequences of compliance or non-compliance with them, and also, if appropriate, with respect to the obligations whose performance is verified by other competent authorities than the probation service.

[25] See Decision no. 27/2015 of the High Court of Cassation of Justice – the panel responsable for solving criminal issues of law, published in the Official Monitor, First Part no. 65 from 22/01/2018.

Provisions of greater detail relating to informing the supervised person are found, for example, in the provisions referred to in Article 14^{61} par.(2) of the Regulation implementing the Law no. 252/2013, according to which the probation counselor case manager informs the supervised person during the meeting with it about the concrete possibilities for carrying out the obligation to provide an unpaid work for the benefit of the Community in the institutions of the Community, as well as those of Article 14^{62} par. (3) of the same Regulation, according to which, within the first interview, the probation counselor case manager informs the supervised person with regard to the concrete possibilities for carrying out the obligation to attend a program of social reintegration at the level of the probation service, within the office reintegration programs or, if not possible, within a community institution listed in the database set up at national level.

10. The principle of professionalism and integrity in the probation activity

Although the principle in question is regulated in two articles of the law, which might mislead the idea of the existence of two principles, the indissoluble link between professionalism and integrity makes us affirm that we are in the presence of a single principle.

In accordance with Article 12 of Law no. 252/2013, staff carrying out their activity in the framework of the probation system must have a specialized background in accordance with the responsibilities assigned to it by the law and must seek, during the activity, the achieving of a high standards of professionalism and compliance with the standards of ethics and professional deontology, and according to Article 13 of the same law, in the framework of the probation system the activity shall be conducted in compliance with the principle of integrity by carrying out the actions in a responsible, transparent, impartial and through the judicious use of available resources.

The principle of professionalism and integrity in the probation is found, in another form, in the Recommendation CM/Rec(2010)1 of the Committee of Ministers to the Member States with regard to the Council of Europe's Rules of Probation, where, in point 13 it is stated, as a matter of principle, in the sense that all activities and interventions performed by the probation offices will observe the highest ethical and professional standards, national and international.

In any field of activity, the proper training and compliance with the ethical and deontological rules of the profession represent imperative conditions of integrity.

The importance of professional training for the probation activity, in accordance with the importance it has among the activities of delivering a criminal justice is highlighted also by the concern the Council of Europe has under this aspect through the Recommendation No R (97) 12 of the Committee of Ministers to the Member States with regard to the staff responsible for the implementation of the sanctions and measures (criminal)[26], allocating a large section for training of staff, detailing long enough for a normative act of such importance, the forms of training, both initial and continuous, purposes and methods of training and even the content that must represent the subject of the training.

As a manifestation of the implementation of the International Recommendations, training of probation staff is the subject to regulation of a the whole section of the Law no. 123/2006 on the statute of the probation staff, through which are laid down the objectives of the training (adaptation to the requirements of the job; updating the knowledge and skills specific to the position; improvement of the professional training; gaining advanced knowledge of modern methods and processes, necessary for carrying out the professional activities; promoting and improving the professional career), the forms of organization of the training after the time criterion (initial and continuing training) and after the criterion of organizing the activities (seminars organized by the Ministry of Justice or other professional training courses in the field, professional traineeships to adapt to the requirements of the job; internships and specializations; the process of supervision).

The importance of professional training is highlighted also by its systematization, by drawing up, by the Ministry of Justice, through the specialized direction, of the professional training programs, as resulting from the provisions of Article 39 of the Law no. 123/2006.

Even if it does not reflect exactly the latest developments of the probation national system, referring here, for example, to the name that the probation staff currently carries, being adopted by the Order of the Minister of Justice No. 3172/C/26.11.2004, the Ethical Code of the social reintegration and supervision staff contains standards of professional conduct of the probation staff, in order for it to be consistent with the honor and dignity of the profession, whose failure to observe can lead to disciplinary liability.

In concrete terms, in the Ethical Code are regulated obligations specific to the profession's deontology, such as: the obligation for the probation counselors to notice, as soon as possible and, in writing, the hierarchical superior, any situation in which they have, or there may be the appearance that they would have any interest of any kind in the case in question; the obligation to carry out with professionalism, loyalty, fairness and conscientiously the tasks and the obligation to refrain from any act which might prejudice the institution in which it carries out the activity; the obligation to fulfil their tasks rapidly, in

[26] Recommendation no. R (97) 12 of the Committee of Ministers to Member States on the staff responsible for implementing sanctions and measures was adopted by the Committee of Ministers on 10 September 1997 at the 600th meeting of the Prime Ministers.

compliance with the deadlines provided by the law and, in the case where the law does not provide a deadline, within a reasonable period of time; the obligation to impose order and decency during the performance of specific activities, by having a balanced attitude, reliable and civilized towards the persons in evidence of the service and other people with whom they come into contact in their capacity; the obligation of continuous training and the of disseminating the knowledge acquired.

Also, the Code draws up interdictions that are intended to ensure the dignity and honor of the profession, but also the freedoms allowed both in the exercise of their professional tasks, as well as outside those, such as: the interdiction to use their professional quality for solving personal, family, or other persons' interests, other than within the limits of the legal framework regulated for all citizens; the interdiction to intervene in order to influence in any way the decisions concerning their career; the freedom of collaboration with the specialized publications; freedom of association with professional organizations.

Conclusion

The set of principles of the national system of probation is not, as it can be seen, a random join of rules of general applicability, with no connection between them. On the contrary, these principles are in a close connection with each other, depend on each other, influence each other in the process of guiding the organization and functioning of the national system of probation, forming themselves a system of general rules.

In order to better understand the way in which principles of the national system of probation are functioning we believe it is useful the parallel with the principles of the criminal trial, whose functioning as a whole was surprised by some of the most renowned Romanian criminal procedural professors in a particularly fine definition, according to which the principles of an institutional system should be understood as *a set of rules that are interconnected dialectically*[27].

Of particular importance is also the functional aptitude of the principles, which means that all the normative provisions after which is organized and operates the national system of probation will be interpreted and applied in the light of the principles governing the system, principles that will also facilitate solving situations where no special rules are provided for.

This last functional aptitude of the principles governing a particular institutional system, to represent a framework for the interpretation and application of the rules with a narrower enclosure area or to constitute legal basis to resolve situations not provided by law, has been recognized also by other authors who have studied institutional systems related to the national system of probation, such as the system of the criminal trial[28].

References

- I. Chiș, *Non custiodial penalties of the XXI century*, Editura Wolters Kluwer, Bucharest 2009
- I. Chiș, A.B. Chiș, *The execution of the criminal sanctions*, Editura Universul Juridic, Bucharest 2015
- N. Volonciu, Treaty of Criminal procedural law. General Provisions, Editura Paideia, Bucharest 1999
- I. Neagu and M. Damaschin, Treaty of Criminal procedural law. General Provisions, Editura Universul Juridic, Bucharest 2015
- V. Schiacu și R. Canton coord., *Probation manual*, Editura Euro Standard, Bucharest 2008
- F. McNeill, P. Raynor și C. Trotter, *Offender Supervision – New directions in theory, research and practice*, Editura Willan Publishing, New York 2010

[27] I. Neagu și M. Damascin, *Treaty of Criminal procedural law. General Provisions*, Editura Universul Juridic, Bucharest 2015, p. 60.
[28] N. Volonciu, *Treaty of Criminal procedural law. General Provisions*, Editura Paideia, Bucharest 1999, p. 54.

THE SUSPENSION OF CRIMINAL INVESTIGATION IN THE EVENT OF INCIDENCE OF A TEMPORARY LEGAL IMPEDIMENT

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Abstract

The criminal investigation is the first stage of the criminal proceeding, necessary to be carried out under legality, so as to collect the necessary evidence to find the truth in order to prosecute or not to prosecute a person subject to the criminal investigation. Sometimes, depending on the quality at the time the criminal offense was committed or on the occasion of the investigations, it is not possible to order the criminal proceedings to be initiated, given that there is a temporary legal impediment. The present study aims to bring to the debate the theoretical and practical elements regarding the institution of temporary legal impediment.

Keywords: *prosecutor, temporary legal impediment, President, Minister, suspension of the criminal investigation.*

1. Introductory considerations

The evolution of the criminal trial is such a complex activity being controlled by the necessity to find out the judicial truth in a certain criminal case, but is also necessary to administer judiciously the evidence so that the parties and the procedural subjects ensure that the rights conferred by the legislator are respected.

As we know, according to the Romanian Criminal Procedural Law, this complex activity takes place in several stages meant to convince the purpose of the criminal trial, namely to establish a solution according to the guilt or innocence of the person subject to the criminal investigation. The stages of the criminal proceedings are the criminal investigation, the trail and enforcement of the court decision, and the preliminary chamber is the link between the first two phases, which is intended to check, *inter alia*, the lawfulness of the act referring a case to court and the censorship of the lawfulness and loyalty of the criminal investigation bodies.

In the present study, we intend to draw attention to the criminal investigation, which has as its object, as it appears from art. 285 of the Criminal Procedure Code, collecting the necessary evidence on the existence of a criminal offense, identifying the individual who committed a criminal offense and establishing their criminal liability, in order to decide whether they should be prosecuted.

The quality of a person at the time of committing the criminal offense or subsequently during the criminal proceedings may be a reason to attract the jurisdiction of a particular judicial body, for example, a quaestor who committed the offense of influence peddling, will be tried at first instance by the Bucharest Court of Appeal, but with regard to a person who was a Minister at the moment of committing a criminal offense of influence peddling, and at the beginning of the criminal investigation he carries out another activity there are certain procedural issues that may impede the initiation of the criminal action.

In the present study we will focus on the institution of suspension of criminal investigation, which does not involve a solution that may be ordered by the prosecutor, but only a temporary interruption of the course of the first phase of the criminal trial. This institution is incidental in several cases, but we will confine ourselves to reviewing all the circumstances in which it may be disposed, but the special attention will be focused on the temporary legal impediment for the commencement of the criminal action.

At the same time, we will try to identify in judicial practice the legal issues that arise over the institution under discussion and how they chose the judicial bodies to interpret the legal provisions when, for example, a person was a minister at the time when a crime was committed in relation to the duties of the service and at the moment when the criminal prosecution bodies appreciate the opportunity to initiate the criminal action, it fulfilled the senator's dignity. Because constitutional issues in the subject matter of the analysis have been shaped in judicial practice, it was necessary for the Constitutional Court to intervene, which has made several decisions.

2. Analysis of the cases in which the suspension may be ordered during the criminal investigation

After the addressee of the substantive criminal law has disregarded the legal compliance report, following the intimation of the judicial bodies, the mechanism of the criminal trial is initiated which seeks to find the judicial truth, so that any person who has committed a criminal offense to be prosecuted in

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relation to the guilt with which he committed the act and no innocent person to be punished.

Therefore, the criminal trial begins with its first phase, one of the most important, since the whole mechanism has its structure in this first stage. In the specialized doctrine, the criminal investigation was shaped as representing the soul and the foundation of the criminal trial, because of the special importance it occupies in this complex activity.

According to the provisions of art. 285 of the Criminal Procedure Code, the object of the criminal investigation is to collect the necessary evidence to prove the existence of criminal offenses, to identify the individuals who committed a criminal offense and to establish their criminal liability, in order to decide whether they should be prosecuted.

Depending on the criminal offense committed and the way in which the participants contributed to the criminal field, the criminal investigation will be carried out by the fact of finding out the truth of the case in order to identify whether they should be prosecuted.

At the end of the first stage of the criminal proceedings, the solutions that may be ordered by the public prosecutor's representative are the classification, the waiver of the prosecution and the prosecution. Therefore, the institution underlying the present study finds its applicability in the course of the criminal investigation, not being a solution that breaks the guilt or innocence of the accused person but represents only a temporary interruption of the first phase of the criminal trial.

Suspension cases are regulated by the legislator in art. 312 of the Criminal Procedure Code of Chapter IV, 2nd Section, which lists the following circumstances that may constitute the basis for discontinuing the first phase of the criminal proceedings:

- In case a forensic medical report establishes that the suspect or defendant is suffering from a serious medical condition that precludes them from taking part in the criminal procedure, the criminal investigation body shall submit to the prosecutor its proposals and the case file so they can order the criminal investigation suspended (art. 312 par. 1 of the Criminal Procedure Code);
- Suspending the criminal investigation shall also be ordered in the situation where there exists a temporary legal impediment to the start of criminal action against a person (art. 312 par. 2 of the Criminal Procedure Code);

Suspending the criminal investigation shall also be ordered for the duration of the mediation procedure, as under the law (art. 312 par. 3 of the Criminal Procedure Code);

3. Judicial bodies who may order the suspension of the criminal investigation and their duties

Even if the criminal investigation is carried out by the prosecutor on a mandatory basis, or under his supervision, the public prosecutor's representative also has the obligation to analyze whether the criminal investigation should be suspended. Insofar, as the criminal investigation is carried out under the supervision of the prosecutor, the criminal investigation body is obliged to submit to the prosecutor the proposals regarding the suspension of the criminal investigation.

The order of suspension of the criminal investigation is communicated to the main procedural parties and subjects and while the phase of the criminal trial is interrupted, the criminal investigation bodies may continue to carry out those activities in which the suspect or defendant is not required. As a guarantee provided by the legislator, when the criminal investigation is resumed, the acts performed during the suspension may be restored wherever possible. We appreciate that criminal investigation bodies may continue to carry out specific activities only in the case of suspension of criminal investigation in case of serious illness of the suspect or defendant.

The communication of this order fulfills a double role – notification of the procedural incident and, on the other hand, gives these main procedural subjects the possibility that, when they are dissatisfied with the measure adopted, when it deems it underground or unlawful, can attack it according to the general procedure established by 339 of the Criminal Procedure Code[1].

During the suspension of the criminal investigation, irrespective of the circumstances which led to this solution, the criminal investigation bodies has the obligation to check periodically, but no later than three month from the date of the suspension, if the fact that caused the interruption of the criminal investigation persists. We appreciate that it is necessary to draw up a report by the criminal investigation bodies whenever they carry out these checks in order to inspect the identified issues. If the fact that leads to the suspension of the criminal investigation is found, the criminal investigation body must draw up the proposal to resume the criminal investigation and immediately inform the prosecutor supervising the criminal investigation of this fact.

When the mediation procedure is initiated, the legislator stipulates in art. 70 of the Law No. 192/2006 the possibility of suspending the criminal investigation, based on the presentation by the parties of the mediation agreement. Therefore, the suspension is an optional one, and the judicial body will appreciate the necessity of the order.

[1] N.Volonciu and others., *The new Criminal Procedure Code commented*, Hamangiu Publishing, 2014, p. 788;

4. The existence of a temporary legal impediment as a basis for suspending the prosecution

In order for this case to be one interrupting the criminal investigation, it is necessary to meet cumulatively the following conditions:

- The criminal investigation to be initiated about an act provided by the criminal law and to be ordered the continuation of the criminal investigation for the suspect;
- To be determined the incidence of a legal obstacle to the criminal proceedings ;
- The impediment to be temporary;
- The impediment to be provided by the law, in a certain normative act.

Such legal and temporary impediments may be those relating to the recognition of immunity from criminal jurisdiction of certain person during the performance of public functions, the performance of a mandate[2]. The President of Romania may be in this situation when he commits a crime provided by the criminal law. According to art. 84 par. 2 of the Constitution of Romania, the President enjoys immunity. We are thus faced with a temporary legal impediment, namely the duration of the mandate, which prevents the need to initiate the criminal proceedings in a particular case.

The case of suspension is not an incident where, for acts committed by a person (even if the function determining the incidence of this condition is limited in time), a prior condition or prior authorization is requires (even if the function which determines the incidence of this condition is limited in time) if the fulfillment of the condition is not possible or the granting of such authorization is refused. In this situation, we are in the hypothesis of the prevention provided by art. 16 par. 1 letter e from the Criminal Procedure Code, the finding of which required the issuance of an order for classifying the case. If, due to the eventual temporary nature of the function or mandate (which determined the necessity of the prior condition or authorization), it ceased, so that the condition is no longer necessary, the criminal investigation previously completed by the classification may be resumed, according to the provisions of art. 335 par. 2 of the Criminal Procedure Code[3].

This may be the case if, after the commencement of the criminal investigation of a particular criminal offense, it is found that the person who is supposed to have committed has the capacity of a Minister and the deed is related to his/her duties.

Ministerial liability is considered, since the last century, one of the foundations of our constitutional system. We first encounter it in the Organic Regulation (1831), in the March Proclamation of the National Party of Moldavia and Muntenia and in the United National Principal Constitution of 1859. The principle of ministerial liability is then proclaimed by the Constitution of 1866, as well as by the Constitution of 1923, which further states that the "*Ministerial liability Law determines the cases of liability and the punishment of ministers*", and it is clear that this text has agreed with the provisions of the Ministerial liability Law of 1879 which encompassed the special criminal offenses ordered in the "*crimes*" and "*felonies*", as well as the penalties applicable to their gravity[4].

Art. 109 par. 2 of the Constitution of Romania regulates that only the Chamber of Deputies, the Senate and the President of Romania have the right to request the prosecution of the members of the Government for the acts committed in the exercise of their mandate. If the prosecution has been requested, the President of Romania may order the suspension from the mandate. The suing of a member of the Government brings him out of his mandate.

Thus, after the criminal investigation of a personal begun, the Prosecutor General of the Prosecutor's General Office attached to the High Court of Cassation and Justice must refer the Chamber of Deputies, the Senate or the President of Romania in order to request the commencement of the criminal proceedings.

In the judicial practice, the problem of issuing these opinions was raised in a criminal case filed by the National Anticorruption Directorate, as follows: Chief Prosecutor of NAD, L.C.K. sent to the Prosecutor General the report for the notification of the President of Romania, of Senate, of the Chamber of Deputies and of the European Parliament, in order to obtain criminal prosecutions for nine former Ministers. The nine were accused in the file known as *Microsoft Licenses*. According to the research carried out, the NAD provides in a statement sent to the public opinion: it follows that "*out of the USD 54 million paid by the Romanian Government under the framework agreement and its extension, the USD 20 million represent the commissions claimed by the persons involved in the project the Government of Romania, the Ministers and the companies involved*".

In relation to the quality at the time the notification was made, several institutions has been notified as follows:

1. Referral of the European Parliament to the request for criminal investigation against:

N.D., Minister of MCTI between 2000 – July 2004 and currently a member of the European Parliament, for offenses of abuse in office, taking a bribe, influence peddling and money laundering

2. Referral of the President of Romania to the request for criminal investigation against:

[2] N.Volonciu and others., *The new Criminal Procedure Code commented*, Hamangiu Publishing, 2014, p. 787;
[3] N.Volonciu and others., *The new Criminal Procedure Code commented*, Hamangiu Publishing, 2014, p. 787;
[4] http://www.amosnews.ro/raspunderea-penala-membrilor-guvernului-2013-02-27;

Ț.A., Minister of Communications and Information Technology during July-December 2004 for offenses of abuse in office, taking a bribe, influence peddling, money laundering

S.G., Minister of Communications and Information Society between December 2008 and September 2010 for committing offenses of abuse in office, taking a bribe, influence peddling and money laundering

F. P.D., Minister of Education and Research for between 2009-2012 for committing the offense of abuse of authority

A.A., Minister of Education and Research during 2003-2005 for committing offenses of abuse in office, taking a bribe, influence peddling and money laundering

T.M.N., Minister of Public Finance between 2000-2004 for offenses of abuse in office, taking a bribe, influence peddling and money laundering

3. Referral to the Romanian Senate for the request for criminal investigation against:

M.P.Ș., coordinator Minister of SGG between December 200 and October 2003 and presently Senator in the Romanian Parliament for committing offenses of instigation of abuse in office, influence peddling and money laundering

E.A., Minister of Education, Research and Innovation, from December 28, 2000 to June 19, 2009, the Minister of Education, Research and Innovation from December 22, 2008 to October 1, 2009 and currently Senator in the Romanian Parliament, for committing offenses of abuse in office, taking a bribe, influence peddling and money laundering

4. Referral to the Chamber of Deputies to the request for criminal investigation against:

V.V., Minister of Communications and Information Society, from September 2010 to February 2012 and present Deputy in the Romanian Parliament, for committing the offense of abuse in office.[5]

In another criminal case, the Directorate for the Investigation of Organized Crime and Terrorism has requested the commencement of criminal investigation against the Minister of Economy, V.V. and former Minister, A.V.

Thus, according to the press release published on the DIOCT website, the Chief Prosecutor of the DIOCT requested the Prosecutor General of the Prosecutor's General Office attached to the High Court of Cassation and Justice:

1. to notify the Romanian Senate for the request to start the criminal investigation against V.V. (former Minister of Economy an member of the Government during December 2006 – December 2008, Senator in the Romanian Parliament in the current parliamentary legislation, also serving as Minister in the Ministry of Economy) in terms of the plot and the undermining of the national economy provided by art. 167 par. 1 of the Criminal Code and art. 165 par. 1 and par. 2 of the Criminal Code, with the application of art. 33 letter a from the Criminal Code, acts committed during the period when he was Minister of Economy.
2. to notify the President of Romania of the application for the commencement of the criminal investigation against V.A. (former Minister of Economy and member of the Government from December 2008 to September 2010) in terms of the plot and the undermining of the national economy provided by art. 167 par. 1 of the Criminal Code and art. 165 par. 1 and par. 2 of the Criminal Code, with the application of art. 33 letter c from the Criminal Code, acts committed during the period when he was the Minister of Economy[6].

In the latter case, the members of the Senate gave a negative opinion to the request of the DIOCT, considering that there is no evidence to indicate the involvement of V.V. in allegedly criminal activity.

Regarding the procedure for the criminal investigation of members and former members of the Government who at the time of the notification had the function of deputy or senator, there was a constitutional legal conflict between the public prosecutor's office – the Prosecutor's Office attached to the High Court of Cassation and Justice, on the one hand, and the Parliament – the Chamber of Deputies and the Senate.

Thus, by decision No. 270/2008, the Constitutional Court was pronounced[7] and found the existence of a legal conflict of a constitutional nature between the public prosecutor's office – the Prosecutor's Office attached to the High Court of Cassation and Justice, on the one hand, and the Parliament – the Chamber of Deputies and the Senate, on the other hand, in the case of requests concerning the criminal investigation of members and former members of the Government for acts committed in the exercise of their mandate and who, at the time of the referral, also have the capacity of deputy or senator.

In applying the provisions of art. 109 par. 2 the first sentence of the Constitution, the public prosecutor's office - the Prosecutor's Office attached to the High Court of Cassation and Justice shall notify the Chamber of Deputies or the Senate, as the case may be, to request the prosecution of members and former members of the Government for acts committed in the exercise of their office and who, at the time of the referral, also have the capacity of deputy or senator.

In applying the provisions of art. 109 par. (2) the first sentence of the Constitution, the public prosecutor's office - the Prosecutor's Office attached to the High Court of Cassation and Justice will notify the President of Romania to request the prosecution of the members of the Government and former members of

[5] http://cursdeguvernare.ro/dna-cere-aviz-pentru-urmarirea-penala-a-noua-fosti-ministri.html;

[6] https://www.hotnews.ro/stiri-esential-15496191-procurorul-sef-diicot-solicita-incepeprea-urmaririi-penale-pentru-varujan-vosganian-adriean-videanu.htm

[7] https://www.ccr.ro;

the Government who, at the time of the referral, deputy or senator.

We note in essence that in connection with the situation of the members of the Government who have committed criminal offenses in connection with the service duties, there is a temporary legal impediment to the commencement of criminal proceedings, namely, the commencement of the criminal investigation issued by the Chamber Deputies, the Senate or the President of Romania, depending on the quality at the time of the referral. This impediment is temporary because of the fact that it can be removed by the approval of the competent body after the procedure under Law No. 115/1999 on Ministerial liability has been completed.

To the extent that the Chamber of Deputies, the Senate or the President of Romania will reject the opinion, this circumstance will be converted into a legal impediment that determines the solution of the classification, art. 16 par. 1 letter. e of the Criminal Procedure Code, respectively the authorization or notification to the competent body. In my opinion, to the extent that the request was rejected because there was insufficient evidence and new facts, a new request can be made with respect to the same member of the Government.

Regarding the temporary legal impediment in the event that the President of Romania committed an act provided by the criminal law, we identified the following case in the practice of the judicial bodies:

On April 16, 2014, a Senator from the Romanian Parliament, named G.F. filed a criminal complaint in which she accused the head of state of that time, T.B., of threats and blackmail, of the statements he made about a show in which he said: *'It would be better to stay in her own corner, and to take care of what happens with her husband who is a mayor, because it is possible that she may not find him one day at home if ... she is not careful ... I understand that bad things happened to hom"*[8].

The prosecutors within the Prosecutor's Office attached to the High Court of Cassation and Justice have considered that the provisions of art. 206 of the Criminal Code, with the application of art. 35 par. 1 of the Criminal Code, respectively the perpetration of the threat of continuation (two material acts). Although the initial investigations were the object of the blackmail offense, the legal classification subsequently changed, the case being analyzed only from the point of view of committing the threat offense.

In relation to the quality held at that time by the named T.B., that of the President of Romania, the investigators considered that it is necessary to order the suspension of the criminal investigation due to the incidence of the legal impediment of the motion of the criminal action that we find regulated in art. 312 par. 2 of the Criminal Procedure Code.

Against this order, the plaintiff, through the chosen defender, filed a complaint with the hierarchically superior prosecutor, a complaint that was rejected and then addressed the preliminary judge of the High Court of Cassation and Justice. Although this judicial body had to reject this complaint as inadmissible, since the legislator does not regulate such a remedy, however, the Preliminary Chamber judge allowed the request to refer the Constitutional Court to the unconstitutionality of art. 312 par. 2 of the Criminal Procedure Code.

Thus, by Decision No. 678 from November 13, 2017[9] the judges from the Constitutional Court rejected the exception invoked by the plaintiff G.F., stating that the provisions of art. 312 par. 2 of the Criminal Procedure Code are constitutional.

The immunity enjoyed by the President of Romania has been defined as a means of protection, designed to protect him from any possible pressures, abuses and blatant lawsuits directed against him in the exercise of his mandate, with the aim of guaranteeing freedom of expression and protection against abusive judicial prosecution[10].

The Constitutional Court motivated its decision to reject, basically acknowledging that the President of Romania, in the exercise of his duties, enjoys immunity in two respects: the lack of liability for the political opinions expressed in the exercise of the mandate, and the inviolability (except of the case provided by article 96 of the Constitution, where the constituent legislator stipulated that the President may be prosecuted for the offense of high treason). By virtue of inviolability, we notice that the provisions of article 312 par. 2 of the Criminal Procedure Code in the case of criminal investigation against the President of Romania, the temporary legal impediment derives from the provisions of article 84 par. 2 of the Constitution regarding the immunity of the President of Romania.

We notice that it will be possible to order the criminal action to be launched against the President of Romania after the temporary legal impediment, namely his mandate, has ceased, and the criminal investigation may be resumed.

In early 2015, after President T.B. completed its second presidential mandate, prosecutors within the Prosecutor's Office attached to the High Court of Cassation and Justice, on the basis of the provisions of art. 333 of the Criminal Procedure Code were ordered to resume the criminal investigation following the cessation of the cause of the suspension, namely the legal impediment - the exercise of the position of the President of Romania.

By the indictment of 15.07.2016, issued in file No. 238 / P / 2014, of the Prosecutor's Office attached to the High Court of Cassation and Justice - the Criminal Investigation Section, verified by the Chief Prosecutor of the Section on 21.07. 2016 in terms of

[8] www.antena3.ro;
[9] To be seen https://www.ccr.ro/ccrSearch/MainSearch/SearchForm.aspx;
[10] https://www.ccr.ro/ccrSearch/MainSearch/SearchForm.aspx;

legality and solidity, the prosecutor ordered that the defendant T.B. be sued in terms of committing the offense of threat in a continuous form (two material acts), a deed stipulated and sanctioned by art. 206 of the Criminal Code with the application of art. 35 par. 1 of the Criminal Code. Subsequently, the indictment was dismissed by the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice and resumed the criminal investigation and the civil party chose to withdraw the previous complaint, so the solution that was ordered was that of the classification[11].

In the specialized doctrine[12], it is argued that this temporary legal impediment would be an incident where, after the commencement of criminal investigation of a criminal offense sanctioned *ex officio*, the legal classification of a criminal offense is punishable only upon a preliminary complaint, but this circumstance can not be immediately brought to the attention of the plaintiff who is away from the country and therefore can not manifest his will for a certain period of time.

Conclusion

We agree with the regulation of this institution under the Criminal Procedure Code which allows the suspension of criminal investigation as long as the incident is a temporary legal impediment.

As John Milton said[13], where there is a great thirst for learning, it is natural to have many contradictory discussions, many writings and opinions; because the opinion of the people of worth is knowledge, we hope that through this paper we have achieved the desideratum considered at the beginning of this work, and the opinions that are presented will be useful to those who want to deepen the subject of the research.

References

- The Criminal Procedure Code
- The Criminal Code
- Law No. 255/2013 for the implementation of Law No. 135/2010 on the Criminal Procedure Code
- Romanian Costitution
- Ion Neagu, Mircea Damaschin, Criminal Procedure Treaty – General Part, Universul Juridic Publishing, Bucharest, 2014
- N. Volonciu și alții, New Criminal Procedure Code commented, Hamangiu Publishing, 2014
- M. Udroiu – Criminal Procedure – Special Part, C.H. Beck Publishing, Bucharest, 2014
- A. Zarafiu, Criminal procedure, General Part. Special Part, C.H. Beck Publishing, Bucharest, 2014
- B. Micu, A.G.Păun. R. Slăvoiu, Criminal procedure. Admission course in magistracy and law. Multiple choice test, Hamangiu Publishing, Bucharest
- P. Buneci and others, New Criminal Procedure Code. Notes. Correlations. Explanations, C.H. Beck Publishing, Bucharest, 2014
- V. Dongoroz and others, Theoretical explanations of the Romanian Criminal Procedure Code. The general part, vol. V, 2nd edition, Academiei Publishing, All Beck Publishing, Bucharest, 2003
- Gh. Theodoru, Criminal procedure. The special part, Al. I Cuza University, Law School, Iași, 1974, Vol. II
- www.ccr.ro
- www.just.ro
- www.echr.coe.int

[11] The opinion was also expressed in the Ph. D. thesis of the undersigned nemed Infirmation, revocation and legal termination of procedural acts in the light of criminal procedural regulations;

[12] Micu B., and others. Criminal procedure. Admission course in magistracy and law, 3rd edition, Hamangiu Publishing, 2017, p. 323;

[13] English poet, https://ro.wikipedia.org/wiki/John_Milton

COMPENSATORY ACTION - A NEW LEGISLATIVE ACTION IMPOSED ON NATIONAL AUTHORITIES AS CONSEQUENCE OF RECENT CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Cătălin Nicolae MAGDALENA*

Abstract

Subsequent to pronouncement by the European Court of Human Rights of the semi-pilot judgement in case Iacov Stanciu v. Romania and the pilot judgement in case Rezmiveş and Others v. Romania - where the Court found structural problems concerning overcrowding of detention facilities and improper conditions of detention - national authorities were imposed to adopt an appropriate legal instrument in order to eradicate injuries of fundamental rights guaranteed by the Convention.

The mechanism established by Law no. 169/2017 amending legislation on execution of punishments and detention measures aimed at achieving a double goal. On the one hand, it pursued to grant compensation to convicted persons executing punishments consisting in deprivation of liberty in improper conditions; on the other hand, it was destined to contribute to relieving places of detention.

The purpose of this study is to analyze the degree to which the recently adopted legislation is suitable to fully attain the assumed end.

The objectives of the study are to make an analysis of the relevant legal provisions and their impact on prison system and execution of punishment and at the same time of relevant case-law, in order to determine if the present form of the law leads to differentiations in treatment towards those to whom it addresses, incompatible to fundamental law.

Keywords: *Compensatory action. Law no. 169/2017. Compensations granted to convicted persons. National solutions to overcrowding of detention facilities.*

1. Introduction

Per Article 3 of European Convention for the Protection of Human Rights and Fundamental Freedoms[1]: „No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

In Romanian national legislation, the importance of this right attributed to any person, regardless of his or her social position, age, education, religion, ethnicity or sex is underlined by its stipulation in the fundamental law[2].

Subsequently, constitutional provisions have been reiterated in legislation, where there has been stated as a principle that "any person who is under criminal investigation or trial must be treated with respect for human dignity"[3] and „it is forbidden to subject any person in execution of punishment or other measures depriving of liberty to torture, inhuman or degrading treatment or other ill-treatment[4]."

Despite the above-mentioned procedural gurantees, by judgemnent pronounced in case Bragadireanu vs. Romania on 06.12.2007[5], the European Court of Human Rights[6] stated for the first time that there has been a breach of Article 3 of the Convention caused by national conditions of detention.

The Court appreciated that penitenciary overcrowding, obligation to share beds with other persons, damaged mattresses and inappropriate sanitary facilities fall in the area of inhuman and degrading treatment of the convicted person during execution of punishment.

During the next 5 years, the Court pronounced other almost 100 judgements, stating that Romania was in breach of Article 3 of the Convention[7], situation caused by, e.g.[8]: overcrowding, insufficient or inadequate alimentation, limited number of bathrooms,

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[1] European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 04.11.1950, ratified by Romania through Law no. 30/18.05.1994, published in the Official Gazette of Romania no. 135/31.05.1994.

[2] According to Article 22 Para 2 of Romanian Constitution: „no one shall be subjected to torture or toany punishment or inhuman or degrading treatment".

[3] Article 11 Para 1 of Romanian Criminal Procedure Code.

[4] Article 5 Para 1 of Law no. 254/2013 on the execution of punishment and detention measures ordered by judicial authorities during the criminal trial, published in the Official Gazette of Romania no. 514/14.08.2013.

[5] ECtHR, Decision adopted on 06.12.2007, Application no. 22088/04, *case Bragadireanu vs. Romania*.

[6] Hereinafter „the Court".

[7] According to ECtHR, decision adopted on 25.04.2017, Applications no. 61467/12, 39516/13, 48231/13 and 68191/13, *case Rezmiveş and Others vs. Romani*a, Para 106, during 2007 – 2012 there have been 93 judgements stating breaches of Article 3 of the Convention by Romania.

[8] ECtHR, decision adopted on 1301.205, Application no. 41040/11, *case Micu vs. Romania*; ECtHR, decision adopted on 18.10.2011, Application no. 38746/03, *case Păvălache vs. Romania*; ECtHR, decision adopted on 6.09.2014, Application no. 51012/11, case *Valerian Dragomir vs. Romania*.

limited access to showers, lack of hygiene, lack of natural light, insufficient ventilation, passive smoking.

The large number of convictions against Romania and lack of adequate response from national authorities lead the Court to state that overcrowding and improper detention conditions represent in fact structural problems of penitentiary system.

This state of facts was acknowledged in the semi-pilot judgement pronounced in case Iacov Stanciu vs. Romania[9] on 24.07.2012. The Court noted that Romanian authorities have taken some general measures to remedy structural problems in prisons, but nevertheless asked domestic authorities to adopt additional new measures designed to ensure compliance with Article 3 of the Covention, without indicating though a deadline ultimatum. At the same time, asked Romania to adopt a national legal instrument in order to allow effective reparation of damages suffered by persons detained in unsuitable conditions.

Requests made were unsuccessful and therefore, after more than four years from the moment the Court had identified the problems, violations of the same kind were found in more than 150 judgments pronounced against Romania, based on overcrowding and inadequate material conditions in prisons[10].

To facilitate effective enforcement of its judgments, the Court adopted ruling pilot procedure which, among other things, clearly highlightend the existence of structural problems underlying the violations and, in addition, indicated to the respondent State measures necessary for remediation[11].

Considering assessments on general measures taken by Romanian authorities and reports of the European Committee for the Prevention of Torture and inhuman punishment (CPT), in conjunction with recognition by the Ombudsman of penitentiary system problems, on April 25, 2017, ECtHR pronounced the pilot judgement in case Rezmiveş and Others vs. Romania. This time, the Court specifically asked Romania to provide within six months, in cooperation with the Committee of Ministers of Council of Europe, an action plan meant to find a solution to prison overcrowding and inadequate conditions of detention.

National authorities have complied and took a first step, so that on July 14, 2017 it was promulgated Law no. 169/2017 which amended and supplemented Law no. 254/2013 on the execution of sentences and detention measures[12].

The main provision of this law was introduction of compensatory measures for inadequate conditions of accommodation of convicted persons.

However, is the adopted domestic remedy able to resolve the structural deficiencies identified in the prison system and lead to the eradication of injuries to fundamental rights guaranteed by the Convention? Is it an effective legal instrument for compensation of persons accommodated in inadequate conditions and relieves places of detention? Does this compensatory action lead to different treatments and consequences for persons who are in the same legal situation, incompatible with Romanian Constitution?

To answer these questions, it is necessary to analyze provisions of Law no. 169/2017 and their impact on prison system and implicitly on punishment execution.

Also, analysis of national case-law is a useful tool to verify whether national legal instrument meet the assumed objectives.

The importance of analysis in the present article is given at the same time by the need to verify compliance of national authorities with requirements of the pilot judgment and also resides in the absolute novelty of problems discussed.

In our opinion, the study presents from a scientific perspective part of national authorities efforts to comply with obligations under the pilot judgment in case Rezmiveş and Others against Romania[13] and, equally, examines the impact on convicts of compensatory mechanism adopted by Law no. 169/2017.

2. Content

According to Explanatory memorandum of Law no. 169/2017[14], the legislator had a double goal: to grant compensation to convicted persons executing punishments in severe overcrowding conditions, and at the same time contribute to relieving places of detention.

The remedy legal instrument by which national authorities have considered compliance with the Court is represented by a compensatory mechanism designed to eliminate violations of Article 3 of the Convention and has been implemented by Law no. 169/2017.

The most important measures adopted by Law no. 169/2017 were:

I. modification of Article no. 40 Para 5 b of Law no. 254/2013 which aimed to a slight relaxation of conditions under which it is possible to change the regime of execution of punishments depriving

[9] ECtHR, decision adopted on 24.07202, Application no. 35972/05, *case Iacov Stanciu vs. Romania*.

[10] R.Paşoi, D.Mihai, *Pilot Judgement in case Rezmiveş and Others vs. Romnia concerning detention conditions*, available online at https://juridice.ro, last accession 06.03.2018, at 08,01.

[11] According to Resolution Res(2004)3 of the Council of Ministers of the Council of Europe, adoped on 12.05.2004.

[12] Published in the Official Gazette of Romania no. 514/14.08.2013.

[13] Under this ECtHR decision, domestic authorities have assumed a whole complex of measures, among which compensatory action respresents only a part.

[14] Available online at http://www.cdep.ro.

of liberty to a regime immediately below as level of difficulty;

II. modification of the content of the right of convicted persons to phone calls by ensuring their freedom to make public mobile communications from prison, in confidentiality conditions, without visual surveillance;
III. granting to the convict the right to renounce to his/her due remuneration for work done in exchange for days additioned to punishment already executed, taking into account the work done;
IV. change of period of punishment considered executed based on work done, so that the convicted person may obtain a more consistent reduction of the period of detention.

In the context of Law no. 169/2017, the most important legislative measure was by far prescription in Article 551 of a compensatory measure for accomodation of convicts in improper condition.

According to the text of the law mentioned before, in calculating the punishment effectively executed, one must take into account execution in inadequate conditions as a compensatory measure (irrespective of regime of execution of punishment). In this case, for each period of 30 days executed under inadequate conditions (even non-consecutive days), other additional 6 days of punishment are considered executed. This benefit cannot be revoked, regardless of circumstances occurred during execution of punishment.

The legislator tried to define the notion of "improper conditions" as accommodation of one person in any detention center in Romania that presented flaws in fulfilling conditions imposed by European standards.

Of course, this definition is at least unfortunate and, at first glance, seems to restrict its scope only to persons in detention centers, defined by Article 115 of the Romanian Criminal Code[15] and Article 136 of Law no. 254/2013, as institutions specialized in social recovery, where only educational custodial measures applied to minors are to be executed.

By means of teleological interpretation, we appreciate however that this was not the scope of the national legislator.

We argue this opinion by reference mainly to the history presented in the introduction of this analysis, the general context of adoption of Law no. 169/2017, the correlation of changes enacted by this law, the objective pursued for adoption, and not least the Explanatory memorandum of the law.

We consider that the notion of „detention centers" should cover an area extended to any detention place in Romania.

The national legislator analyzed, synthesized and classified, according to standardization landmarks, the aspects considered by the European Court of Human Rights as "inappropriate conditions" in its conviction judgements. According to the actual form in force of Article 55^1 Para 3, accomodation in any of the following situations is considered execution of punishment in inadequate conditions:

a) accommodation in a space less than or equal to 4 m/convict, calculated by excluding surface of toilets and food storage facilities, by dividing the total area of detention rooms to the number of people accomodated, regardless of equipping the concerned space;
b) lack of access to outdoor activities;
c) lack of access to natural light or sufficient ventilation or ventilation availability;
d) lack of adequate temperature of the room;
e) lack of possibility to use the toilet in private and respect of basic rules of health and hygiene requirements;
f) existence of infiltration, dampness and mold in detention room walls.

These provisions are also to be applied correspondingly to calculate the punishment effectively executed as preventive measure/ punishment in detention centers and also pre-trial arrest in improper conditions[16].

To this respect, there is no reason leading to establishment of different legal situations for different categories of persons in state custody.

It is not considered execution of punishment under inadequate conditions the day or period when the person was:

a) admitted to infirmaries within places of detention, hospitals of the sanitary network of National Penitentiary Administration, Ministry of Internal Affairs or public health network;
b) in transit.

However, the person who was already compensated for improper detention conditions by final decisions of national courts or the European Court of Human Rights (for the same period for which compensation was granted and the person was subsequently transferred or moved to spaces with improper detention conditions), cannot benefit of compensatory action. Therefore, the person in this situation cannot obtain a reduction of punishment, according to Article 55^1 Para 6 of Law no. 254/2017.

Adoption of compensatory action automatically raised a controversy over the date to be considered as starting point to calculate the additional days under this mechanism.

According to Para 8, the date to be considered is July 24, 2012, when the judgment in the semi-pilot case Iacov Stanciu vs. Romania was rendered.

Nonetheless, is it possible that a law passed in 2017 should produce legal effects since 2012, considering the fact that, in general, the law applies only for the future?

[15] Romanian Criminal Code, adopted by Law no. 286/2009, published in the Official Gazette of Romania no. 510/24.072009.
[16] Per Article 55^1 Para 4 of Law no. 254/2013.

The answer is positive and based on Article 15 Para 2 of Constitution, under which the law applies only for the future, *but for more favourable criminal law* (and this is the juridical nature of compensatory action). Setting the date of July 24, 2012 as a starting point to calculate days additionally executed appears however randomly chosen and is susceptible to criticism, since neither the Explanatory memorandum to Law no. 169/2017, nor the latter clarifies the reasons for this choice.

In addition, Court decisions stating violations of Article 3 of the Convention have been delivered starting from December 6, 2007[17], and until July 24, 2012 Romania had already been convicted in 93 other similar judgments.

As a result, there is no reason why compensatory action should not also be applied before pronouncement of the judgment in the semi-pilot case Iacov Stanciu vs. Romania, with consequence of eliminating any difference in treatment of convicted persons who have executed punishments in the same inadequate conditions *before* and *after* date of July 24, 2012[18].

In order to implement the compensatory measure, in each penitentiary there was established a Commission for evaluation of prison conditions[19], whose role is to make an inventory of buildings destinated for accommodation existing at unity level, and an analysis so as to determine which of them fall under incidence of Article 55[1] Para 3 concerning improper detention conditions.

In terms of the criteria stated in Article 55[1] Para 3a) of Law no. 254/2013, the Commission will carry out the analysis taking into account the average monthly index of overcrowding associated with each analyzed building.

In terms of the criteria stated in art. 55[1] Para 3b) and f) of Law no. 254/2013, the Commission will analyze considering the existence of judgments pronounced by national or international courts, which have found defficiencies in the outdoor/indoor space of analyzed buildings.

In terms of the criteria stated in Article 55[1] Para 3c) of Law no. 254/2013, the Commission will carry out the analysis according to national standards.

In terms of the criteria stated in Article 55[1] Para 3d) of Law no. 254/2013 for the period July 24, 2012 to entry into force of the law, the Commission will analyze considering the heat delivery program for cold season. For the period after the entry into force of the law, ensurance of proper temperature will be determined by the daily measurements inside the building.

In terms of the criteria stated in Article 55[1] Para e) of Law no. 254/2013, the Commission will analyze in relation to existence of a sanitary space equipped with door and locking system, compliance to national health standards, as well as those requiring respect of rights attached to individual and collective hygiene for persons deprived of liberty.

The centralized situation of buildings inadequate in terms of conditions of detention was approved[20] by Order of Minister of Justice no. 2773/17.102017[21], and its simple reading demonstrates that no place of detention run by the National Prison Administration meets European standards of accommodation[22].

Under the principle of equal treatment of persons in the same legal situation, the legislator established by Article VI of Law no. 169/2017 that provisions of the mentioned law are to be applied to convicts temporarily placed in detention centers at request of judicial authorities and also to persons deprived of liberty who executed under Article 55[1] Para 2 of Law no. 254/2013 punishments and/or measures depriving of liberty, when these persons were subject to a measure depriving of liberty.

Following the same principle, compensatory action applies correspondingly to minors executing educational measures in detention centers, educational centers or prisons, and also to minors convicted under the former Romanian Criminal Code of 1968[23] and at the moment of entry into force of the present law are executing educational measures in detention centers.

The legislator opted for an administrative procedure of calculating the benefit of compensatory action, stating in Article V that the Office of registration and work organisation within each unit will open a registration file for each person deprived of liberty, where there are to be noted buildings of accommodation during execution of punishment and calculation of days to be deducted from executed punishment following to improper detention conditions.

Although at first glance compensatory action appears to meet the requirements of drafting legal acts[24], in reality the situation is far from achieving this goal.

In this contex, a number of questions regarding legal situations appeared, that the legislator most likely had ignored or not forseen. We will subsequently

[17] ECtHR, Decision adopted on 06.12.2007, Application no. 22088/04, *case Bragadireanu vs. Romania*, already mentioned.

[18] M.A. Hotca, Un bun început pentru respectarea hotărârii-pilot în cauza Rezmiveș și alții împotriva României – adoptarea Legii nr. 169/2017 privind modificarea și completarea Legii nr. 254/2013, available online at https://juridice.ro, last accession on 06.03.2018, at 08,00.

[19] Per Article II of Law no. 169/2017, the Commission consists of: deputy economic administrative director or equivalent, as chairman; deputy director for safety and regime or equivalent; head of penitentiary regime service or equivalent; heads of department of the buildings evaluated; chief medical and responsible for safety of work, as secretary.

[20] Per Article IV Para 7 of Law no. 169/2017.

[21] Published in the Official Gazette of Romania no. 822/18.10. 2017.

[22] Save for a few accomodation spaces.

[23] Law no. 15/1968 on Romanian Criminal Code, published in the Official Gazette of Romania no. 79-79bis/ 21.061968.

[24] Clarity, simplicity and predictability, according to Common Guidelines of the European Parliament, the Council and the Commission for those participating in drafting EU legislation.

identify, indicate and analyze some of them, in an attempt to find some answers according to the undertaken scope of the research:

1. Which is the legal nature (regime) of days considered additionally executed in compensation for accomodation in inadequate conditions?

Lack of answer lead to diverging views, which is the reason why in some cases it was found that days granted in compensation for accommodation in unsuitable conditions should be reduced, e.g., from total fraction of release on parole, while in other cases it was considered that days should be deducted from punishment itself, thus changing fractions of release on parole and date of expiry of punishment.

In our opinion, by adopting this remedy instrument prescribed by Law no. 169/2017, the legislator pursued compensation by reducing the period of execution of punishment in prison, and not the punishment covered by res judicata principle. As a result, days granted in compensation for accommodation in unsuitable conditions cannot lead to changes concerning the punishment established by the court, and the fractions prescribed for release on parole are to be calculated according to the punishment established by the final decision of conviction.

2. Changing the date when the punishment is considered entirely executed following to application of compensatory action represents a modification of punishment established by the final judgement which may be done only by the court by means of challenge to enforcement governed by Article 598 Para 1 of Romanian Criminal Procedure Code, or is it possible by mere administrative procedure performed by the administration of the detention?

We are of the opinion that changing the date when the punishment is considered entirely executed does not amount to change of punishment itself, and in the first case jurisdiction belongs to Office administration of persons deprived of liberty. According to Article 20 of Order of Minister of Justice no. 432/2010/05.02.2010[25] approving Instructions regarding the nominal and statistical number of persons deprived of liberty in custody of units subordinated to National Administration of Penitentiaries, after having received the convict in prison, the employee shall, inter alia, establish the date when the person concerned is to be released following entire execution of punishment and calculates, according to duration of punishment established by the court, the date when the fractions prescribed for release on parole expire.

One can therefore easily see that, by means of an administrative procedure, there are calculated the date when execution of punishment starts, the date when it expires and different fractions of punishment.

For the same reasons, the Office will also calculate (as required by Article V Para 3 of Law no. 169/2017), days additioned to punishment following inappropriate conditions of detention, and afterwards will accordingly modify the date of expiry for punishment execution and the fractions for release on parole.

It is only if the administration of prison refuses to calculate days additioned or they are wrongly quantified, that the convicted person may appeal to the court by way of challenge against enforcement.

This was also the opinion expressed in criminal sentence no. 54/12.01.2018[26] by Judecătoria Sectorului 5 Bucureşti, which dismissed as unfounded the challenge against enforcement filed by convict T.A.F., concerning miscalculation of days additioned in application of compensatory mechanism.

The court found that awarding compensation days ist o be done administratively by the prison unit where the convicted person is imprisoned. The challenge to enforcement was denied as unfounded, as long as the administration of the detention place had calculated for the convict a number of 156 compensatory days for accommodation in inadequate conditions during 27.10.2015-08.01.2018.

3. Release of convicts at the expiry of duration of punishment depriving of liberty is to be done administratively, or following referral by the administration of the detention to the court, in order to promote a challenge to enforcement under Article 598 of Romanian Criminal Procedure Code?

This question arose in the context of lack of specific regulation of release procedure before the end of punishment, the period of which had been changed following the application of compensatory measure under art. 55^1 Para 1 of Law no. 254/2017.

When the law entred into force, some courts appreciated that release of convicted persons benefiting of compensatory mechanism is not to be done administratively, but by court decision based on Article 598 of the Criminal Procedure Code regarding challenge to enforcement.

I.e., based on Article 598 para 1d of Romanian Criminal Code, Judecătoria Sectorului 5 Bucureşti decided to admit the challenge to enforcement filed by the judge delegate in charge of enforcement (criminal sentence no. 2616/19.09.2017[27]). By calculating the benefit of additional days consequant to accommodation in unsuitable conditions, the court found that the convict T. A. had executed the punishment and ordered release.

For identical reasoning, the courts accepted challenges to enforcenment filed by other convicted persons[28].

[25] Published in the Official Gazette of Romania no. 157/11.03.2010.
[26] Final by criminal decision no. 206/23.02.2018 pronounced by Bucharest Tribunal – Ist Criminal Section, unpublished.
[27] Final by non-contestation, unpublished.
[28] Criminal sentences no. 2617/19.09.2017, no. 2618/19.09.2017, no. 2619/19.09.2017, pronounced by Judecătoria Sectorului 5 Bucureşti, final by non-contestation, unpublished.

We appreciate, however, that the answer to our question results from corroborating Article 53 of Law no. 254/2013 and Article 20 of Order of Minister of Justice no. 432/2010/05.02.2010 (previously referred to).

Per Article 53 Para 1 of Law no. 254/2013, director of the prison has jurisdiction to order release at "the expiry of imprisonment, the date of the final judgment ordering the release on parole, as well as any other date decided by competent judicial bodies in cases provided by law (...)". Thus, administration of detention place releases the convicted person at the expiry of period of imprisonment, by administrative procedure, without any need of referral to court.

At the same time, the expiry date of punishment is calculated by Registration Bureau organized in each place of detention, considering additional days as result of execution of punishment under inadequate conditions of detention. Benefit of additional days under compensatory mechanism leads to a new situation in national law, which requires regular updating of the date of expiry of punishment depending on conditions of detention.

Basically, when the convicted person is imprisoned, the responsible employee calculates the starting and respectively the expiry date of punishment according to the final judgment, but the latter will be modified over time through administrative proceedings, as for every 30 days of accommodation in unsuitable conditions 6 days will be considered as effectively executed.

Summarizing, release at expiry of period of punishments deprivating of liberty will be done administratively, under the procedure governed by Article 53 of Law no. 254/2013.

This conclusion is also supported by case-law. For example, criminal sentence no. 88/16.01.2018 issued by Judecătoria Sectorului 5 București[29] rejected as inadmissible the challenge to enforcement filed by the convict N.D., arguing that grant of compensation days according to Law no. 169/2017 is to be done administratively by the prison unit where the convicted person is imprisoned, and not by way of challenge to enforcement.

Only in case that these days should not be granted, the convicted person may submit an application to the court under the principle of access to justice. In case under discussion, the court found that Rahova Penitenciary calculated for the applicant N.D. a number of 132 compensation days for the period 17.09.2014-21.12.2017 during which the convict had been detained in improper conditions, and therefore the appication was inadmissible.

4. After entry into force of Law no. 169/2017, situation of all persons deprived of liberty benefiting of compensatory action must be analyzed by Commissions for release on parole organised in penitenciaries, according to Article VII of the law?

Response can only be negative.

Per Article 97 of Law. no. 254/2013, release on parole is granted at the request of the convicted person or at the proposal of the Commission for conditional release. The report for release on parole, along with supporting documents and, where appropriate, recommendations of probation officer made under Article 97 Para 7 are submitted to the court of first instance which has territorial jurisdiction over the prison[30].

There are situations where, by applying compensatory action, the convicted person gets vocation to release on parole by fulfilling fractions of punishment stipulated in Article 99 and Article 100 of Romanian Criminal Code. In this case, the Commission for release on parole shall analyze and notify to the court. Similarly, the Commission will also proceed in the same manner if the application for release on parole was rejected (before entry into force of compensatory action) for non-accomplishment of legal fractions of punishment.

The Commission will inform the court even though the deadline for request renewal is not fulfilled, as Law no. 169/2017 has the character of a more favorable criminal law.

On the other hand, if before entry into force of Law no. 169/2017 the court rejected the application for release on parole on the grounds that the convict did not reform and cannot reintegrate in society, and established a deadline for renewal of application for a date situated after entry into force of compensatory action, the Commission will not have to notify the court before accomplishment of the deadline established by a judgment entered into res judicata area. If it does however, we consider that the application should be rejected as inadmissible.

Recent case-law confirms this conclusion. Thus, criminal sentence no. 3032/17.11.2017 pronounced by Judecătoria Sectorului 5 București[31] admitted the proposal for release on parole for convict M.G.A. Although court of first instance held that release on parole was possible before the date established by a final decision (pronounced prior to entry into force of Law no. 169/2017) when the proposal could be renewed, the higher court decided on the contrary.

Considering on basis of circumstances presented that the legal situation of the convicted had not been modified by entry into force of compensatory mechanism and the period during which the application could be renewed (as established by previous court ruling) still produced legal effects by virtue of res judicata principle, the court of judicial review rejected the proposal for conditional release as inadmissible.

5. When application for release on parole was rejected, the period established by the court after

[29] Final by criminal decision no. 167/15.02.2018 pronounced by Bucharest Tribunal – Ist Criminal Section, unpublished.
[30] According to Article 205 of Regulation implementing Law no. 254/2013, published in the Official Gazette of Romania no. 271/11.04.2016.
[31] Final by criminal decision no. 205/23.02.2018 pronounced by Bucharest Tribunal – Ist Criminal Section, unpublished.

which the application can be renewed modifies, as consequence of additional days considered executed as compensation under inadequate conditions of accommodation?

This hypothesis must be considered from two perspectives. The first one concerns the situation when release on parole was denied *prior* to entry into force of the law, by analogy with assessments made in paragraph 4 and specific distinctions as shown there. The second one concerns the case when release on parole was rejected *after* entry into force of compensatory action, situation where there is no reason to modify the period established by the court, covered by res judicata principle, along with the final decision.

In all cases, period of renewal established by the court when rejecting the application/proposal for release on parole cannot be longer than 1 year[32] and must be indicated separately in all cases when the solution is based on non-compliance of requirements prescribed by law, including the situation where the remainder to be executed until accomplishment of legal faction is less than or equal to 1 year. If the application/proposal for release on parole is denied for non-compliance of the fraction prescribed by law, and the remainder to be executed until reaching this fraction is longer than one year, the court will not establish a concrete date, but will generically set that the application/proposal shall be renewed after expiry of fraction[33] (which is to be calculated considering also the benefit of compensatory action).

6. In case of persons deprived of liberty sentenced to life imprisonment, days considered additionally executed following to improper conditions are/are not taken into account when calculating the required fraction for release on parole?

In accordance with Article 99 Para 1 of Romanian Criminal Code, release on parole for life imprisonment can be accepted if the convict has effectively served 20 years in prison.

We appreciate the days considered additionally executed as result of inadequate accommodation conditions represent days actually executed from the punishment, as unequivocally results by gramatical interpretation of Article 55^1 alin. 1^{34}.

Moreover, assessment to the contrary could lead to criticism aimed at the very constitutionality of the legal text, as long as it leads to differential treatment in respect of persons in the same legal situation, disregarding the principle of equality before law.

Constitutional Court frequently examines in its case-law respect of constitutional requirements enshrined in Article 16 Para 1 of the Constitution, which states that: „All citizens are equal before the law and public authorities, without any privilege or discrimination."

In older decisions, Constitutional Court held that the principle of equality requires establishment of equal treatment of situations which, depending on the purpose, are not different[35]. Also, according to recent jurisprudence of the same court, situations concerning certain categories of people should differ in essence so as to justify the difference of treatment, and this difference of treatment must be based on objective and reasonable criteria[36]. In essence, ignoring the principle of equal rights has the effect of unconstitutionality of the norm establishing a privilege or discrimination. To this respect, Constitutional Court stated that, according to its case-law, discrimination is based on the notion of exclusion from a right/benefit[37], and the specific constitutional remedy where unconstitutional discrimination appears is granting/offering access to the benefit of the right[38].

7. Compensatory action also influences the regime of punishment execution?

The response cannot be but positive, considering that per Article 40 Para 2 of Law no. 254/2013, change of regime of depriving of liberty punishment execution may be granted after serving legal fraction of inprisonment punishment (compensatory measure will be included in this fraction). Therefore, Commission for individualisation and change of regime of execution of punishments depriving of liberty will analyze accomplishment of conditions for regime change for all convicts who, by benefit of additional days, get vocation to a milder regime.

8. When the detained person is in custody under several enforcement warrants in execution/succesively executed, which is the starting point for calculation of days considered additionally executed, following accomodation in inadequate conditions?

In general terms and by applying a systematic interpretation, we can see from the entire economy of Law no. 169/2017 that compensatory measure concerning additional days granted for inadequate conditions of detention concerns only the punishment in execution, and not also punishments already executed based on previous convictions. This framework remains valid even if the current enforcement warrant is executed at the final point of execution of a previous enforcement warrant.

In our opinion, additional days considered executed following to improper detention conditions can be calculated as a compensatory measure only for punishments in execution at the moment of entry into force of Law no. 169/2017. In consequence, if the

[32] According to Article 587 Para 2 of Romanian Criminal Procedure Code, the term begins on the date the judgment becomes final.

[33] To this respect, see decision no. 8/20.03.2006 pronounced by High Court of Cassation and Justice (by a specific procedure prescribed by Romanian law, called „review for uniform interpretation of law"), published in the Official Gazette of Romania no. 475/01.06.2006.

[34] Which states that: „when calculating the punishment effectively executed it is to be considered (…) as compensatory measure (…)".

[35] Constitutional Court of Romania, decision no. 1/08.02.1994, published in the Official Gazette of Romania no. 69/16.03.1994, penultimate Para.

[36] Constitutional Court of Romania, decision no. 366/25.06.2014, published in the Official Gazette of Romania no. 644/02.09.2014, Para 55.

[37] Constitutional Court of Romania, decision no. 62/21.10.1993, published in the Official Gazette of Romania no. 49/25.02.1994.

[38] Constitutional Court of Romania, decision no. 681/13.11.2014, published in the Official Gazette of Romania no. 889/08.11.2014, Para 24.

convicted person has served sentence of imprisonment starting from July 24, 2012 and was released from prison at the end of punishment, before entry into force of Law no. 169/2017[39], this person cannot benefit of compensatory action.

Similarly, execution of successive enforcement warrants canot result in entitlement to benefit of compensation but for the period executed in unsuitable conditions under the active warrant, as the punishment established by previous warrant had already been executed.

In arguing this opinion, it is to be noted that the legislator prescribed a single method of compensation, namely deduction of days from the punishment in execution, and not from punishments already executed. In the latter situation, the convicted person who has served sentence in inadequate conditions may appeal to civil courts by means of tort actions brought against the state for compensation.

For example, civil sentence no. 6538/26.09.2016 pronounced by Judecătoria Sectorului 5 Bucureşti[40] partly accepted the application filed by applicant P.I. and ordered that the defendants Bucharest Rahova Penitentiary and the National Prison Administration should jointly pay to the applicant the amount of 10,000 lei as moral damages.

The court considered that the applicant was incarcerated for 211 days and did not benefit from a minimum of 4 square meters space, contrary to Article 1 Para 3a of the Minimum rules on accommodation of detainees, adopted by Order of Minister of Justice no. 433/2010, and this situation caused psychological distress to the detained person.

Although some courts have held that simple statement of improper accommodation conditions was in itself sufficient just satisfaction for non-pecuniary damage inflicted on the convicted person, these solutions were modified by higher courts.

Thus, civil decision no. 3281/12.09.2016 issued by Bucharest Tribunal – Vth Civil Section admitted the appeal lodged by the applicant S.F. against civil sentence no. 521/01.21.2016 pronounced by Judecătoria Sector 4 Bucureşti and the defendants Jilava Penitentiary, National Administration of Penitentiaries and Romanian State (represented by Ministry of Finance) were obliged to pay to the applicant the amount of 1,500 euros moral damages.

We appreciate that for such cases a much better solution would have been prescription by Law no. 169/2017 of a compensatory pecuniary benefit (alternating the compensatory action consisting in additional days), and every convicted person who has already executed punishment should receive a sum calculated for each day served in the place of detention in inadequate conditions.

Analyse of case-law of the courts results in the idea that additional compensatory days following inappropriate detention conditions concern only punishment in execution.

For example, the challenge to enforcement filed by convict N.D., detained in Bucharest-Rahova Penitenciary, was denied as unfounded by criminal sentence no. 306/08.02.2018 pronounced by Judecătoria Sectorului 5 Bucureşti[41].

The court found that N.C. is in execution of a punishment of 5 years and 197 days, following merger of a 4 years punishment (applied as consequence of a post conviction criminal offence) with the rest to be executed from a previous punishment of 5 years and 197 days (which had a total amount of 18 years of imprisonment). As grounds for this solution, the court stated that the benefit of Law no. 169/2017 must be reported to the resulting punishment in execution at the present moment, without considering the period already executed from the first 18 years punishment. This period is situated between the date when execution of the 18 years punishment began and the date when a new criminal offence took place, and at the same time is not part of the resulting punishment.

9. When a convict is released following to benefit granted according to compensatory action and afterwards returnes to prison in execution of another punishment which was merged with the punishment previously executed, this person can benefit from a new compensation for the period already executed ?

We are of the opinion that, in this case, the convicted person cannot benefit of a new compensation covering the same period for which the benefit was already granted, although by merging concurrent punishments a single warrant is to be executed. The background of this solution is that no one can get double compensation for the same reason.

10. In case of persons deprived of liberty who committed a criminal offence in prison during execution of punishment, which date should be considered as starting point in calculating additional days following to accomodation in improper conditions?

According to the line of reasoning already presented, additional days are to be calculated from the date of commencement of the new punishment applied as result of the new criminal offence committed in prison, calculated on the basis of the new enforcement warrant.

11. In addition to issues above-mentioned, arising in the context of lack of regulation by Law no. 169/2017, legal practitioners pondered on the question whether, contrary to public statements of national officials, the benefit of compensatory action should also be applied to convicts who had been released from the prison prior to entry into force of law and were situated within the term through which the convict is supervised.

[39] July 21, 2017.
[40] Final by civil decision no. 2837/15.09.2017 pronounced by Bucharest Tribunal – IVth Civil Section, unpublished.
[41] Final by criminal decision no. 238/05.03.2018 pronounced by Bucharest Tribunal – Ist Criminal Section, unpublished.

It was considered that art. 55^1 of Law no. 254/2017 was also incident in this situation and the convict can obtain a reduced punishment (and hence reducement of the term through which the convict is supervised) by means of challenge to enforcement based on Article 598 Para 1d of Romanian Criminal Procedure Code.

E.g., Bucharest Tribunal – Ist Criminal Section[42] accepted the challenge to enforcement filed by convict P.A.

Under Article 598 Para 1d of Romanian Criminal Procedure Code related to Article 55^1 of Law no. 254/2013, the court found that a number of 205 days were additionally executed, as consequence of the period when P.A. was accommodated in inadequate conditions in detention centers or centers of detention and arrest. At the same time, the court found that the 5 years punishment applied to convict P.A. was entirely executed on 17.10.2017.

By teleological interpretation, the court appreciated that Law no. 169/2017 did not restrict its scope only to imprisoned persons in execution of punishments at entry into force of the law. Thus, the benefit of compensatory measure was also to benefit to convicts who had executed part of the punishment in inadequate conditions and had been released on parole prior to entry into force of the same law.

The court also held that, based on actual form of Law no. 169/2017, that there is no legal argument to establish a difference in treatment between the convict who is still in prison and the one who executed part of the punishment in inadequate spaces, but was released on parole and was still inside the term through which supervision was in course.

3. Conclusions

Precarious conditions of detention in Romanian prisons have resulted in several convictions at the European Court of Human Rights, starting with judgment pronounced in case Bragadireanu and ending with those in semi-pilot case Iacov Stanciu and pilot case Rezmiveș and Others, all cases vs. Romania.

Only in 2017 there were 378 conviction judgments, and the consequence was obligation of Romanian state to pay the amount of 2.296,451 euros. Forced to take concrete measures to address structural problems in prisons and ensure compliance with art. 3 of the Convention, national authorities adopted a compensatory legal instrument.

Law no. 169/2017 amended provisions of Law no. 254/2013 on execution of punishments and detention measures and at the same time introduced a new mechanism, in order to relieve places of detention and grant compensation to convicted persons executing punishments in conditions incompatible to Convention.

Juridical actions undertaken by national authorities cannot represent but a first step in fulfilling the conditionalities assumed, as lack of clarity of law and a comprehensive view on compensatory mechanism make this approach not to entirely meet the assumed purpose. Initially conceived as a rather simple procedure, compensatory action proved however in practice increasingly more difficult to apply in situations which do not match perfectly the standard pattern regulated by the legislator.

The study analyzed some of the problems arising after entry into force of the Law no. 169/2017 and tried to find practical answers based on systemic, teleological and literal interpretation of substantive and procedural provisions. Nevertheless, results achieved by means of interpretation cannot be validated as universal and courts will bring forward their own arguments, based on interpretation of the same provisions which in the present form appear to lack juridical consistency.

In this context, judgements pronounced by national courts will inherently generate non-unitary case-law and in consequence need of a new legislative intervention or pronouncement of interpretation judgments[43].

The current regulation of compensatory mechanism leads to different solutions for persons in similar legal situations and raises from this perspective problems of incompatibility with fundamental law, which will probably be considered by the Constitutional Court at the right time. In the same line of reasoning, application of benefits of the law only to persons executing punishments (and as a consequence exclusion of those who served full sentence or were released on probation) creates the appearance of a constitutional conflict, in absence of another compensatory mechanism available to these categories, such as, for example, pecuniary compensation[44].

From this perspective, we consider necessary the amendment of legislative provisions regulating compensatory action, aiming to cover also situations such as those analyzed in the present research.

Law gaps also make impossible the adoption (i.e., by provision of Director of National Administration of Penitentiaries), of specific regulations during execution of punishments in order to avoid application of different measures to persons in the same legal situation[45].

Despite the above-mentioned application difficulties, according to statistics made at national level, from entry into force of the law to January 29, 2018, units subordinated to the National Administration of Penitentiaries have ordered the release of 1,031 people due to compensatory benefits

[42] Final by non-contestation, unpublished.
[43] Procedure regulated by Article no. 475 of Romanian Criminal Procedure Code.
[44] Pecuniary compensatory mechanism is used by several states (e.g., Italy, Poland, Hungary) and appreciated by ECtHR as satistactory.
[45] Interpretation of law cannot be made by means of secondary legislation.

prescribed by Law no. 169/2017[46]. Likewise, courts have upheld other 3427 applications for release on probation, consequent to application of the same compensatory mechanism.

This means that, in less than four months, a total of 4458 people sentenced to imprisonment have left places of detention, situation which proves the efficacy of compensatory mechanism.

The present research has a very pronounced character of novelty, and its usefulness resides not only in a theoretical exposure of compensatory mechanism established by national authorities, but also in identifying, indicating and analyzing the main problems appeared in practical implementation of the adopted measures.

Results presented above may be a starting point both for future legislative changes in the field of execution of depriving of liberty punishments, and also for analysis and reflection of all those involved in enforcement of this compensatory legal instrument: administration personnel of detention places, theoreticians and practitioners (lawyers, prosecutors and judges).

Future research may concern verification of (unified) solution to the problems identified in this study, orientation of case-law and an analysis of non-unitary jurisprudence in the area of compensatory action, or identification of other compensatory mechanisms for persons who had already served full sentence at the moment Law no. 169/2017 entered into force.

Finally, we consider that, in a reasonable period of time, a new analysis on the impact of compensatory mechanism on the execution of depriving of liberty punishments should be useful.

References

- European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 04.11.1950, ratified by Romania through Law no. 30/18.05.1994, published in the Official Gazette of Romania no. 135/31.05.1994, http://www.echr.coe.int, last accession on 18.02.2018, at 15,25
- Romanian Constitution, http://www.cdep.ro, last accession la 18.02.2018, at 15,42
- ECtHR, Decision adopted on 06.12.2007, Appication no. 22088/04, case Bragadireanu vs. Romania, https://hudoc.echr.coe.int, last accession on 05.03.2018, at 22,37
- ECtHR, decision adopted on 1301.205, Application no. 41040/11, case Micu vs. Romania, https://jurisprudentacedo.com, last accession on 18.02.2018, at 16,46
- ECtHR, decision adopted on 18.10.2011, Application no. 38746/03, case Păvălache vs. Romania, http://www.hotararicedo.ro, last accession on 18.02.2018, at 16,53
- ECtHR, decision adopted on 6.09.2014, Application no. 51012/11, case Valerian Dragomir vs. Romania, www.csm1909.ro, last accession on 18.02.2018, at 17,03
- ECtHR, decision adopted on 24.07202, Application no. 35972/05, case Iacov Stanciu vs. Romania, http://hudoc.echr.coe.int., last accession on 18.02.2018, at 17,18
- ECtHR, decision adopted on 25.04.2017, Applications no. 61467/12, 39516/13, 48231/13 and 68191/13, case Rezmiveș and Others vs. Romania, https://hudoc.echr.coe.int, last accession on 03.03.2018, at 17,39
- Constitutional Court of Romania, decision no. 1/08.02.1994, published in the Official Gazette of Romania no. 69/16.03.1994;
- Constitutional Court of Romania, decision no. 62/21.10.1993, published in the Official Gazette of Romania no. 49/25.02.1994
- Constitutional Court of Romania, decision no. 366/25.06.2014, published in the Official Gazette of Romania no. 644/02.09.2014
- Constitutional Court of Romania, decision no. 681/13.11.2014, published in the Official Gazette of Romania no.889/08.11.2014
- High Court of Cassation and Justice, decision no. 8/20.03.2006, published in the Official Gazette of Romania no. 475/01.06.2006
- Explanatory memorandum of Law no. 169/2017, http://www.cdep.ro, last accession on 06.03.2018, at 07,47
- Common Guidelines of the European Parliament, the Council and the Commission for those participating iin drafting EU legislation, http://eur-lex.europa.eu, last accession on 06.03.2018, at 07,57
- Law no. 135/2010, published in the Official Gazette of Romania no. 486/15.07.2010
- Law no. 254/2013 on the execution of punishment and detention measures ordered by judicial authorities during the criminal trial, published in the Official Gazette of Romania no. 514/14.08.2013
- Law no. 15/1968 on Romanian Criminal Code, published in Buletinul Oficial no. 79-79bis/21.06.1968
- Law no. 286/2009, published in the Official Gazette of Romania no.510/24.07.2009
- Hotca Mihai Adrian, Un bun început pentru respectarea hotărârii-pilot în cauza Rezmiveș și alții împotriva României – adoptarea Legii nr. 169/2017 privind modificarea și completarea Legii nr. 254/2013, https://juridice.ro, last accession on 06.03.2018, at 08,00
- Order of Minister of Justice no. 2773/17.10.2017, published in the Official Gazette of Romania no. 822/18.10.2017

[46] Press release no. 23362/SC/29.01.2018, available on http://anp.gov.ro, last accessed on 03.03.2018, at 16,19.

- Order of Minister of Justice no. 432/2010/05.02.2010 approving Instructions regarding the nominal and statistical number of persons deprived of liberty in custody of units subordinated to National Administration of Penitentiaries, published in the Official Gazette of Romania no. 157/11.03.2010
- Paşoi Ruxandra, Mihai Daniela, Hotărârea pilot în cauza Rezmiveș și alții împotriva României în materia condițiilor de detenție, https://juridice.ro, last accession 06.03.2018, at 08,01
- Regulation implementing Law no. 254/2013, published in the Official Gazette of Romania no. 271/11.04.2016
- Resolution Res (2004)3 of the Council of Ministers of the Council of Europe, adoped on 12.05.2004, http://www.echr.coe.int, last accession on 06.03.2018, at 08,20
- Press release no. 23362/SC/29.01.2018, http://anp.gov.ro, last accessed on 03.03.2018, at 16,19
- Criminal sentence no. 54/12.01.2018 pronounced by Judecătoria Sectorului 5 Bucureşti, final by criminal decision no. 206/23.02.2018 pronounced by Bucharest Tribunal – Ist Criminal Section, unpublished
- Criminal sentence no. 2616/19.09.2017 pronounced by Judecătoria Sectorului 5 Bucureşti, final by non-contestation, unpublished
- Criminal sentence no. 2617/19.09.2017 pronounced by Judecătoria Sectorului 5 Bucureşti, final by non-contestation, unpublished
- Criminal sentence no. 2618/ 19.09.2017 pronounced by Judecătoria Sectorului 5 Bucureşti, final by non-contestation, unpublished
- Criminal sentence no. 2619/19.09.2017 pronounced by Judecătoria Sectorului 5 Bucureşti, final by non-contestation, unpublished
- Criminal sentence no. 88/16.01.2018 pronounced by Judecătoria Sectorului 5 Bucureşti, final by criminal decision no. 167/15.02.2018 pronounced by Bucharest Tribunal – Ist Criminal Section, unpublished
- Criminal sentence no. 3032/17.11.2017 pronounced by Judecătoria Sectorului 5 Bucureşti, final by criminal decision no. 205/23.02.2018 pronounced by Bucharest Tribunal– Ist Criminal Section, unpublished
- Civil sentence no. 6538/26.09.2016 pronounced by Judecătoria Sectorului 5 Bucureşti, final by civil decision no. 2837/15.09.2017 pronounced by Bucharest Tribunal – IVth Civil Section, unpublished
- Civil sentence no. 521/21.01.2016 pronounced by Judecătoria Sectorului 4 Bucureşti, final by civil decision no. 3281/12.09.2016 pronounced by Bucharest Tribunal – Vth Civil Section, unpublished
- Criminal sentence no. 306/08.02.2018 pronounced by Judecătoria Sectorului 5 Bucureşti, final by criminal decision no. 238/05.03.2018 pronounced by Bucharest Tribunal– Ist Criminal Section, unpublished
- Criminal sentence no. 2622/29.12.2017 pronounced by Bucharest Tribunal – Ist Criminal Section, final by non-contestation, unpublished

THE OBSERVANCE OF FUNDAMENTAL HUMAN RIGHTS. THE DEATH PENALTY AND CORPORAL PUNISHMENTS. THE PROHIBITION OF TORTURE AND INHUMAN OR DEGRADING PUNISHMENTS

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Abstract

Corporal punishments by and large and death penalty specifically raise serious problems as to respecting human dignity and the fundamental human rights. The supreme courts of the UN member states quasi-unanimously consider that the death penalty infringes on the absolute ban of torturing, inhuman or degrading treatments due to the pain and psychological suffering they cause to the sentenced people who may wait for years in a row or even decades, more often than not in isolation and in an uncertain legal situation. Human rights represent a concept that develops rapidly, and most bodies for monitoring the international and regional treaties apply a dynamic interpretation of the law on treaties concerning the human rights. From the historical point of view, the protection standard granted by the absolute prohibition of torture and cruel, inhuman or degrading punishments is the result of a progressive and dynamic interpretation, according to the evolution of the society

This publication aims at describing the constantly evolving standards, according to which the death penalty or the corporal punishments, largely accepted decades ago, have become the contemporary equivalent of torture or inhuman or degrading treatment. Thus, they anticipate the establishment of international norms that would absolutely forbid the use of such punishments.

Keywords: *Fundamental rights of convicted persons, limitation on the right to life and bodily integrity, prohibition of torture, inhuman or degrading punishments, death penalty, corporal punishments, standards and evolution of the international and regional jurisdictional bodies' case law.*

Introduction

Even nowadays death penalty and corporal punishments represent global phenomena, and few countries succeeded in completely eliminating them, while many others scored significant success against such practices. At the same time, we must notice that there are many states that consider that they should be maintained, by invoking various reasons (such as combating terrorism, extremely unstable political climate or exceptional situations such as war) so as not to eradicate or at least reduce them.

Thus, we must observe that the death penalty is still in force in some states, while corporal punishments are applied in many others, being justified by the enforcement of judicial sanctions, and most victims aren't political prisoners or terrorists, but regular persons, belonging to vulnerable groups, suspected of committing common law offences, such as women, children, disabled persons or persons with a sexual orientation that is forbidden by the dominant religious concepts.

This work aims at making a contribution through a comparative and punctual approach to the evolution of international standards regulating the death penalty and the corporal punishments, as well as the compatibility of such standards with the states' obligation to comply with the unconditional ban on torture and ill-treatment.

Furthermore, this presentation completes the existing specialized literature by means of a critical approach to the evolution of the international case law bodies in the matter of capital punishment, at the same time describing the mismatches and inconsistencies of the approaches related to capital punishment and corporal punishments.

Last but not least, the present study also contains a comparative law presentation but also a historical presentation of the regional and international standards and values in the field, explicitly outlining the qualitative leap of the protection provided in the European system, both within the European Union and the Council of Europe.

Paper content

Death penalty represents the only exemption from the fundamental right to life, inherent to any human being, set forth by art. 2 of the Universal Declaration of Human Rights[1] and art. 6 of the *International Covenant on Civil and Political Rights*[2], provisions that imposed to all signatory states to protect this right by law. Although they did not force the states to abolish death penalty, the two documents restrict the rights of the states to enforce death penalty, by establishing that a

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[1] Adopted by the UN General Assembly on 10 September 1948

[2] Adopted and opened for signing by the UN General Assembly on 16 December 1966. Entered into force on 23 March 1976, according to art. 49, for all provisions except for the ones at art. 41, and on 28 March for the provisions of art. 41. Romania ratified the Covenant on 31 October 1974 by Decree no. 212, published in the "Official Journal of Romania", part I, no. 146 dated 20 November 1974.

death sentence can only be ruled for the most severe crimes, according to the laws in force at the time the crime was committed and such laws should not be in conflict with the provisions of the Covenant or with the ones of the Convention on the Prevention and Punishment of the Crime of Genocide.

Four of the six paragraphs of article 6 of the Covenant, referring to the right to life, regulate the conditions related to the imposition of the capital punishment, establishing that such punishment may be executed only based on a final order of a competent court, pronounced according to the minimum guarantees of a fair trial and in accordance with the other provisions of the Covenant; it may only be applied for the most serious crimes. In accordance with the principle of humanity, a death sentence may not be pronounced for crimes committed by persons under the age of 18 and may not be executed against pregnant women. Distinct from the right to life and correlative with such right, it is expressly regulated that the persons sentenced to death have the right to require the pardoning or the commutation of the sentence, and it is set forth that the amnesty, pardon or commutation of death sentence may be granted in all cases. In addition, article 6 - paragraphs (2) and (6) - clearly express the message that the Covenant promotes the abolition of death penalty and that the abolitionist party states undertake not to reinstate it.

Article 4 of the American Convention on Human Rights, a regional document inspired by and based on the Covenant, develops a higher protection system, expressly establishing a ban for the abolitionist states to reinstate the death penalty in their internal legislation, it forbids its enforcement for political offences or related common offences, but also the application of such sanction to the persons who, at the date when the offence was committed, were over 70 years of age.

The Convention on Children's Rights[3], in article 37 (a), requests the party states to make sure that no capital punishment will be imposed for the crimes committed by persons under 18 years of age.

Despite the global tendency to abolish death penalty, its application and execution do not represent an actual infringement of the right to life if carried out according to the severe restrictions and guarantees provided by the international regulations and by the internal regulations in compliance with the international ones. At the same time, the above-mentioned international documents forbid in absolute terms the torture and the cruel, inhuman or degrading treatment or punishment, as set forth by article 7 of the Covenant and art. 1 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment[4], art. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[5], art. 2 of the American Convention on Human Rights and art. 4 of African Charter of Human and Peoples' Rights.

It had been constantly accepted in the doctrine and case law that the provisions of art. 6 of the Covenant and the ones of art. 1 of the din Convention against Torture should be interpreted in the sense that the death penalty may not be considered in itself a breach of the ban on torture and cruel, inhuman or degrading punishment. However, as underlined by UN Special Rapporteur in its 2009 report on death penalty[6], in what concerns the judicial bodies, such interpretation may change in time, just as it happened to the corporal punishments. Human rights represent a concept that develops rapidly, and most bodies for monitoring the international and regional treaties apply a dynamic interpretation of the law on treaties concerning the human rights.

From the historical point of view, the protection standard granted by the absolute prohibition of torture and cruel, inhuman or degrading punishments is the result of a progressive and dynamic interpretation, according to the evolution of the society. As for the corporal punishments, they can be compared to the death penalty in the sense that, beyond the physical pain and the suffering that they cause, they have come to be considered a direct attack upon the dignity of the individual and, consequently, they are forbidden by the international law.

Thus, in 1950, at the time of the ECHR adoption, the corporal punishments were widely accepted in European societies, mainly as a family punishment and as a disciplinary punishment in schools, prisons, military institutions, etc., and they were not considered cruel, inhuman or degrading punishments in most European countries. However, this attitude changed significantly in the 1960's and 1970's, reaching a peak when the European Court of Human Rights pronounced its judgment in the case Tyrer v. United Kingdom[7], which stated, in a dynamic interpretation of art. 3 of the European Convention on Human Rights, that giving three strokes of birch rod to a student, a traditional punishment on the Isle of Man, was no longer compatible with a modern in interpretation of the human rights in Europe.

Referring to the European Convention as to a "living instrument" that must be interpreted in the light

[3] Adopted by the General Assembly of the United Nations on 20 November 1989. So far, the Convention has been adopted by 194 countries that are members of the United Nations (except USA and Somalia);

[4] Adopted and opened for signing by United Nations General Assembly, by Resolution 39/46 dated 10 December 1984. It entered into force on 26 June 1987 according to the provisions of art. 27(1).

Romania joined the Convention on 9 October 1990 by means of Law no. 19, published in the "Official Journal of Romania ", part I, no. 112 dated 10 October 1990.

[5] Fundamental document of the protection system set up at European Council level. It is effective as from 3 September 1953, and Romania became a party by its ratification on 20 June 1994.

[6] A/HRC/10/44

[7] Judgment dated 25 April 1978 in the case Tyrer v. Great Britain, Series A.26, par. 31

of the present conditions, the Court considered that the corporal punishment is degrading. After only four years, the Human Rights Committee, in its general comment on the prohibition of torture and cruel, inhuman or degrading treatment of punishment, expressed a unanimous opinion that the prohibition from article 7 of the International Covenant on Civil and Political Rights should also be extended to corporal punishments, including the excessive punishments as educational or disciplinary measures (paragraph 2). In 2000, the Human Rights Committee came to the same conclusion in the case Osbourne v. Jamaica, referring to the execution of a criminal punishment applied by a court, consisting in giving 10 strokes of tamarind switch across the buttocks in the presence of 25 prison warders. By unanimous decision[8], the Committee stated that, irrespective of the nature of the crime that must be punished, no matter how brutal such crime is, the corporal punishment represents a cruel, inhuman and degrading treatment or punishment, opposed to article 7 of the Covenant. This constant case law of the European Court of Human Rights and of the Human Rights Committee was also confirmed by the case law of the Inter-American Court of Human Rights[9], the one of the African Commission on Human and Peoples' Rights and of national courts, as well as by the practice of other monitoring bodies, including the Committee against Torture and by the Special Rapporteur on torture.

In March 2005, in the case Winston Caesar v. Trinidad and Tobago, the Inter-American Court of Human Rights condemned for the first time the application of corporal punishments as judicial sanction[10]. The Court unanimously stated that the punishment of the prisoner by whipping is, by its very nature, purpose and consequences, incompatible with the standards set forth by articles 5.1 and 5.2 of the American Convention on Human Rights ". The Court considered that the very nature of this punishment reflects an establishment of violence which, even though permitted by law, ordered by the state judges and applied by the penitentiary authorities, represents a sanction that is incompatible with the Convention. As such, the corporal punishment by whipping was considered a form of torture and, consequently, represents a breach of any individual's right to physical and mental integrity.

However, in several states, the corporal punishment is still permitted as judicial sanction in the criminal law or as disciplinary sanction of prisoners, in schools or in the army. In other countries, the corporal punishment is neither explicitly authorized, nor forbidden by law, which means that it is largely applied in practice. What is common for all forms of corporal punishments is that the physical force is intentionally used against the person in order to cause a significant level of pain. In addition, without any exception, the corporal punishment has a degrading and humiliating element, therefore all forms of corporal punishments should be considered to represent cruel, inhuman or degrading punishments that infringe the international law of human rights.

Although only a very limited number of states currently support the legality of such forms of judicial sanctions, they continue to be applied even nowadays, despite the incredible cruelty of some of the reported punishments, such as amputation of right hand, giving 5000 whip strokes, many of them being applied in order to repress sexuality-related acts, such as "non-Islamic sexual activities" "illicit relationships" or adultery[11]. Adultery is also the most common infringement in the cases when the individuals are sentenced to death by stoning.

The Criminal Code of Iran sets forth the following: a woman sentenced to death by stoning must be buried up to a line above her breasts (article 102 of the Criminal Code), before being hit with stones that shall not be so big as to kill the person by one or two strikes, neither shall it be so small that they cannot be called a stone (article 104 of the Criminal Code). Other corporal punishments provided for by Sharia law include public whipping and they are applicable in case of alcohol consumption, intimacy of unmarried couples or gambling. Such infringements are usually judged in public trials where the audience may shout at the defendant, making the reasonable doubt devoid of any content. In addition, the execution of the punishments is carried out in public, being often televised.

Moreover, the Criminal Code of Aceh (a province in Indonesia) enforces extremely discriminatory sanctions for women: apart from public whipping, the punishments include cutting woman's dress in public and forced cutting of the hair, which represent inhuman and degrading treatments. The fact that these punishments are carried out in public generates stigmatizations and social sanctions that are well beyond the punishment execution, the women condemned to such public punishments being labelled as immoral by their husbands, families and communities, this leading to social exclusion which also represents an inhuman and degrading treatment. In general, as shown in the report prepared by the UN Special Rapporteur, more often than not the women are the ones found guilty of adultery and of other related crimes and are subject to corporal punishments, including death penalty, which is incompatible with the prohibition of discrimination based on gender, established in all main instruments concerning human rights, including the Convention on the Elimination of All Forms of Discrimination against Women[12].

[8] Decision dated 15 March 2000 in the case Osborne v. Jamaica, no. 759/1997, para. 3.3
[9] Decision dated 11 March 2005 in the case Winston Caesar v. Trinidad and Tobago, Series C no. 123
[10] Idem
[11] E/CN.4/2006/6/Add.1, para. 398
[12] A/HRC/7/3, para. 40

As for the corporal punishment as judicial sanction, the following specifications need to be brought to attention, in the light of the many similarities with the capital punishment. In the stage of preparatory works of UN Convention against Torture, article 1 of the UN Declaration against Torture, dated 9 December 1975[13] and article 1 of this convention draft presented by Sweden[14] represented the starting point of the debates on defining torture, which took place within the work groups. Both provisions included a clause concerning the so-called legal sanctions, which were exempted from the definition of torture, specifying that it "does not include the pain or the suffering inherently resulting from the imposition of the legal sanctions, in so far as they are in compliance with the standard established by the Standard Minimum Rules for the Treatment of Prisoners[15]" and mainly by art. 31 of these rules that sets forth that "the corporal punishment, the punishment by incarceration in a dark cell and all cruel, inhuman or degrading punishments shall be completely forbidden as sanctions for disciplinary offences".

In the end, the referral to the minimum rules was removed from article 1 of CAT due to the fact that certain governments did not want to include in a treaty of mandatory nature a referral to a legal instrument without mandatory nature. When such governments realized that the removal of the referral to the Minimum Rules will eliminate a series of severe forms of corporal punishments from the torture prohibition scope, they tried to replace it with another referral to the mandatory international standards. For example, the United States proposed that the legal sanctions "that fragrantly break the accepted international standards" should not be permitted.

Under such conditions, until the drafting of the final form of the CAT Convention, no agreement has been reached concerning the defining of these "accepted international standards", many governments trying, without success, to completely eliminate the clause of legal sanctions. On the contrary, others insisted in their comments in writing that the term "legal sanctions" must be interpreted as referring to both the domestic law and the international law.

In an extreme interpretation, supported by certain Islamic states, it is considered that any sanction imposed under the national legislation, the criminal law, including the corporal punishment, is covered by the clause concerning the legal sanctions. Such interpretation is opposed to the international law on human rights, as unanimously stated in the above-mentioned case law of the Human Rights Committee, in relation to article 7, that decided that any form of corporal punishment represents an infringement of the international law and it would lead to the absurd conclusion that, by adopting in 1984 the CAT Convention, whose well-determined aim and purpose was the one of consolidating the already existing obligations of the states to prevent and punish torture, led to an actual diminution of the international standard. Consequently, such interpretation is obviously incompatible with the object and purpose of the convention and, therefore, it may not be admitted in the light of article 31 of the Vienna Convention on the law of treaties. In addition, the clause from article 1 paragraph 2 of CAT Convention prevents such an interpretation.

The evolution of the regulations of international law in the matter of corporal punishments continued with the adoption of the Declaration on the Elimination of Violence against Women in 1993, when the prohibition of such forms of sanctioning was also extended in the private sphere of the family, the states being imposed an obligation to adopt legislative and other measures in order to protect women against domestic violence, including the corporal punishments. Moreover, the positive obligation of the states to efficiently forbid and prevent the corporal punishment of children was confirmed by various monitoring bodies, including the Human Rights Committee and the European Committee of Social Rights.

In conclusion, in the light of the international law on human rights, any form of corporal punishment applied either as judicial or disciplinary or domestic sanction by state authorities or by private persons, including schools and parents, shall be considered cruel, inhuman or degrading, and it shall not be justified, even in exceptional situations, since the absolute and non-derogating prohibition of subjecting the human being to torture or cruel, inhuman or degrading treatments or punishments opposes.

Starting from this conclusion, the international bodies monitoring the respect for the human rights have the unanimous opinion that the same legal reasoning should also be applied to the death penalty, since it only represents an aggravated form of corporal punishment. By admitting that the amputation of the limbs is a cruel, inhuman or degrading punishment, in his report referring to torture and cruel, inhuman or degrading treatment or punishment[16], UN Special Rapporteur Manfred Nowak, was rhetorically asking himself how the beheading of a person could be differently judged, and he concluded that, according to the international law, the absolute prohibition of any form of corporal punishment cannot reconcile with hanging, electric chair, incineration or any other forms of execution of a death sentence, admitted under the same treaties.

The same author noticed that, surprisingly, the case law of the international bodies for monitoring the human rights is much less clear in terms of death penalty than in terms of corporal punishment.

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[13] Resolution of UN General Assembly no. 3452 (XXX) dated 1975.

[14] E/CN.4/1285 par.

[15] "Standard Minimum Rules for the Treatment of Prisoners", approved by UN Economic and Social Council by Resolutions no. 663C (XXIV) of 31 July 1957 and no. 2076 (LXII) of 13 May 1977

[16] A/HRC/10/44, par. 38

Even the European Court of Human Rights who had already stated in 1989 that the phenomenon of death corridors in Virginia was an inhuman or degrading punishment, never reached the conclusion that the death penalty infringes article 3 of the ECHR. The Human Rights Committee followed the systematic interpretation of the right to life and to individual integrity initially developed by the European Court, although it has become more and more obvious that there is an inconsistency between its approaches concerning the corporal and the capital punishments.

The execution methods vary very much among the states that continue to impose the death penalty. Within the last 50 years, several methods have been used in order to execute the condemned: beheading (Saudi Arabia), hanging (Bangladesh, Botswana, Egypt, Iran, Iraq, Japan, Malaysia, Pakistan, Saint Kitts and Nevis, Singapore and Sudan), lethal injection (China, United States of America), shooting (Afghanistan, Belarus, China, Indonesia, Iran, Mongolia and Vietnam), death by stoning (the Islamic Republic of Iran) and electrocution (the United States). There is a great dispute whether one or another method is unacceptably cruel, inhuman or degrading. For example, in an answer to the questionnaire sent to the Office of the United Nations High Commissioner for Human Rights, the Arabian Libyan Jamahiriya reported that the execution by electrocution on electric chair, the lethal injection or the toxic gases are not acceptable under the domestic law.

Referring to the different execution methods that may be considered cruel, inhuman or degrading punishments, the case law discrepancies also stand out. Although it is unanimously admitted that certain methods, such as stoning, that intentionally extend the pain and the suffering of the convict, represent cruel, inhuman or degrading punishments, the opinions considerably differ in terms of "human" executions. In the controversial decision for Kindler v. Canada[17], the majority of the Human Rights Committee acknowledged in 1993 that the execution by lethal injection, as practiced in Pennsylvania, does not represent an inhuman punishment. United States Supreme Court reached a similar conclusion in 2008. On the other hand, in its opinion in the case Ng v. Canada from 1993[18], the majority of the Human Rights Committee found that the execution by asphyxiation with gas, as practiced so far in California, represented a cruel and inhuman treatment and, consequently, Canada broke article 7 of the Covenant by extradition of the plaintiff to the United States.

In Staselovich v. Belarus, The Committee considered that the execution by a burning team was in compliance with article 7 of the Covenant, but, at the same time, it considered that authorities' failure to notify the mother about the date established for the execution of her son and about the place of its grave represented an inhuman treatment of the mother.

In the cause ÖCALAN v. Turkey[19], the European Court of Human Rights analysed the conventional case law in terms of capital punishment.

Abdullah Öcalan is a Turkish citizen that executes a life sentence in a Turkish prison. He complained about the imposition and/or execution of the death penalty in his case. Before being arrested, the plaintiff was a leader of PKK (Workers' Party of Kurdistan, an illegal organization). After having been detained in Kenya under contested circumstances, in the evening of 15 February 1999, he was brought to Turkey where he was sentenced to death in June 1999 for acts meant to lead to the separation of the Turkish territory. Following the abolition of death penalty in August 2002, in time of peace in Turkey, the State Security Court from Ankara commuted the death sentence decided for the plaintiff into life prison in October 2002.

The Court determined that there were no infringements of art. 2 (right to life), art. 3 (prohibition of inhuman or degrading treatment) or art. 14 (prohibition of discrimination) of the Convention, since the death penalty was abolished and the plaintiff's sentence was commuted to life prison. The Court acknowledged that the death penalty in time of peace came to be considered in Europe an inacceptable punishment form which was no longer allowed under article 2 of the Convention. However, no firm conclusion was reached whether the states that are parties if the Convention established a practice for considering the execution of death penalty an inhuman or degrading treatment, opposite to article 3 of the Convention.

Within the last 10 years there have been important international evolutions in terms of death penalty, within inter-governmental organizations, within international courts and human rights monitoring bodies. The most significant evolution was probably the adoption of the resolutions of the UN General Assembly in 2007 and 2008, by which a moratorium concerning the death penalty was requested.

The Assembly debate concerning the issues related to death penalty at the end of the 1960's had led to the adoption in 1968 of an initial resolution (no. 2393 (XXIII)), that actually determined the preparation of the first five-year report on death penalty.

In paragraph 1 of Resolution 32/61 from 8 December 1977, the Assembly stated that the main target pursued in the field of death penalty was the one of the progressive restriction of the number of crimes for which death penalty could be imposed, in order to completely eliminate this punishment. However, many years passed until there were new attempts to approach the issues related to death penalty in the Assembly.

[17] Human Rights Committee, Decision dated 30 July 1993, no. 470/1991, para. 15.1.
[18] Decision dated 5 November 1993 in the case Ng v. Canada, no. 469/1991, par. 16.4.
[19] No. 46221/99 Decision of the Great Chamber dated 12 May 2005

In November 2007, an interregional group of member states presented in the General Assembly a resolution draft by which a moratorium on death penalty is requested. On 18 December 2007, the Assembly Resolution 62/149, entitled "Moratorium on the use of the death penalty" was adopted.

Following the adoption of the resolution, on the 11th of January 2008, the representatives of 58 permanent missions within United Nations Organizations addressed a Note Verbal to the Secretary-General in order to express their wish "to emphasize that they have persistent objections against any attempt to impose a moratorium on the use of the death penalty or on the abolition of such penalty by infringement of the existing provisions in compliance with the international law".

On 21 April 2004, the eighth annual resolution on death penalty was adopted by the Human Rights Commission.

By Resolution no. 2004/67, the Commission requested the states that had still maintained the death penalty to completely eliminate it and, meanwhile, to establish a moratorium on the executions and urged these states not to enforce the death sentence for the crimes committed by persons under the age of 18 or by the ones suffering of mental illnesses.

In Resolution 2005/59, entitled "Death Penalty Issue", The Human Rights Commission reiterated the content of the previous resolutions, but it asserted at the same time the right of each person to life and declared that the abolition of the death penalty is essential in order to protect this right. In the same resolution, the Commission reproved the use of death penalty based on the legislation, discriminatory policies or practices, as well as the disproportionate use of such penalty against the persons belonging to national or ethnical, religious or linguistic minorities, and requested that the states should not impose mandatory death sentences under the internal criminal legislation.

Human Rights Commission was replaced in 2006 by the Human Rights Council. The Council took the responsibility for the reports and studies on the mechanisms and mandates taken over from the Commission.

At European level, the death penalty was eliminated from all 27 Member States of the European Union. The Charter of Fundamental Rights prohibits the death penalty, as well as the extradition to a state where such penalty may be imposed.

The Charter is included in the Lisbon Treaty that entered into force on 1 December 2009. The activity of the European Union concerning the death penalty is carried out according to the "Guidelines on EU Policy towards Third Countries on Death Penalty" adopted on 29 June 1998 according to an EU declaration in the Amsterdam Treaty, dated 2 October 1997. They were revised and updated by the Council of European Union in 2008, and in the future they will be revised every three years. The Guidelines include a list of "minimum standards" that are to be used for the auditing of the third countries that still maintain the death penalty. At a certain extent, these minimum standards exceed the ones contained in the Safeguards of the United Nations.

For example, the Guidelines of the European Union declare that "death penalty should not be imposed for non-violent financial crimes or non-violent religious practices or expressions of conscience". In 2008, the following words were added: "and for sexual relations between consenting adults, as well as no mandatory sentence".

Within the latest years, the European Union has issued over 80 initiatives to third countries or territories, at the same time offering substantial financing to the non-governmental organizations in their efforts to promote the abolition of death penalty in the entire world. As part of the budget of 100 million euro of the European Initiative for Democracy and Human Rights, the European Commission supported projects meant to reduce the use of death penalty, e.g. by publishing the inefficiency of the death penalty as a mechanism for reducing criminality.

In the last years, there have been four new ratifications or accessions to Protocol no. 6 to the European Convention on Human Rights, which repeal the death penalty, except for time of war or of imminent threat of war: the ones in Monaco, Montenegro, Romania and Serbia. At the end of 2008, all 47 members of the European Council, except for the Russian Federation, were parties of the protocol. The Russian Federation signed the Protocol in 1997.

Protocol no. 13 to the European Convention on Human Rights that totally repeals the death penalty, including in times of war, was adopted on 3 May 2002.

Based on article 6 of the Treaty on European Union, the respect for human rights and fundamental liberties represents one of the common principles of the member states. Therefore, the Community decided in 1995 to consider that the respect for human rights and fundamental liberties is an essential element of its relationships with third countries. In this respect, it was decided that a clause should be included in any new commercial agreement of general nature for cooperation and association that the Community concludes with the third countries.

Article 2 paragraph (2) of the Charter of Fundamental Rights of the European Union[20] stipulates that no person may be sentenced to death or executed. On 29 June 1998, the Council approved "the Guidelines to European Union Policy towards Third Countries on Death Penalty" and decided that European Union shall make efforts in order to globally abolish the capital punishment.

Article 4 of the Charter provides that no person may be subjected to torture or inhuman or degrading treatment and punishment. On 9 April 2001, the Council approved "the Guidelines to the European

[20] OJ C 364, 18.12.2000, p. 1.

Union Policy towards Third Countries on Torture and Cruel, Inhuman or Degrading Treatment or Punishment". These guidelines refer to the adoption in 1998 of the European Union Code of Conduct on arms export and other current activities, having the purpose of introducing a control of the exports of paramilitary equipment at the European Union level, as examples of measures aiming at efficiently contributing to the prevention of torture and of other cruel, inhuman or degrading punishment or treatment within the common foreign and common security policy. These guidelines also stipulate that third parties must be obliged to prevent the use and production, as well as the trade of equipment designed for torture and for other cruel, inhuman or degrading punishments or treatments and to prevent the abusive use of any other equipment for this purpose. Besides, they indicate that the prohibition of the cruel, inhuman and degrading punishments requires clear limits for resorting to the death penalty. That is why, according to these texts, the death penalty is under no circumstances considered a legitimate sanction.

In its resolution on torture and other cruel, inhuman or degrading treatment or punishment, adopted on 25 April 2001 and supported by the European Union member states, the Human Rights Commission of the United Nations invited UN members to take proper measures, especially legislative measures, in order to prevent and prohibit, among others, the expert of materials especially designed for torture of other cruel, inhuman or degrading treatment or punishment. This point was confirmed by the resolutions adopted on 16 April 2002, on 23 April 2003, on 19 April 2004 and on 19 April 2005.

On 3 October 2001, the European Parliament adopted the Resolution[21] concerning the second annual report of the Council, prepared by applying point 8 of the European Union Code of Conduct for arms export, requesting the Commission to act rapidly in order to propose an adequate community mechanism that forbids the promotion, trade and export of police and security equipment, the use of which is inherently cruel, inhuman or degrading, and to make sure that this community mechanism enables the suspension of the transfer of equipment with little known medical effect and of equipment with a practical use that proved to have a significant risk of abuse or unjustified wounding.

It was considered that it is necessary to establish community regulations concerning the trade with third country on goods likely to be used for imposing the death penalty, and on goods likely to be used in order to apply torture and other cruel, inhuman and degrading punishment or treatment. Taking into consideration that these regulations shall contribute to the furtherance of the respect for the life and the fundamental rights of the human beings and that they shall serve to protection of the ethical principle of the society, the European Parliament concluded that it is required to establish a system of guarantee that the community economical operations should not gain any profit from the trade that either encourages or otherwise facilitates the enforcement of policies on death penalty or torture or other cruel, inhuman or degrading treatment or punishment, that are not compatible with the relevant guidelines of the European Union, with the Charter of Fundamental Rights of the European Union and with the international conventions and treaties.

In the light of these principles, EEC Regulation 1236/2005[22]of 27 June 2005 was adopted, which prohibits the export and import of equipment with no other practical use than for the purpose of capital punishment, or for the purpose of torture and other cruel, inhuman and degrading treatment or punishment. The guidelines of EU policy concerning torture and other cruel, inhuman and degrading treatment or punishment provides, among others, that the heads of missions in third countries should include in their periodical reports an analysis of the cases of torture and other cruel, inhuman and degrading treatment or punishment in the country for which they are accredited, as well as of the measures taken in order to combat them. The Regulation obliges the competent authorities in the member states to consider these reports and any similar reports prepared by the competent international organizations and by the civil society whenever taking decisions about the applications for authorizing exports, the measures thus provided being meant to prevent the use of the capital punishment, but also the torture and other cruel, inhuman and degrading treatment or punishment in third countries. Its rules contain restrictions on the trade with such countries, in relation to goods that may be used for the purpose of capital punishment, torture or other cruel, inhuman and degrading treatment or punishment. The European Parliament deemed it was not necessary to submit the operations inside the Community to similar controls, given that the capital punishment does not exist in the member states and that such states adopted adequate measures for preventing torture and the other cruel, inhuman and degrading treatment or punishment, their responsibility remaining the one of imposing and applying the required restrictions concerning the use and production of this equipment for the purpose of export to third countries, but also in order to provide technical assistance in relation to such equipment.

Conclusions

The purpose of applying a punishment is to re-educate, reintegrate the individual in the society, and not to physically liquidate that individual, as a final solution for removing him/her from the society, nor to

[21] OJ C 87 E, 11.4.2002, p. 136.
[22] OJ L 200/1, 2005

affect the physical or mental integrity of the condemned person, by applying corporal punishments that cause the humiliation and eventually the dehumanization of such individual.

We must certainly maintain a just balance between the public interest of protecting the society members against various crimes, especially the most severe ones, on the one hand, and, on the other hand, the private interest of the condemned person, forced to endure a capital punishment or corporal punishments.

The reasons invoked in order to legitimise the application of the death penalty and of the corporal punishments are varied, being different not only at regional level, but also from one state to another, or even inside the same state. Therefore, from the perspective of the civilisation level, many states still consider that death penalty or corporal punishments are not inadequate, and they believe that no eradicating measures should be adopted; in their opinion, such sanctions have a well-established role in maintaining the order of the society. On the contrary, other states, with a high level of economic development and with a high level of civilisation, consider that the capital punishment is necessary in certain cases, but the procedure applied for its execution must be efficient, and especially it should not violate the dignity of the respective person. The same states consider, based on a similar reasoning, but with completely opposite conclusions, that the corporal punishments violate the integrity and the dignity of the person, thus being incompatible with the respect for the fundamental rights of individual.

The present work extensively presents the interpretation manner of the absolute prohibition to subject a person to torture, cruel, inhuman or degrading treatment or punishment, from the perspective of the legality of violating the right to life, according to art. 2 of the Universal Declaration of Human Rights, but also to the evolution of the protection standard provided for by the Convention against Torture (CAT). The present work underlines that, despite the general obligation to respect the individual's right to physical and mental integrity, the imposition and execution of the death penalty is not considered in itself a treatment contrary to art. 1 of the Convention, while the case law of the international bodies for monitoring and controlling the respect for the human rights avoids raising this issue by applying the reasoning unanimously adopted in the matter of corporal punishments.

We consider that, distinctly from the legal and exceptional nature of the death penalty, such sanction cannot be seen but as an extreme form of corporal punishment that leads to the annihilation of the individual, and that, independently from the manner in which it is carried out, it inherently represents an inhuman or degrading treatment as it leads to the very annihilation of the human being. Therefore, the demarches of the international and regional bodies concerning the respect for the human rights must focus on the necessity to abolish this punishment, not on the necessity to define the "human" forms of execution, aiming not only at the elimination of the provisions contained in the national legislation, that provide for this form of punishment, but also at taking the required measures in order to prohibit the trade and technical assistance related to the equipment exclusively designed for the imposition of the capital punishment.

References

- Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development - Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, UN Documents, A/HRC/10/44
- Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment,Manfred Nowak - Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention, UN Documents, A/HRC/13/39/Add.5
- Civil and political rights, including the questions of torture and detention - Torture and other cruel, inhuman or degrading treatment or punishment, Report of the Special Rapporteur, Manfred Nowak E/CN.4/2006/6/Add.1, 21 March 2006

THE WITNESS'S RIGHT AGAINST SELF-INCRIMINATION. NATIONAL STANDARD

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Abstract

This study is meant to reveal the legal solution in the Romanian system regarding the witness's right not to contribute to self-incrimination. Thus, as a translation of the principle nemo testis idoneus in re sua, the Romanian legislator stipulated the witness's right against self-incrimination under the privilege of not using his statements, in consideration of his locus standi, against him, regardless of the fact that he later on was given the status of a defendant for the same offence or whether he is a defendant in a different case, which is connected to the one where he is a witness. Likewise, the privilege of not using his statements against him, stipulated under these conditions in the criminal procedure law, seems to respond to the three difficult choices that the witness has, a premises for the necessity to formulate, on a jurisprudential bases, the witness's right to remain silent and the right against self-incrimination.

Keywords: *right to remain silent, self-incrimination, nemo testis idoneus in re sua, national legal solution.*

1. Legal framework.

According to the Reasoning of the project for the Law regarding the Criminal Procedure Code, it was explicitly regulated according to the European Court of Human Rights (the case *Serves v. France*), *the privilege* against self-incrimination, also in respect to the hearing of the witness.

In its initial form, the proposed legislation, the privilege against self-incrimination was marginally defined, under Article 118 Criminal Procedure Code, *The right of the witnesses to avoid self-incrimination* that is *the witness's statement may not be used in a trial against him.* Later on, Article 102 point 75, Law no. 255/2013 for the implementation of the criminal procedure law, the content of Article 118 suffered a series of changes, practically lacking utility, the text thus became *the 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 him. The legal authorities have the obligation to stipulate, when the declaration is written, the previous capacity of that person.*

For a better understanding of the law-maker and of the elements that accounted for its legal acknowledgement, for the patrimony of the witness's rights, of the privilege against self-incrimination, we consider it necessary to highlight the relevant circumstances that the European Court took into consideration in the above-mentioned reasoning, respectively *Serves v. France*[1].

As to the facts, it was maintained that the applicant Paul Serves, a regular officer in the French army, that held the rank of captain, was in command of the first company of the 2nd Foreign Parachute Regiment ("2nd Para") and was based in the Central African Republic. On 11 April the applicant, holding information on poaching activities, he ordered an "unofficial" investigation mission in order to find and catch the poachers. For this purpose, he ordered that any poachers encountered during the missions should be intercepted, and, if they fled, should if necessary be fired on after a warning had been given. During one mission, one poacher was wounded in the leg and later killed by one of the subordinates of the applicant.

Regarding this incident, several investigations were carried on under the supervision of a prosecutor at the Paris Military Court who, on 20 May 1988, had been notified and presented the names of the soldiers involved, and the applicant was amongst them.

Thus, following this notification, the prosecutor charged the applicant with manslaughter, later a murder charge was substituted, and the applicant was detained.

Notes that the investigation was commenced without the opinion of the Minister of Defense or of the authority referred to the Code of Military Criminal Procedure, the Paris Court of Appeal upheld the orders in issue, the only documents held were the messages with the names of the persons involved in the incident that had been sent to the prosecutor.

Restarting the investigation, and after receiving the opinion of the Minister of Defense, showing that the facts seemed to be severe crimes and that a criminal investigation had to be carried on, the prosecutor charged two of the applicant's subordinates, and the applicant was summoned to appear as a witness. The hearing of the witness failed as he refused to oath and give evidence on the facts. Each time he was ordered to pay fines.

The applicant appealed against those orders and his argument in his pleadings was that the preliminary inquiry and the messages of 18 and 20 May 1988 on

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[1] CEDO, Serves v. France, 20225/92, 20 Oct. 1997, [www.hudoc.echr.coe.int].

which his 1988 charge had been based remained effective, there was incriminating evidence against him such as enabled him to be charged, so that he could not be examined as a witness without his defense rights being infringed and a breach of Article 6 of the Convention and Article 105 of the Code of Criminal Procedure being committed.

The applicant was later charged for aiding and abetting murder and convicted to four years' imprisonment at first court.

For the reason that the applicant was summoned by the military authorities as a witness, regardless of the fact that there were evidence that he had been involved in the case, that he could have been considered as a defendant according to the autonomous sense of the convention, the European Court held that Article 6 paragraph 1 was applicable.

For these reasons, the European Court held that, the way he acted, the investigation judge placed the applicant in the position to choose either to refuse to take the oath and give evidence, thereby making himself liable to repeated fines, or should he convince the judge of the overwhelming nature of the case against him and thus, ultimately, admit guilt.

The Court reiterated that the right of any "person charged" to remain silent and the right against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6 of the Convention. Their rationale lies, *inter alia*, in protecting the "person charged" against improper compulsion by the authorities and thereby contributing to the avoidance of miscarriages of justice and to the fulfillment of the aims of Article 6. The right against self-incrimination, in particular, presupposes that the prosecution in a criminal case seeks to prove their case without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the "person charged".

Resuming to national provisions, we also note the fact that according to Article 47 paragraph (5) of Law no. 24/2000 regarding the legislative technique norms for laws – wide-ranging laws, as it is the case of codes, the articles should have marginal definitions that express the synthetic object, but with no self-significance within the body of the provision.

Under these circumstances, we understand the witness's right against self-incrimination as the privilege stipulated by the law that no charge or unfavorable solution of the court should be based on the statements given as a witness before or after becoming an offender or defendant in the case.

2. The conventional standard.

Unlike other systems of fundamental rights protection[2], the European Convention does not explicitly provide the right to remain silent or the right not to contribute to self-incrimination. Nevertheless, jurisprudence, as a form of protection of the defendant against improper compulsion by the authorities, in order to avoid judicial errors and to the fulfillment of the objectives of Article 6[3], the European Court formulated the right of any "person charged" to remain silent and the right against self-incrimination[4]. The jurisprudential formulations were elaborated under the umbrella of the notion of the right to a fair trial under the Article 6 § 1, pointing, especially, the connection with the presumption of innocence stipulated by Article 6 § 2[5]. Though, the doctrine observed that recent jurisprudence seems to place the discussion towards the lack of equity of the procedure[6].

The concept of "criminal charge" or "the charge under the criminal law" has an autonomous meaning, according to the specific meaning of the European Convention, a solution which is imposed to ensure the object and the purpose of the convention[7], given the multitude of interpretations of these concepts under domestic law systems which might endanger the actual protection of the right in lack of a common standard, of consistency, imposed by Strasbourg Court.

Thus, a "charge" is "the official notification of an individual by the competent authority that he is suspected of committing a criminal offence", the definition corresponds to the test whether "the situation of the [suspect] has been substantially affected"[8].

The exam whether the charge was "criminal" is by taking the *Engel* test[9], which has as a starting point *the classification of the offence under the domestic law*, the second point is *the nature of the offence*, and the third refers to the *severity of the penalty.*

The first criterion is absolute or relative, depending on the way the offence is stipulated under the domestic law, whether it is a crime or, on the contrary, it is not stipulated at all, and it falls under other areas (e.g. the civil law, the administrative law, etc.). Therefore, the test ends when according to the domestic law, the offence is stipulated under the criminal law, the criteria from point two and three are no longer analyzed, but they are used when under the appropriate domestic system either the offence was no

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[2] Art. 14 pct. 3/g of International Covenant on Civil and Political Rights.
[3] CEDO, *John Murray v. UK*, 18731/91, 08 Feb. 1996, para. 45.
[4] CEDO, *Funke v. France*, 10828/84, 25 Feb. 1993, para. 44.
[5] CEDO, *Saunders v. UK*, 19187/91, 17 Feb. 1996, para. 68.
[6] J.F. Renucci, *Tratat de drept european al drepturilor omului*, Editura Hamangiu, Bucureşti, 2009, p. 517.
[7] CEDO, *König v. Germany*, 6232/73, 28 June 1978, para. 88.
[8] CEDO, *Deweer v. Belgium*, 6903/75, 27 Feb. 1980, para. 46.
[9] CEDO, *Engel and others v. The Netherlands*, 5100/71, 5101/71, 5102/71, 5370/72, 8 June 1976, para. 82.

longer considered a crime[10], or it has never been part of the criminal law and was stipulated under other areas. This approach, more substantial than formal, is nothing but the mirror of the guaranty of the rights in a real and effective manner, not in a theoretical and illusory one.

As according to the hypothesis of this study the offence is a crime according to the domestic law, which legitimates the criminal procedure where the parties of the trial are heard, we assess that it is no need to dwell upon this aspect.

Returning to the first element, respectively the hypothesis of a person who committed or took part in the commitment of a crime, we refer only to the situation when the party had not been granted the status of a charged person, with all the consequences deriving from, and he was invited by judicial authorities to testify as a witness.

This particular case, as the court itself noticed, places the person in the position of choosing one of three possibilities, all of them reaching the point of getting the person sanctioned or charged: either he does not make any statement and he would probably be fined, or he agrees to make statements, but he does not tell everything he knows about the case or he decides to distort the truth, and then he would probably be charged with false testimony, or he tells the whole truth and he places himself amongst the participants to the offence, as he confesses all the facts and circumstances[11].

To avoid such a judicial trap, the European Court emphasized that the subject of a crime has to acquire the quality of a defendant as soon as the judicial authorities have reasonable doubts that the person was involved in the commitment of the crime. His hearing as a witness is purely formal when the judicial authorities have consistent evidence proving he took part in the commitment of the crime[12].

As a first conclusion, we identify that the authorities have the negative obligation not to hear as a witness the person who is under the suspicion of participating or committing the crime, as the moment of turning him into a defendant does not lie in the hands of the judicial authorities. If such evidence does not appear in the case, the judicial authority has no reason to presume the person committed the crime, the criminal party is heard as a witness during the criminal trial, and the negative obligation of the judicial authority stays latent up to the moment when that person incriminates himself by the data and information he provides. As soon as the witness provides the incriminating elements, the judicial authority has to bring to his attention the right to remain silent and the right to an attorney, otherwise, it does not mean that the witness gave up his rights as he continues to make statements[13].

This is one of the two cases identified by the European Court as breaches of the right to remain silent and the privilege against self-incrimination, respectively the use of constraint in order to obtain information against the person who is invited to provide that information, the person who holds the status of a charged person according to the autonomous concept under Article 6 § 1. If the case has no elements leading to the conclusion that the witness had any implication, the European Court verifies whether the incriminating information was used in a subsequent criminal case[14].

3. The witness in the Romanian criminal trial.

During a criminal trail, the following persons can be heard: the suspect, the defendant, the injured party, the party who pays money to victim of a crime, the witnesses and the experts (art. 104). Any person can be heard as a witness, except for the parties [art. 115 paragraph. (1)]. A witness is also a person who suffered an injury from a criminal offence in case of an internally generated investigation, if the person states he does not wish to take part in the criminal trial [art. 81 paragraph (2)].

Hence, the witness is the natural person who is aware of any offence or circumstance that helps in finding the truth and who is invited by the judicial authorities to be heard about the knowledge he poses.

The doctrine underlined the social duty the witness has to help the judicial authorities to find the truth, and also the legal obligation that calls for the witness to come to the judicial authorities when invited and to tell the truth about the facts and the circumstances he knows, and not fulfilling this can bring along judicial constraints[15]. The law asks for the witness to be objective and to efficiently contribute to the finding of the truth because his status, outside the interests of the legal relationship, fully permits him to do so[16].

3.1. Domestic standard regarding the witness's rights and obligations.

During the criminal trial, the witness has the *obligation* to come in front of the judicial authorities when he is summoned, at the place, day and hour mentioned in the citation, the obligation to sworn testimony or to solemnly make statements, the obligation to tell the truth about the case [art. 114, paragraph (2)] and the obligation to write, in a five days

[10] CEDO, *Öztürk v. Turkey*, 8544/79, 21 Feb. 1984, para. 49.
[11] CEDO, *Serves v. France*, 20225/92, 20 Oct. 1997, para. 45.
[12] CEDO, *Brusco v. France*, 1466/07, 17 Oct. 2010, para. 47.
[13] CEDO, *Stojkovic v. France and Belgium*, 25303/08, 27 Oct. 2011, para. 54.
[14] CEDO, *Weh v. Austria*, 38544/97, 08 Apr. 2004, para. 41-43.
[15] Gr. Theodoru, *Tratat de drept procesual penal*, ed. a 2-a, Editura Hamangiu, București, 2008, p. 387.
[16] Trib. Suprem, *secția penală,* dec.nr. 1957/1979, in CD 1979, p. 441.

term, any change in the address to be cited [art. 120 paragraph (2) letter c)].

The witness has the *right* to protective measures and to get back the money paid during the trial [Article 120 paragraph (2) letter a)].

3.3. The right not to contribute to self-incrimination.

As a novelty, the new criminal procedure law introduced the right of the defendant against self-incrimination (Article 118), which is defined as the interdiction to use against himself the statement he made as a witness if, in the same case, before or after the statement he became a suspect or a defendant.

The meaning of the criminal procedure provision seems to be a real a criminal procedure aporia, thus the doctrine developed several possible opinions.

Thus, according to one opinion, the criminal procedure law does not regulate under the provisions of Article 118, or under any other provision, *in terminis,* a virtual right of the witness to remain silent or against self-incrimination. The new provision regulates in fact a right associated with the exclusion of evidence[17].

According to another opinion, the witness cannot raise the right to remain silent, as, in principle, the quality he has when heard, does not reveal the formulation of a criminal charge against him[18]. At the same time, it was noticed that the witness's right against self-incrimination is defined by the domestic law-maker as a negative procedural obligation of the judicial authority which cannot use the statement made by the witness against the same person who obtained the status a suspect or a defendant[19]. According to both opinions, obtaining the status of a charged person in the criminal trial does not lead, *per se,* to the exclusion of evidence as being unfaithfully or illegally taken.

We consider this last opinion to be just, the conclusion derives *proprio motu* by simply reading the incident texts, the statement made as a witness by a party on whom, at that time the judicial authority had no suspicion that he had been involved in the commitment of the crime as it was legally taken, but, due to the law, the authorities will not be able to use it against him.

In other words, the judicial authority will not be able to ground the solution on this evidence when the former witness is charged, as the use of this information is forbidden including as a test to confirm the other evidence taken in the case.

A contrario, the statement will have probative force for the benefit of the person who was a witness and then turned into a defendant and in the detriment of the other persons involved in the commitment of the crime.

Thus, the mere successive assignment of several status in the same case, especially at the beginning of the criminal investigation, cannot be considered as being, per se, an unfaithful procedural behaviour of the judicial authority, because the necessary elements for the preservation of all the aspects appear, due to the nature of things, during and at the end of the criminal investigation.

Coming back to the witness's right against self-incrimination, as it is stipulated under Article 118 Criminal Procedure Law, we notice a difference of content from the right to remain silent that the defendant has during the criminal case[20]. This is because the subject against whom there is no evidence showing he was involved in the commitment of the crime, has the obligation to respond when the judicial authorities invite him to testify as a witness, and the right to decline the invitation by claiming the right to remain silent is not accepted.

The same meaning was given also by the legal constitutional court; the judicial authorities have the liability to take all the available evidence in order to find the truth regarding the offence and the person who committed it, the witness's self-incriminating statements are, at the same time, the statements necessary to resolve the case, regarding another charged person[21].

The legislative solution of neutralizing the statement made against the charged witness shows that the defendant's right against self-incrimination is rescued, the subject who is heard as a witness shall not be asked to choose from one of the three above mentioned options that injure him, as the statement he made is never going to be unfavourable to him.

As a procedural remedy for the hypothesis of the judicial authority had sufficient incriminating data against the subject, the hearing of the person as a witness will be illegal, having as consequence the exclusion of the evidence from the criminal case and those deriving from it. Likewise, when the witness's statement brings self-incriminated evidence and the judicial authority does not immediately stop the hearing and does not warn the subject that he has the right to remain silent and the right to be assisted by an attorney, his statement shall be excluded as illegally taken.

4. Elements of comparative law.

In other legal systems, the problem is treated the same way and there is no breach in the procedural law

[17] T-V. Gheorghe, *Audierea martorilor* in N. Volonciu, A.S. Uzlău, *Codul de procedură penală. Comentat,* ed. a 3-a, revizuită și adăugită, Editura Hamangiu, 2017, p. 334; G.-D. Pop, *Dreptul martorului de a nu se acuza, [www.juridice.ro]* accessed on 15 Mar. 2018.

[18] M. Udroiu, *Procedură penală. Partea generală,* ed. 3, Editura C.H. Beck, București, 2016, p. 333.

[19] V. Constantinescu, *Capitolul II. Audierea persoanelor* in M. Udroiu, coord., *Codul de procedură penală. Comentariu pe articole,* ed. 2, Editura C.H. Beck, București, 2017, p. 575.

[20] A. Zarafiu, *Drept procesual penal. Partea generală. Partea specială,* ed. a 2-a, Editura CH Beck, București, 2015, p. 195.

[21] DCC nr. 519/2017, p. 16, *[www.ccr.ro]*.

if the person who is supposed to have committed the crime is heard as a witness if the circumstances of the case did not bring sufficient solid clues of culpability[22]. In case there are clues of culpability that are not sufficient to state a criminal charge, the judicial authorities will hear the subject as an assisted witness *(témoin assisté)*[23].

Likewise, according to Article 63 Criminal Procedure Law of Italy, if a person is heard during the criminal case and, in case he is not under investigation, he makes statements that provide circumstances against him, the judicial authority shall stop the hearing and worn the person that his statements can trigger investigations against him, and invites him to bring a lawyer. The witness's statements are unusable if he makes them as a witness, when narcotic substances were found at his dwelling place, because this circumstance reveals sufficient elements of culpability to state a charge against him from the very beginning of the investigation[24].

Conclusions

As a conclusion, we consider that the solution of the Romanian law-maker caters to the conventional test, the privilege against self-incrimination outlined by the extreme solution of neutralization of the statement in the detriment of the charged-witness by safeguarding his rights, for the benefit of which the European Court developed and acknowledged the right to remain silent and the right to not contribute to self-incrimination.

References

- Beltrani, Sergio, coord., *Codice di Procedura Penale,* Giuffré Editore, Milano, 2016
- *Code de procédure pénale*, 54e édition, Editions Dalloz, 2013
- Culegere de Decizii ale Tribunalului Suprem pe anul 1979, Editura Științifică, 1980
- Pop, George-Dominic, Dreptul martorului de a nu se acuza, [www.juridice.ro]
- Renucci, Jean-François, *Tratat de drept european al drepturilor omului,* Editura Hamangiu, București, 2009
- Theodoru, Grigore, *Tratat de drept procesual penal,* ed. a 2-a, Editura Hamangiu, București, 2008
- Udroiu, Mihail, *Procedură penală. Partea generală,* ed. 3, Editura C.H. Beck, București, 2016
- Udroiu, Mihail, coord., *Codul de procedură penală. Comentariu pe articole,* ed. 2, Editura C.H. Beck, București, 2017
- Volonciu, Nicolae, Uzlău, Andreea-Simona, *Codul de procedură penală. Comentat,* ed. a 3-a, revizuită și adăugită, Editura Hamangiu, 2017
- Zarafiu, Andrei, *Drept procesual penal. Partea generală. Partea specială,* ed. a 2-a, Editura CH Beck, București, 2015

[22] Art. 105 French Criminal Procedure Code, Crim. 18 dec. 1963 în *Code de procédure pénale*, 54e édition, Editions Dalloz, 2013, p. 354.
[23] J. Pradel, *Procédure pénale,* 17e édition, Editions Cujas, Paris, 2013, p. 694.
[24] Cass. III, 24944/2015 in Sergio Beltrani coord., *Codice di Procedura Penale,* Giuffré Editore, Milano, 2016, p. 199.

THE VICTIM IN THE ROMANIAN CRIMINAL TRIAL

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Abstract

When drafting the new Criminal Procedure Code (nRCPC), the Romanian legislator chose to reassign the procedural roles, that is to reduce the number of parties from four (the accused, the injured party, the civil party and the party with civil liability) to three (the defendant, the civil party and the party with civil liability). Thus, the person who has suffered physical, material or moral injury while the offense was being committed can no longer attend the criminal proceedings as a party, as he has the capacity of victim – a main procedural subject. Apparently, this change does not entail the reduction of the procedural rights. Thus, according to art 33. para.(2) nRCPC, the main procedural subjects have the same rights and obligations as do parties, except for those rights that the law grants to them exclusively. Nevertheless, as we will see, we will identify numerous procedural hypotheses in which the victim, stricto sensu, does not have the legal possibility to exercise certain procedural rights, accessible to other parties.

Keywords: *victim, parties in criminal proceedings, main procedural subjects, equality of arms, new Romanian Criminal Procedure Code.*

1. Introduction

When the new Romanian Criminal Procedure Code (nRCPC) entered into force on February 1, 2014, new roles were officially assigned to both the parties and the main subjects. Thus, for the very first time, the legislator defined the parties as the litigants who file judicial action or against whom judicial action is filed [art. 32 para. (1) RCPC]. Furthermore, the defendant, the civil party and the party with civil liability are included in the same category, whereas the victim ceased to be considered a party belonging to the criminal proceedings. This modification was completed by regulating a new category, namely 'main subjects', consisting of two participants, the suspect (the accused in the former Romanian Criminal Procedure Code) and the victim (the injured party in the former Romanian Criminal Procedure Code). In other words, we could see that in case the person injured while an offense was being committed intends to participate in criminal proceedings so that the perpetrator could be prosecuted, he will become 'a victim', no longer being a party.

Considering the provisions of art. 32 para. (1) (as the procedural subject are not statutorily defined), we could draw the conclusion, *per a contrario*, that the victim is not considered a party in the criminal proceedings as he neither files a judicial action (criminal or civil), nor is he a passive subject of a judicial action being filed. In our opinion, this reasoning is partially incorrect, as we will explain in this paper.

2. The relation between the victim and the judicial actions in criminal proceedings

As pointed out earlier, the reason why the legislator chose to confer the status of main subject on the person injured while the offense was being committed, at the expense the procedural status of party, is because it is impossible to establish a connection between this participant and the exercise of civil and criminal actions.

Regarding the civil action, the explanations are simple because the injured party cannot be an active or a passive subject of this action. Thus, it cannot be denied that the active subject of the civil action is the civil party and, in compliance with art. 19 para. (3) nRCPC, the prosecutor, while the procedural subject against which the civil action can be exercised is the defendant and, possibly, the party with civil liability. The person injured while the offense was being committed has the right to exercise a civil action, but, in this case, he becomes a civil party in criminal proceedings.

Regarding the relationship between the victim and the criminal action, it is obvious that he cannot be the passive subject when exercising the criminal action, as the only procedural party in this situation is the defendant.

It remains to be discussed whether the victim may participate in the exercise of criminal action. Undoubtedly, from the perspective of the legislator, the answer is negative, as criminal proceedings can be filed only by the state, through its servants. However, in our opinion, the solution to this problem is nuanced because the victim has a procedural regime (as provided in nRCPC, as well) which allows us to

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consider that this procedural subject can participate in the exercise of criminal action.

But what does it mean to exercise criminal action?

There is no definition for 'the exercise of criminal action' in the criminal procedure law. If we closely examine the criminal procedure rules, the provisions included in art. 14 para. (3) nRCPC easily stand out: 'Criminal action can be exercised during the criminal proceedings, under the law.' [1] Therefore, the legislator prescribes a timeframe for the exercise of criminal action, without specifically indicating who may participate in exercising it.

In specialized literature[2], the exercise of criminal action was defined as 'bringing a criminal action in order to be able to hold the defendant criminally responsible,' which can be achieved by presenting the evidence in a criminal case, taking procedural measures, filing application forms, introducing exceptions etc. In a different form, but expressing essentially the same approach, criminal action may be exercised by performing activities and procedural acts in order to boost the criminal proceedings and thus lead to the effective realization of the objective of criminal action, i.e. holding the guilty ones criminally responsible.' [3].

It is easy to see that the exercise of criminal action is primarily an attribute of criminal investigation bodies, with particular reference to the prosecution. Thus, the prosecutor is the only party who could start the criminal action, participating, in this capacity, in exercising criminal action, which arises directly from art. 55 para. (3) c) nRCPC. Similarly, the provisions of art. 99 para. (1) nRCPC, according to which the burden of proof in criminal proceedings lies mainly with the prosecutor, further emphasizes this aspect.

Although there is no express regulation in this regard, criminal investigation authorities are clearly involved in the exercise of criminal action by means of the acts of disposition that they can issue (beginning *in rem* prosecution, expanding criminal investigation, change the legal classification etc.), by submitting evidence and by having the legal possibility to order detention of the suspect or the defendant. In our opinion, in a subsidiary way, the court may also exercise powers subsumed to the exercise of criminal action during the proceedings, referring to the possibility of submitting new evidence during the court proceedings or when resubmitting unchallenged evidence *ex officio*, according to art. 374 para. (8) nRCPC.

In this context, the next issue that needs to be clarified is whether the victim may participate in the exercise of criminal action. Having in mind the conceptualization of 'the exercise of criminal action', as discussed above, we consider that, indeed, the victim may exercise criminal action, together with the judicial bodies, in particular by activating the rights recognized by law in matters of evidence, and through a series of procedural acts that may result during the criminal proceedings.

In this sense, the victim has the right to propose submitting evidence by the prosecution, to raise claims, to draw conclusions and also the right to make any other claims related to the settlement of the criminal component of the case under article 81 para. (1) b) and c) nRCPC. More importantly, the victim can make a contribution to accomplishing the objective of criminal proceedings by certain procedural acts, such as the complaint against the order of ranking, followed by the judge's decision to start the trial in compliance with art. 341 para. (7) line 2) c) nRCPC, by lodging an appeal call or using extraordinary legal remedies under the law etc. The exercise of criminal action by the victim is even more obvious in cases where criminal proceedings are initiated and carried out, triggered by the prior complaint. In these cases, the victim must express his wish as this is essential when holding someone criminally responsible, not only for the start of the criminal proceedings (the initiation of criminal proceedings, respectively), but also for conditioning the exercise of criminal action by the absence of the order for the prior complaint withdrawal.

On the other hand, it is important to note that, in specialized literature, the victim is considered an active subject of the criminal action, together with the Public Ministry and the criminal investigation bodies, as they have the recognized right to perform procedural acts by means of which the defendant is held criminally responsible[4].

Based on these brief arguments, we consider that the victim may participate in the exercise of criminal action in criminal proceedings together with the prosecutor and the criminal investigation bodies, which invalidates the legislator's option to remove him from the category of parties.

Nevertheless, it is important to determine whether this change in assigning the roles to the parties in the criminal proceedings is likely to jeopardize the

[1] Obviously, it is necessary to consider a restrictive interpretation of the rule invoked because no matter the hypothesis one might have in mind, no criminal action can be exercised during the third phase of the criminal trial, the enforcement of criminal judgments, for the simple reason that once a final decision is taken, the criminal action is extinguished.

[2]. I. Neagu, M. Damaschin, *Tratat de procedură penală. Partea generală* (Criminal Procedure Treatise), Ed. Universul Juridic, București, 2014, p. 265; see also A. Crișu, *Drept procesual penal. Partea generală* (Criminal Procedure Law. The General Part), Ed. Hamagiu, București, 2016, p. 178.

[3]. N. Volonciu, *Tratat de procedură penală. Partea generală* (Criminal Procedure Treatise. The General Part), Ed. Paideia, București, s.a, p. 234.

[4]. Gr. Gr. Theodoru, *Tratat de drept procesual penal* (Criminal Procedure Law Treatise), ediția a 3-a, Ed. Hamangiu, București, 2013, p. 97; see also N. Volonciu, *op. cit.*, pp. 235-236; I. Neagu, *Tratat de procedură penală* (Criminal Procedure Treatise), Ed. Pro, București, 1997, p. 168 (the author particularizes this possibility for the cases in which the victim's prior complaint is necessary); Gh. Mateuț, *Tratat de procedură penală. Partea generală* (Criminal Procedure Treatise. The General Part), *vol. I*, Ed. C.H. Beck, București, 2007, p. 539.

procedural interests of the person injured while the offense was being committed. Apparently, considering the provisions of art. 33 para. (2) nRCPC, according to which the procedural subjects have the same rights and obligations as the parties, except for those granted by law exclusively to them, including the victim in the category of the main procedural subjects does not change the procedural rules for this party. The provisions of art. 81 nRCPC, which provide for the victim's rights, basically regulated in the same way as the rights of the parties, lead us to the same conclusion.

However, as we shall see below, the new Romanian Criminal Procedure Code comprises many hypotheses in which the victim was omitted by the legislator from the category designating the parties that hold certain procedural rights. As follows, we present these situations (without claiming that we have identified all the cases), trying to determine whether the respective omission could cause infringement of the victim's procedural rights and interests. We would like to mention that had the victim been qualified as a party in the criminal proceedings, these cases would not have existed.

3. Cases in which the victim was wrongly excluded from exercising certain procedural rights

Disjoinder of a civil action. During the trial stage, due to reasons related to ensuring a reasonable timeframe for settling the criminal action, the court has the opportunity to order the disjoinder of the civil action. According to art. 26 para. (2) nRCPC, a disjoinder shall be ordered by the court *ex officio* or upon request by the prosecutor or the parties. In this first example, we consider that this could be explained as an omission done by the legislator[5], as there is no valid reason for which the victim could not seek separation of the two actions, especially if it is thought that settling them together would lead to delays in settling the criminal action.

Disjoinder of cases after joinder. The joinder of cases, procedural hypothesis leading to the prorogation of jurisdiction in criminal matters can be granted according to art. 45 para. (1) nRCPC, at the request of the prosecutor, the parties, the victim and *ex officio*. Although, in this case, the victim is granted the right to seek joinder, as far as the disjoinder of the cases after joinder is concerned, the situation is different. In this regard, according to art. 46 para. (2) nRCPC, disjoinder of a case shall be ordered by the court through a court resolution, *ex officio* or upon request by the prosecutor or the parties.

The conflict of jurisdiction occurs in the event that two or more courts mutually proceed to waiving their jurisdiction (negative conflict of jurisdiction) or admit their jurisdiction to hear the same case (positive conflict of jurisdiction). According to the procedure leading to the settlement of the positive conflict of jurisdiction, provided in art. 51 para. (3), the shared hierarchically superior court may also be seized by the court having acknowledged its jurisdiction last, by the prosecutor or by the parties. It also becomes apparent that the legislator omitted to regulate the right of the victim to seek the ascertaining of the existence of the jurisdiction conflict and its settlement.

The transfer procedure, a remedy for those cases which raised the question of the lack of impartiality of the court as a whole (a threat of a public order disturbance, respectively) occurs, considering the issues analyzed in this paper, when the victim is repeatedly ignored[6]. First, transferring the examination of a case could be sought, among other things, when the impartiality of judges of that court is impaired due to 'the capacity of parties'. The declarative interpretation of this statute should lead us to the conclusion that transferring the examination of a case may not be requested, if, for example, the court president is a close relative of the victim, his capacity not being described in the statute. Obviously, such an interpretation cannot be accepted, as otherwise the principle of equality of arms would be infringed.

The omissive regulation in respect of the victim also existed as far as the parties of the transfer application were concerned. Thus, in the initial form of art. 72 para. (1) nRCPC, transfer could be exclusively requested by the parties or by the prosecutor. Following the amendments made by the Romanian Government Emergency Ordinance no. 18/2016, the victim was included in the category designating the parties, having the right to file for case transfer.

The procedure regulating the settlement of the transfer application comprises other examples where the victim was not taken into consideration by the legislator. Thus, in order to prepare the examination of the application, the president of the hierarchically superior court shall take steps 'to inform the parties on the filing of a case transfer application'; 'parties may transmit memoranda and may come to court on the set hearing term for the application settlement'; if participating in the hearing, the High Court of Cassation and Justice or the Court of Appeals of competent jurisdiction 'shall give the floor to the party who filed the case transfer application, as well as to the other attending parties (...)'. We would like to point out to the fact that, when considering these hypothetical cases, 'parties' refer to subjects procedurally interested in settling the transfer application, therefore the victim is included as well. However, whatever the content of the regulation, it is obvious that the victim will fully

[5] Moreover, anticipating, for most cases that have been analysed, the common element which justifies the lack of regulation is represented by this 'omission' of the legislator.

[6] Nevertheless, we would like to mention that the victim can seek the transfer of the examination of the cause, as art. 72 para. (1) nRCPC was supplemented by the Romanian Government Emmergency Ordinance no. 18/2016.

participate in the transfer procedure, under the same conditions as the parties.

Special rules regarding the hearing of persons. In accordance with art. 106 para. (2) nRCPC, a detained person may be heard at the detention facility through videoconference, in exceptional situations and if the judicial bodies decide that this does not harm the proper conducting of the trial or the rights and interests of the parties. *Per a contrario*, this type of hearing derogating from the rules of ordinary law could not be accessed in the event that one found out that the victim's interests were prejudiced (or, equally, the suspect's), as this is an interpretation which cannot be accepted.

The procedure for the approval of electronic surveillance. ***Home search and computer search***. According to art. 140 para. (3) nRCPC, the application requesting approval of electronic surveillance shall be ruled on in chambers, on the same day, without 'summoning the parties'. Although it might follow that the suspect and the victim will be summoned, the interpretation of this statute is that this activity is performed confidentially, without the main procedural subjects and the parties taking part in the proceedings. In this case, the omission of the legislator may lead to granting additional rights to the victim, as compared to the parties in the trial, as this purpose was targeted when drafting the criminal procedure law, given the peculiarities of electronic surveillance.

Likewise, according to art. 158 para. (5) and art. 168 para. (4) nRCPC, applications requesting approval for conducting a home search or a computer search are ruled on in chambers, without 'summoning the parties'. To comply with identical reasoning, the findings made in reference to the procedure approving electronic surveillance apply in these hypotheses as well.

Appointment of the expert. In the procedure of appointing the legal expert, it is legally possible for the unofficial procedural subjects to get involved in conducting this evidentiary process. Thus, according to art. 173 para. (4) nRCPC, the parties and main procedural subjects have the right to require that an expert recommended by them, other than the one appointed by the judicial body, would participate in concluding an expert report. In this case, we notice that the victim has the opportunity to propose a so-called expert-party. Further on, however, the legislator regulates the expert's incompatibility hypotheses, laying down that one cannot appoint, as an expert 'recommended by the parties' in the given case, a person working in the same forensic medical institution, specialist institute or laboratory as the expert appointed by the management of the relevant institution upon request by judicial bodies. It is clearly an omission of the legislator, omission which is not found as a counter example, in the case referred to in art. 175 para. (4), according to which the expert may request clarifications from 'the parties and main procedural subjects' based on an approval from and under the terms established by the judicial bodies. In the same sense, we can mention the provisions of art. 177 para. (1) nRCPC, according to which, when ordering the conducting of an expert report, the criminal investigation bodies or the court set a term on which 'the parties, main trial subjects (…) are summoned'.

The non-unitary nature of the criminal procedural rules, in terms of omitting the mentioning of the victim, is also present in art. 178 para. (4) nRCPC, which states that the expert report includes in the introduction, among other pieces of evidence, 'the proof of having informed the parties', if they participated in the examination and gave explanations during this activity.

Letters rogatory. According to art. 200 nRCPC, in case a letter rogatory has been ordered by the court, 'the parties may ask questions before such court' and the questions will be submitted to the court performing the letter rogatory procedure. Similarly to the other hypotheses presented, it may result, *per a contrario*, that the victim would not have the right to ask questions that were to be submitted to court which enforces the procedural act by letter rogatory, a situation that of course cannot be accepted. Likewise, 'either party' (including the victim, as well) may request to be summoned in the enforcement of the letter rogatory.

Summoning procedure during court proceedings. While carrying out the summoning procedure, some irregularities may occur, which may end up in failing to accomplish the purpose of the procedure, namely ensuring the presence before the judicial body. These procedural incidents were provided for in art. 263 nRCPC. In this regard, according to para. (1), during the trial, irregularities in the summons procedure shall only be considered if the person who is missing at the date of summons raises such irregularity at the next hearing where they are present or legally summoned. This situation also belongs to the matter of evidence, as the provision could be enforced on the victim, as well. Similarly, the same extensive interpretation should be used with reference to art. 263 para. (2) according to which an irregularity in the summons procedure of 'a party' can be raised by the prosecutor, by 'the other parties' or *ex officio* only at the date where it occurred.

The procedure for correcting obvious material errors. According to art. 278 para. (2) in order to correct the obvious material errors of a procedural act, parties may be summoned to provide clarifications. In this case we are again in the situation of an obvious legislative omission, the victim being able to contribute to the correction of a material error, as far as that is covered by the respective procedural act.

The regime of absolute nullity. In this case, the omission of the legislator leads to some situations which are clearly discriminatory against the victim. According to art. 281 para. (1) f) nRCPC, always causing nullification is the infringement of rules concerning legal assistance by a counsel for the suspect or defendant, as well as of the other parties, when assistance is mandatory. In other words, the hypothetical cases in which the provisions relating to

the mandatory legal assistance to the victim were infringed, the consequent penalty will be relative nullity, only if it is proved that the procedural error caused an infringement of the rights of the victim, which cannot otherwise be removed, but by nullifying the act.

We would like to point to the fact that there are legal hypotheses during the criminal proceedings in which legal assistance to the injured victim is mandatory. According to art. 93 para. (4) and (5) nRCPC, we have in our view those cases in which the victim lacks mental competence or has a limited mental competence or when the judicial body considers that he cannot prepare the defense on his own. For these cases, if legal assistance is not provided, the penalty would be relative nullity.

In this case as well, we hold the view that the provisions included in art. 281 para. (1) f) nRCPC should be extensively interpreted. Otherwise, not only the victim's right to defense would be violated, but also the equality of arms to the procedural rules of the suspect or defendant and, more importantly, to the procedural rules granted to the civil party and the party with civil liability.

4. Conclusions

The examples mentioned in this paper are not unique [the same approach should be taken in respect to the provisions of art. 369 para. (2) nRCPC, art. 381 para. (5) nRCPC, art. 377 para. (4) nRCPC, art. 412 para. (3) and (4) nRCPC etc.]. In our opinion, two main causes could explain the current situation, namely the inclusion of the victim in the category of main procedural subjects, though, as we have seen, being a party in criminal proceedings is perfectly justifiable in terms of the possibility of exercising criminal action, and the legislative shortcomings demonstrated during the drafting of the criminal procedure law.

Thus, referring to the first cause, if the legislator had chosen that the victim would attend the trial as a party, these regulatory differences included in this paper would not have existed, as the exercise of certain procedural rights would have been made available to 'the parties'.

Given that the victim will continue to be considered a main procedural subject, the criminal procedural regulation should be improved by adding references to this procedural subject, as well. In this case, the law takes a cumbersome form, comprising difficult wordings (e.g., in order to meet the requirements of the principle of equality of arms, art. 200 nRCPC should be rephrased as follows: 'when a letter rogatory is ordered by the court, the parties *and the victim* may ask questions before such court'). Therefore, the modification of the procedural framework with regard to the victim (in many cases, issues relevant to the suspect, as well) should be mandatory because the objective is to ensure a procedural regime characterized by the possibility to exercise the same procedural rights during criminal proceedings.

References

- Crișu, Anastasiu, *Drept procesual penal. Partea general* (Criminal Procedure Law. The General Part), Ed. Hamagiu, București, 2016
- Mateuț, Gheorghiță, *Tratat de procedură penală. Partea generală* (Criminal Procedure Treatise. The General Part), *vol. I*, Ed. C.H. Beck, București, 2007
- Neagu, Ion, *Tratat de procedură penală* (Criminal Procedure Treatise), Ed. Pro, București, 1997
- Neagu, Ion; Damaschin, Mircea, *Tratat de procedură penală. Partea generală* (Criminal Procedure Treatise. The General Part), Ed. Universul Juridic, București, 2014
- Th. Theodoru Gr. Grigore, *Tratat de drept procesual penal* (Criminal Procedure Law Treatise), ediția a 3-a, Ed. Hamangiu, București, 2013
- Volonciu, Nicolae, *Tratat de procedură penală. Partea generală* (Criminal Procedure Treatise. The General Part), Ed. Paideia, București, s.a

THE EUROPEAN INVESTIGATION ORDER IN CRIMINAL MATTERS - GROUNDS FOR NON-RECOGNITION OR NON-EXECUTION

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Abstract

The European Investigation Order (EIO) is the newest mechanism for judicial cooperation in criminal matters. This instrument was laid out in the Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 and was transposed into the Romanian legislation through the most recent changes of the Law nr. 302/2004 concerning international judicial cooperation in criminal matters The main goal was the introduction of a single instrument for the gathering of evidence between EU Member States in cases with a cross-border dimension. Also, the European Investigation Order is the most recent application of the principle of mutual recognition of judgments and judicial decisions, which is, since the Tampere European Council the cornerstone of judicial cooperation in criminal matters within the Union. Starting with an analysis of the principle of mutual recognition, this paper presents the grounds for non-recognition or non-execution provided both by the Directive regarding the European Investigation Order and Romanian national legislation. Non-recognition and non-execution grounds of a European Investigation Order are either the classic reasons for the cooperation instruments (ne bis in idem principle), but are also noticed through elements of novelty as the ones based on respecting the fundamental rights, aspect that represents an important step in the cooperation matter and shows the ECJ jurisprudence tendency.

Keywords: *European investigation order, principle of mutual recognition, judicial cooperation in criminal matters, mutual legal assistance.*

1. Introduction

The European Investigation Order (EIO) is the newest cooperation mechanism in criminal matters between the EU Member States. Laid out in the Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014[1], (following – "EIO Directive"), the order was transposed into the Romanian legislation through the most recent changes of the Law nr. 302/2004 concerning international judicial cooperation in criminal matters[2] (following- "The Law"), its purpose being that of facilitating and speeding up the obtaining and transfer of evidences between member states, but also offering harmonized procedures for obtaining these. The order replaces both the classic procedures of cooperation set up by the Convention concerning judicial assistance in criminal matters between the EU Member States[3], but also the European Evidences Warrant[4]. The paper aims to analyse the non-recognition and non-execution grounds foreseen by the Romanian legislation, to identify the differences concerning their regulation into the EIO Directive, and also stating the reason for these, but also emphasizing the difficulties that can appear in a concrete applying when executing such an order.

2. Principle of mutual recognition - the cornerstone of judicial cooperation in criminal matters

By European Investigation Order we understand a judicial decision issued or validated by a judicial authority of a member state, in order to accomplish one or more investigation measures specific in another member state, in order to obtain evidences or transmitting the evidences that are already in the possession of the competent authority of the executing state[5]. The European Investigation Order can be issued for any investigation measure, with the exception of the setting up of a joint investigation team and of gathering evidence within such a team.

The fundament of the European Investigation Order is represented by the principle of mutual recognition and trust[6] that starting with the works of the Tampere Council in 1999, was confirmed as being the 'cornerstone of judicial cooperation in criminal matters'[7], having as purpose the removal of the cooperation difficulties linked to the differences of the

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[1] O.J. L130/1 of 1.5.2014.

[2] Republished in the Official Romanian Journal, Part I, nr. 377 from 31 May 2011, completed through Law nr. 236 from 5 December 2017, published in the Official Romanian Jurnal nr. 993 from 14 December 2017.

[3] Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the EU, OJ, C 197/1 of 12.07.2000.

[4] Council Framework Decision2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ, C 115/13 of 09.05.2008.

[5] Art. 268[1] alin. 2) let. a) from the Law.

[6] Art. 1 pct. 2) from EIO Directive.

[7] See Tampere Council Conclusions, Finland, 15-16 October 1999. The measure programme adopted with this occasion was published in the Official Journal of the European Communities nr. C 12 E from 15 January 2010.

legal systems between the member states[8]. According to this principle, a judicial sentence issued by a judicial authority of an EU Member State is acknowledged and/or executed by another member state, having the same value as a sentence emitted by the previous. In the same time, the mutual recognition implies the fact that a judicial sentence of a member state produces effects in all the member states without having to be subordinated to some extra conditions in accordance to the judicial order of the executing member state[9].

In the light of this principle, a European Investigation Order issued in one of the EU Member States has to be acknowledged and executed by the judicial authorities from the other member states in concordance with the foresights of the Directive, so that the result is obtaining the evidence in order to use them in criminal trials.

3. Grounds for non-recognition or non-execution

However, the mutual recognition is not absolute, the Directive stipulating refusal grounds for executing the European Investigation Orders specific to all the cooperation instruments. In this case, the non-recognition and non-execution grounds can be included into three categories: explicit and general reasons, regulated by the 11th article from the Directive, taken in the article 268^8 from the national law; recurring to alternative investigation measures (art. 10 from the Directive and art. 268^7 from the law); reasons that make the execution impossible, for example the case of a videoconference hearing without the consent of the suspect(art. 24 pt. 2 from the Directive and 268^{18} from the law).

By the present paper, we will analyse only the general non-recognition and non-execution reasons (applicable to all measure categories requested through the European Investigation Orders) and explicitly regulated in the art. 268^8 from the Law and art. 11 from the Directive.

3.1. Immunities and privileges, the principle of speciality and the freedom of the press

The article 2688 let. a) from the Law: „there exists immunity or a privilege, as diplomatic immunity, or the principle of speciality or any other circumstances stipulated by the Romanian law or there are norms concerning the determination or limitation to criminal charges connected to the freedom of the press and of freedom of expression in other media information methods that make the execution of the European Investigation Order impossible".

Grounds of refusal based on the existence of „immunity" or a „privilege" are stipulated by the majority of mutual recognition instruments, the only exception being the European Arrest Warrant. Nevertheless, none of these tools doesn't define the two notions. The German doctrine, for example, also includes in the category of "privilege" the witness right of not declaring in the cases that concern relatives or the privilege of the client-advocate relationship[10]. In order to avoid this kind of interpretations, the Romanian legislative hasn't proceeded in defining these, but has exemplified their nature: „for example diplomatic immunity".

However this refusal ground is not absolute, align. 5 of art. 2688 from the Law stipulating that in this case and if the competence of revoking the privilege or the immunity reverts to an authority of the Romanian state , the Romanian execution authority files a petition in this matter with no delay. If the competence to revoke the privilege or immunity reverts to an authority of another state or an international organization, the Issuing Foreign Authority files a petition in this matter to the acting authority.

Moreover, concerning the foresights of the Directive, in the Romanian law there has also been inserted as a non-executing reason the "principle of speciality". In our opinion this regulation can only be linked to other judicial cooperation instruments, as extradition or surrender on the basis of an European Arrest Warrant, ulterior, for other deeds than the ones these have operated for, not being able to initiate a criminal investigation, including by issuing an European Investigation Order, than with respecting the principle of speciality. In the light of these considerations, we appreciate that the option of the Romanian legislative is redundant as the two shown mechanism already contain specific protection instruments through the speciality rule.

The Romanian law has also taken the ground referring to the determining or limiting the criminal responsibility connected to the freedom of the press or other mass media information methods, aspect that marks the expansion of the notion of immunity or privilege.

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[8] According to pct. 36 in Conclusions, „the principle of mutual recognition should also apply to pre-trial orders, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable; evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States, taking into account the standards that apply there".

[9] Giséle Vernimmen, A propos de la reconnaissance mutuelle des décisions sentencielles en général, in Gilles de Herchove, Anne Weyembergh (coord.), La reconnaissance mutuelle des décisions judiciaires pénales dans l'Union européenne, Bruxelles, Université de Bruxelles, 2001, p. 148.

[10] Lorena Bachmaier Winter, The proposal for a Directive on the European Investigation Order and the Grounds for Refusal: A Critical Assessement, in Stefano Ruggeri (Ed.), Transnational Evidence and Multicultural Inquiries in Europe, Springer International Publishing Switzerland, 2014, p.78.

3.2. National security, jeopardising the information source, classified information

The article 2688 let. b) from the Law: „executing the European Investigation Order, in a specific case, would bring damage to the fundamental interests concerning the national security, would jeopardise the information source or would involve using classified information regarding specific activities of the secret services.'

The refusal ground identically implemented in the Romanian legislation is not recent, being found since the Judicial European Convention in 1959 that was also enumerating in addition grounds that concern suzerainty, public order, or other essential interests of the executing authority. Meanwhile, the Directive lets go the suzerainty and public order[11] clauses, aspect that doesn't come to restrain, but, on the contrary to considerably expand the refusal ground, covering this way the hypothesis where the execution risked to jeopardize the information source, aspect that could have an important impact in the organised crime domain where there are often necessary investigation measures whose source has to be protected[12].

3.3. The existence of a non-criminal procedure in the issuing state's legislation

The article 2688 let. c) from the Law: „the European Investigation Order was issued within the procedures stipulated in art. 2682 let. b) or c) and the investigation measure wouldn't have been authorised, according to the Romanian law, in a similar cause".

The procedures that this refusal ground is referring to concern the issued orders within the procedures initiated by the administrative authorities concerning deeds that represent the violation of the rightful law and that are punished in the national legislation of the issuing state, and where the decision can create an action in front of a competent court, especially criminal matters; or in case of the initiated procedures by the judicial authorities concerning deeds that represent braking the rightful laws and that are punished in the national legislation of the issuing state, if the decision of the mentioned authorities can create an action in front of a competent court, especially criminal matters[13].

Some judicial systems of the member states have regulated the so called „ administrative offences". For example the German law knows such a category of offences called „Ordnungswidrigkeiten" that are not punished by the criminal courts, but by an administrative group, but after the decision taken by the administrative court there can be released a procedure for the criminal courts[14]. This is the reason why the Directive has created the possibility of issuing a European Investigation Order referring to this category of offences. However in the case when for the offence for which the European Investigation Order was issued the requested measure cannot be authorised in the legislation of the executing authority, it is incident the analysed refused ground.

3.4. Ne bis in idem principle

The article 2688 let. d) from the Law: „executing the European Investigation Order would be contrary to the ne bis in idem principle".

Ne bis in idem principle is recognised at a supranational level inside EU, being regulated by art. 50 from the Charter of Fundamental Rights of the European Union. At the same time, ever since the Directive Preamble, it is emphasised that the ne bis in idem principle represents a fundamental principle in the Union's right, as it was recognised by the Charter and expanded by the jurisprudence of the European Justice Court[15]. This way the executant authority should have the right to refuse executing a European Investigation Order if its execution would be contrary to this principle. However, the Directive recognises the preliminary character of the procedures that stand at the ground of a European Investigation Order, so that the execution of this shouldn't have the role of a refusal when it wants to establish the existence of a possible conflict with ne bis in idem principle or when the issuing authority has provided insurances that the transferred evidences after the execution of the European Investigation Order won't be used with the purpose of prosecution or applying a sanction to a person for whose cause was pronounced a definitive sentence in another member state for the same offences.

In practice, we appreciate that for the execution authority it is difficult to identify the incidence of the ne bis in idem rule reported to the short description of the offences in the form where the European Investigation Order is manifested and at the low probability that an eventual procedure carried for the person in cause by the investigative measure to be known by the execution judicial authority, especially when this took place in another member state.

3.5. The place where the offence have been committed

The article 2688 let. e) from the Law: „the European Investigation Order refers to a offence that is presumed to have been committed outside the issuing state's territory and partially or totally on Romanian territory, and the deed for which the European

[11] See Lorena Bachmaier, Transnational Evidence. Towards the Transposition of Directice 2014/41 Regarding the European Investigation Order in Criminal Matters, in Eucrim, nr. 2/2015, p.47-60.

[12] Daniel Flore, Droit pénal europ*é*en. Les enjeux d'une justice pénale europ*é*enne, 2e edition, Larcier, Bruxelles, p. 607.

[13] Art 4 lit.b si c din Directiva.

[14] Lorena Bachmaier Winter, *The proposal for a Directive on the European Investigation Order and the Grounds for Refusal: A Critical Assessement*, in Stefano Ruggeri (Ed.), Transnational Evidence and Multicultural Inquiries in Europe, Springer International Publishing Switzerland, 2014, p.80

[15] Considerent 17 from Preamble.

International Order was issued in not incriminated in the Romanian law".

The ground identically adopted by the local legislation can be synthetized in completing three conditions: the offence was not committed on the territory of the issuing state; the offence has been committed partially or integrally on Romanian territory; the offence is not an offence in the Romanian legislation. This way it is noticed that the refusal ground has a double valence that derives from the principle of the territory, and also of double incrimination.

The main justifying of this ground concerns the avoidance of abusive using of the extraterritorial jurisdiction and avoiding the jurisdiction conflicts. However the refusal ground is not protected from critics because it is considered that the solution of the jurisdiction conflicts can be found through other methods, not being mandatory to stop obtaining the evidences[16].

3.6. Respecting the fundamental rights

The article 2688 let. f) from the Law: „there are strong grounds to consider that executing an investigation measure would be incompatible with the obligations assumed by the Romanian state according to art. 6 TEU and the Charter of Fundamental Rights of the European Union".

The directive represents the first instrument of cooperation based on the principle of mutual recognition that introduces a refusal ground based on protecting the fundamental rights[17]. The reason of non-existing of such a refusal ground can be taken from the jurisprudence of the CJUE according to whom the mutual recognition principle that represents the base of the European Investigation Order has as a fundament mutual trust between the member states regarding the fact that their national juridical orders are capable to provide an effective and equivalent protection of the fundamental rights accepted by the Union, especially in the Charter[18].

However in the recent jurisprudence of the Luxembourg Court there has been admitted that not respecting the fundamental rights in the issuing state can lead to the postponing of executing an European warrant until information are obtained regarding the detention conditions in the issuing state and in the end to the refusal of executing the warrant in case the non-respecting of the fundamental rights issued in art. 4 from the Charter[19] is established.

The regulation of the refusal ground in the Directive is quite large, evidences concerning the violation of the fundamental rights not being necessary, but 'strong reasons' that the execution of a European Investigation Order would be qualified to produce such a violation[20].

There has to be emphasized that the referring point in the appreciation of the incidence of this refusal ground is art. 6 from TEU and the stipulations of the Charter, aspect that is meant to stop the member states from imposing their own fundamental right standards[21].

3.7. Lack of double incrimination

The article 2688 let. g) from the Law: „the deed for whom the European Investigation Order was issued is not incriminated in the Romanian law, with the exception of the case where there are references to the crimes from annex nr. 14[22], this being indicated by the issuing authority, if the deed is punishable in the issuing state with an arrest sentence or with a freedom privative measure for a period of maximum three years".

In matters of international cooperation, the double incrimination means that the deed that is in cause to be an offence both in the requiring state and the solicited one. Starting with the mechanism of the European Arrest Warrant, the cooperation instruments that have at their grounds the mutual recognition principle have marked an easing of the double incrimination rule that represents a useless distrust

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[16] Lorena Bachmaier Winter, The proposal for a Directive on the European Investigation Order and the Grounds for Refusal: A Critical Assessement, in Stefano Ruggeri (Ed.), Transnational Evidence and Multicultural Inquiries in Europe, Springer International Publishing Switzerland, 2014, p.84.

[17] The refusal ground has represented a particular request of the European Parliament within the negotiations of the Directive. What is noticeable is that the Directive is the first instrument that is situated in the repressive sphere where the European Parliament is co-legislator. See D. Flore, *Droit pénal européen. Les enjeux d'une justice pénale européenne*, 2e edition, Larcier, Bruxelles, p. 607.

[18] See ECJ, C-168/13, Jeremy F., Judgment of 3 May 1013, ECLI:EU:C:2013:358, pct. 50.

[19] ECJ, C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru*, Judgment from 5 April 2016, ECLI:EU:C:2016:198.

[20] Lorena Bachmaier, Transnational Evidence. Towards the Transposition of Directice 2014/41 Regarding the European Investigation Order in Criminal Matters, in Eucrim, nr. 2/2015, p.54.

[21] Regina Garcimartin Montero, *The European Investigation Order and the Respect for Fundamental Rights in Criminal Investigations*, in Eucrim, nr. 1/2017, p.47. See, also ECJ, C-399/11, *Stefano Melloni*, Judgment from 26 february 2013, ECLI:EU:C:2013:107.

[22]. Participation in a criminal organization, terrorism, trafficking in human beings sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions and explosives corruption, fraud, including that affecting the financial interests of the European Union within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests laundering of the proceeds of crime counterfeiting currency, including of the euro, computer-related crime, environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties, facilitation of unauthorised entry and residence, murder, grievous bodily injury, illicit trade in human organs and tissue, kidnapping, illegal restraint and hostage-taking, racism and xenophobia, organised or armed robbery, illicit trafficking in cultural goods, including antiques and works of art, swindling, racketeering and extortion, counterfeiting and piracy of products, forgery of administrative documents and trafficking therein, forgery of means of payment, illicit trafficking in hormonal substances and other growth promoters, illicit trafficking in nuclear or radioactive materials, trafficking in stolen vehicles, rape, arson, crimes within the jurisdiction of the International Criminal Court, unlawful seizure of aircraft/ships, sabotage.

signal not compatible with the postulate of mutual recognition[23].

From the economy of the dispositions that regulate the refusal ground, it is concluded that for executing a European Investigation Order the rule is the existence of the double incrimination for the offence.

As an exception, the execution cannot be refused if the offence is included in the list of the 32 crimes mentioned in the directive and adopted by the Romanian law, if these are punished by the issuing state legislation with a maximum of three years of incarceration. Concerning the regulation of the positive list of crimes, doctrinarian discussions about the European Arrest Warrant are maintained, this way being emphasized that these rather represent criminological categories than independent offences, aspect that is meant to offer a big manoeuvring range to the issuing state. But we also appreciate that it maintains the actuality the orientation given by ECJ in the Advocaten voor de Wereld cause. In this cause, concerning the legality of the incrimination principle , ECJ has ruled that, in the process of applying a frame-decision even though the member states textually take over the counting of the categories of infractions from the list of 32, the real definition of these crimes and the applicable sentences are the ones stipulated by the issuing member state's right, and this because the frame-Decision is not following the harmonising of the crimes regarding their constitutive elements or the sentences stipulated for these[24]. At the same time referring to the mutual recognition principle and considering the high level of solidarity and trust between the member states, that, through their nature, or the maximum sentence of minimum three years, the categories of that crime are part of the ones where the gravity of the damage brought to public order and security justifies the elimination of checking the double incrimination[25].

A second exception from the double incrimination is aimed at, by the non-intrusive and non-coercive measures, obtaining information or evidences already in possession of the Romanian execution authority and information that could be obtained in accordance to the Romanian Law within some crime procedures or for the purposes of the evidences that could be European Investigation Order; obtaining information contained in data bases owned by the police or judicial authorities that are direct accessible to the execution authority within some crime procedures; hearing a witness, an expert, a victim, suspect or accused or a third part on Romanian territory; any measure of investigation without a coercive character as it is defined in the Romanian law; identifying abandoned people by a phone number or IP address within the conditions of the Romanian Law.

Expressly, art. 268^8 align 3 takes from the Directive the fact that in case of the European Investigation Order is referring to a offence of custom matters, of taxes of the exchange rate, the executing authority cannot reuse the acknowledgment or execution using the reason that the Romanian legislation doesn't claim the same type of taxes or the same regulations concerning customs, of duties, taxes or currency as the right of the issuing state.

3.8. The impossibility of applying the measure according to the Romanian legislation for the offence referred in the European Investigation Order

The article 2688 let. h) from the Law: „the indicated measure in the European Investigation Order is not stipulated in the Romanian law only for some offences or sentence limits, that don't include the offence that the European Investigation Order refers to".

For example, in case of the soliciting of communications and calls interceptions, the offence where the measure can be displayed has to be found among the ones stipulated in the from the Criminal Procedure Code.

As in the referring situation to the double incrimination, the refusal ground is not incident but for the following measures: obtaining information or evidence already in the possession of the executing Romanian authority and information or evidences that could be acquired, in conformity to the Romanian law, within some crime procedures or in European Investigation Order purposes; obtaining information from data bases owned by the police or judicial authorities that are direct accessible to the execution authority among some crime procedures; hearing a witness, an expert, a victim, a suspect or accused or a third part on the Romanian territory; any investigation measure without coercive character, as the Romanian law is defined; identifying people subscribed to a phone number or an IP address, within the conditions of the Romanian law.

4. Conclusions

Non-recognition and non-execution grounds of a European Investigation Order are either the classic reasons for the cooperation instruments (ne bis in idem principle), but are also noticed through elements of novelty as the ones based on respecting the fundamental rights, aspect that represents an important step in the cooperation matter and shows the ECJ jurisprudence tendency. However all these grounds are optional, the executing authority having only the possibility to refuse the recognition and execution the European Investigation Order and not an obligation.

But, in most of the cases, before deciding the non-recognition or non-executing of a European

[23] D. Flore, p. 584
[24] ECJ, C-303/05, *Advocaten voor de Wereld*, Judgment from 2 May 2007, ECLI:EU:C:2007:261, parag. 52.
[25] Ibidem, parag. 57.

International Order for the execution judicial authority it is established the obligation of consulting with the eminent authority through any means that permit a written recording, and require the eminent authority to provide with no delay any necessary information by case.

References

- Lorena Bachmaier Winter, The proposal for a Directive on the European Investigation Order and the Grounds for Refusal: A Critical Assessement, in Stefano Ruggeri (Ed.), Transnational Evidence and Multicultural Inquiries in Europe, Springer International Publishing Switzerland, 2014
- Lorena Bachmaier, Transnational Evidence. Towards the Transposition of Directice 2014/41 Regarding the European Investigation Order in Criminal Matters, in Eucrim, nr. 2/2015, p.47-60
- Daniel Flore, Droit pénal européen. Les enjeux d'une justice pénale européenne, 2e edition, Larcier, Bruxelles
- Regina Garcimartin Montero, The European Investigation Order and the Respect for Fundamental Rights in Criminal Investigations, in Eucrim, nr. 1/2017, p.47
- Giséle Vernimmen, A propos de la reconnaissance mutuelle des décisions sentencielles en général, in Gilles de Herchove, Anne Weyembergh (coord.), La reconnaissance mutuelle des décisions judiciaires pénales dans l'Union européenne, Bruxelles, Universite de Bruxelles
- Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, published in O.J. L130/1 of 1.5.2014
- Law nr. 302/2004 concerning international judicial cooperation in criminal matters Republished in the Official Romanian Journal, Part I, nr. 377 from 31 May 2011, completed through Law nr. 236 from 5 December 2017, published in the Official Romanian Jurnal nr. 993 from 14 December 2017
- Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the EU, OJ, C 197/1 of 12.07.2000
- Council Framework Decision2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ, C 115/13 of 09.05.2008
- Tampere European Council Conclusions, Finland, 15-16 October 1999
- ECJ, C-399/11, Stefano Melloni, Judgment from 26 February 2013, ECLI:EU:C:2013:107
- ECJ, C-168/13, Jeremy F., Judgment of 3 May 1013, ECLI:EU:C:2013:358
- ECJ, C-404/15 and C-659/15 PPU, Pál Aranyosi and Robert Căldăraru, Judgment from 5 April 2016, ECLI:EU:C:2016:198
- ECJ, C-303/05, Advocaten voor de Wereld, Judgment from 2 May 2007, ECLI:EU:C:2007:261

THE ROLE OF THE ATTORNEY WITHIN THE LEGAL DEBATE DURING A CRIMINAL TRIAL

Bogdan Sebastian GAVRILĂ[*]

Abstract

The attorney, during the criminal trial, endeavours to help his client in any way possible, by utilising a most complex legal arsenal so as to win the debate between the accusation and the defence. The criminal trial often involves very high stakes for the parties involved, which may incur some difficulties in maintaining a normal dialogue until its completion. Thus, the lawyer must step in to facilitate this dialogue, in helping the judge to determine the relevant issues which require a most thorough analysis, so as to ensure that the client receives a fair trial. In fulfilling this objective, he must concentrate his speech on only the key issues and present only relevant conclusions. Failure to do so may result in a dismissal of all his arguments, instead of merely the non pertinent ones. The risk is evident and proper measures need to be taken, in order to minimise it, so that ultimately the judge may grasp the situation accordingly. The aim of the article is to shed some light on the issue at hand, by establishing some good practices which may significantly aid in expressing the viewpoint of the accused to the court in the manner which best fits the needs of the client.

Keywords: *Attorney's Role Criminal Trial Duty Power of Attorney.*

1. Introduction

1.1. What matter does the paper cover?

The paper deals with the many problems which may arise in practice due to the fact that the legal debate during a criminal trial presents more challenges for all parties involved.

It shall focus on outlining several usefuls courses of action for the attorney, in circumventing the most common impediments which may prevent him from exercising his duties to the best of his abilities.

1.2. Why is the studied matter important?

The studied matter is very important given the fact that judicial errors can sometimes be made in the context of an improper legal debate. It thus falls on the attorney to utilise the best means available in order to facilitate the exchange of opinions between himself and the judge in order to prevent any potential problems. The paper shall offer an analysis of the main legal texts applicable and try to establish some useful guidelines to properly employ them.

1.3. How does the author intend to answer to this matter?

Upon a thorough analysis of the legal applicable texts and the views of well renowed legal authors, it is hoped that certain good practices may be identified.

Thus. the recipients of the message may receive potential solutions to the problems which may arise from contradictions between the laws which regulate the procedure.

1.4. What is the relation between the paper and the already existent specialized literature?

The paper shall endeavour to add to the perspectives on the matter at hand expressed in the specialised literature. The authors whose opinions will be integrated in the paper are well known and have managed to offer interesting views regarding the issue. Thus the task of improving on their perspective is that much more daunting. Nonetheless, the article is to establish some useful observations regarding the challenges of ensuring that the rights of the client are respected without infringing upon any legal texts, including the Statute of the lawyer.

2. The legal applicable texts and opinions of some proeminent legal authors

2.1. The Criminal Procedural Code

Firstly, our national Criminal Procedural Code[1] outlines the legal framework regarding the role of the lawer during the debate int the criminal case in: **Article no. 88** -" *The lawyer **assists or represents**, in the criminal proceedings, the parties or the main procedural subjects, **according to the law***. "-; **Article no. 92** - "*…During the preliminary and trial proceedings, the lawyer has the right to **consult the case files**, assist the defendant, **exercise his procedural rights, make complaints, requests, memos, exceptions and objections**… The attorney of the suspect or defendant has the right to benefit from the time and facilities necessary to prepare and carry out an effective defense.*"-; **Article no. 109** -" *… The suspect or defendant has the right to **consult with the lawyer***

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[1] Law no. 135/2010 regarding the Criminal Procedure Code, published in the Official Gazette of Romania no. 486 of July 16, 2010.

***both before and during the hearing**, and the judiciary may, when he considers it necessary, allow him to use his own notes and personal writings…* "; **Article no. 129** -"*… The principal procedural subjects, their parties and their lawyers may **address questions to the witness interviewed under para. (1)**…* "-; **Article no. 378** -" *…The defendant is allowed to express everything he knows about the act for which he was sent to trial, then the prosecutor, the injured party, the civil party, the civilly responsible party, the other defendants, **as well as their lawyers and the defendant's lawyer who is being heard**…*"; **Article no. 388 -** " The debates and the order in which the word is given *(1) At the end of the judicial inquiry the debates shall be debated with the following order: the prosecutor, the injured party, the civil party, the civil responsible party and the defendant(2) The President may also **grant the word in reply.** (3) The **duration of the conclusions** of the prosecutor, the parties, the injured person and their attorneys **may be limited**....* "-

2.2. Law no. 51/1995 Published the Official Gazette of Romania no. 98 of 7 February 2011

The analisys shall also focus on the the lawyer's rights and obligation, as stated in the provisions of his statute, as established by Parlament.

Key aspects fall under article **Article no. 2** -" … In the exercise of his profession, the lawyer is independent **and is subject only to the law, the statute of the profession and the code of ethics**… In the exercise of the right of defense, the lawyer has the right and the duty to enforce the free access to justice for a fair trial **which is to last a reasonable amount of time**. "-; **Article no. 39** -" … The lawyer shall not be liable for the oral or written claims, in the appropriate form and in compliance with the provisions of paragraph (2) before the courts, …if they are done **in compliance with professional deontology rules**… It is not a disciplinary misdemeanor nor can any other legal form of legal liability be attributed to the **lawyer's legal opinions, the exercise of rights, the fulfillment of the obligations provided by law, and the use of legal means to prepare and effectively defend the legitimate** freedoms, rights and interests of his clients. "-; **Article no. 86** -" The lawyer shall be **liable to disciplinary action for failure to comply with the provisions of the present law or statutes**, for failure to comply with binding decisions adopted by the governing bodies of the Bar or the Union and for any acts committed in connection with the profession or outside the profession which are detrimental to the honor and the prestige of the profession, the body of lawyers or the institution.... "-.

2.3. High Court of Cassation and Justice case law

Finnaly, the High Court of Cassation and Justice[2] has expressed in its Appeal in the interest of the law no. 15 of 21 September 2015 formulated by the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice regarding the unitary interpretation and application of the provisions of art. 348 of the Criminal Code, in the case of exercising activities specific to the profession of lawyer by persons who are not part of the forms of professional organization recognized by Law no. 51/1995 that " *in interpreting and applying the provisions of art. 348 of the Criminal Code states: "The act of a person exercising activities specific to the profession of lawyer within entities not belonging to the forms of professional organization recognized by Law no. 51/1995 on the organization and pursuit of the profession of lawyer, republished, as subsequently amended and supplemented, **constitutes the offense of exercising a profession without right or activities provided by art. 348 Criminal Code***."

2.4. The opinion of the legal authors

Adrian Tony Neacșu[3] has expressed his reservations concerning the emphasis on the style of speech instead of on the need for the lawyer to focus on merely conveying the relevant facts of the case and his view on the applicability of the legal texts. His role is not to win a speech contest, but to use the allotted time as efficiently as possible and express as much useful insight as he can.

Some other authors[4] have expressed the idea that " The right to defense is a judicial function exclusively for the lawyer, of crucial importance in achieving impartial justice and a fair trial, **even though this judicial function is not currently expressly regulated in the Code of Criminal Procedure.** ".

Indeed, as it has been pointed out, there are some aspects which may not have been properly and expressly emphasized in the Code of Criminal Procedure, but this is an opportunity to lay the steps for proper relations between the accused and the state with the aid of the attorney.

In the treaty written under the coordination of the late Vintilă Dongoroz[5], the main guideline which is to be followed by the lawyer, consists in doing all that he can in order to aid the party he represents, within the limits of the law and the powers that have been granted to him. In order to achieve this, he may exercise the right to come into contact with the accused, and should

[2] Decision no. 15 of 21 September 2015 of the High Court of Cassation and Justice

[3] Neacșu, Adrian Toni, (2014), „*Convinge judecătorul.Tehnica și arta convingerii instanței*"[Convince the judge. The technique and art of persuading the court], București: Wolters Kluwer, pp. 255-256

[4] RADU, Casandra (2016), *„ Consilieri juridici vs. avocați. Avocați pentru avocați și avocați în apărarea consilierilor juridici* "[Legal advisers vs. Lawyers. Lawyers for lawyers and lawyers for legal advisers], juridice.ro. https://www.juridice.ro/417931/consilieri-juridici-vs-avocati-avocati-pentru-avocati-si-avocati-in-apararea-consilierilor-juridici.html

[5] Dongoroz, Vintilă, coordonator, "*Explicatiile teoretice ale Codului de procedura penala roman. Editia 2. Volumul V,* "[Theoretical explanations of the Romanian Criminal Procedural Code], București: Ch Beck, pp. 94

the accused request it, the right becomes an obligation for the lawyer[6].

Some rights of the accused may be exercised only personnaly, such as the refusal to make any statements, or to have the last statement in the trial[7].

However, it is important to note that in the last example, exercising his duties may mean interrupting his own client when he may incriminate himself.

Mihail Udroiu[8] has also analysed the difficult role of attorney. He considers that the presence of the lawyer during the proocedings is a guarantee of the right to a fair trial, protected by article 6 of the Europeean Convention on Human Rights and also article 3. In cases in which the court appointed attorney is incapable of mounting a proper defence, the defendant may solicit his replacement or that he be jointed by yet another counsellor[9].

3. The interpretations of the author

Firstly, in regards to article **88** of the Criminal Procedural Code, it is crucial to note that the most important obligation of the attorney is to obey the law. No matter how useful for the client would be to invoke certain articles, make unfounded requests to the court, solicit certain witnesses to be heard, despite the evident impossibility in this respect, the primary obligation for the lawyer is to act in full accordance with our legislation.

Indeed, there have been cases in which the lawyer has requested the court to solicit the point of view of the Constitutional Court of Romania in regards to certain legal provisions which may be relevant to the final solution.

Given the fact that once our laws made it mandatory for the court to suspend the entire proceedings until a point of view was presented by the Constitutional Court of Romania on the specific matter at hand, some defendants have greatly benefited from the statute of limitations in their cases, with the court ending the case with an acquittal.

This course of action of postponing the case as often as possible may provide the party with significant advantages - memory loss for witnesses for the prosecution- but it should be noted that it is also in complete defiance of Article 88 and also article 2 of Law no. 51/1995: " *In the exercise of the right of defense, the lawyer has the right and the duty to enforce the free access to justice for a fair trial* ***which is to last a reasonable amount of time***.". Thus, there are certain conflicting issues which stem from the provisions previously indicated, given the necessity for the lawyer to walk a very fine line in terms of avoidind potential infringements.

As to article **92** of the Criminal Procedural Code, it is paramount to note the fact that the attorney should always struggle to receive the needed time in order to mount a most proper defence. There will be cases with an enormous amount of paperwork. He should strive to use the technology available in his favour. High quality fotographs should be taken of the key aspects of these cases, combined with Optical Character Recognition technology aimed at turning the photos into editable text. Thus, sifting through the mountains of information in high complexity cases should prove more feasible.

In regards to Article no. **109,** he should conduct a careful analysis of the aspects which may be revealed during the hearing of the defendant. He has to always be ready to interrupt his client's testimony, should it become damaging for the defence. When the evidence is clearly leading to a guilty verdict, he should seize the opportunity to solicit the applicability of Article no. 375 of the Criminal Procedural Code. He ought to address the proper questions to his client and lead the client into focusing on the key issues during the actual testimony, without any potential deviations. The client, during the stage of the testimony when he freely expresses his point of view, should be guided by the lawyer in order to prove the positive and determined facts, the positive undetermined facts and the negative determined facts. The outcome of the efforts should result in conveying to the court that he is innocent or that he never was near the crime scene.

Article no. **129** of the Civil Procedural Code is equally important in this respect. Here, the role of the lawyer is to address as many control questions as possible to the witnesses in order to establish whether or not they were actually at the time of the crime and have also properly perceived the events. This can be done in a very simple manner, like asking what sort of garment was the defendant wearing at the key moment and presenting survellaince pictures from the local bank which may depict a very different picture. His duty is to challenge the credibility of the witness when his testimony is damaging for the defence but also to enforce the testimony of the defence witnesses in order to convince the court. Of great importance is to constantly corroborate in his mind all the evidence presented before the court in order to gain a proper insight on the needed course of action.

Article no. **378** of Criminal Procedural Code should be interpreted in the sense that the main objective of the defence counsel is to focus on the alibi of the defendant. He should always strive to provide a most compelling alibi, no matter how circumstantial the

[6] Dongoroz, Vintilă, coordonator, "*Explicatiile teoretice ale Codului de procedura penala roman. Editia 2. Volumul V*, "[Theoretical explanations of the Romanian Criminal Procedural Code], București: Ch Beck, pp. 352

[7] Dongoroz, Vintilă, coordonator, "*Explicatiile teoretice ale Codului de procedura penala roman. Editia 2. Volumul V*, "[Theoretical explanations of the Romanian Criminal Procedural Code], București: Ch Beck, pp. 353

[8] Udroiu, Mihail, „ *Procedură penală. Partea generală. Ediția 3*" "[Criminal Procedure. General Aspects. Third Edition], București, 2016, Ch Beck, pp. 48

[9] Udroiu, Mihail, „ *Procedură penală. Partea generală. Ediția 3*" "[Criminal Procedure. General Aspects. Third Edition], București, 2016, Ch Beck, pp. 790

accusatory evidence is or how poorly the case is being handled by the prosecutor. It is not a question of an infringement to the right to be considered innocent until proven guilty, but coming forward before the court is also useful. A proper collaboration during the trial may lead to a more mild sentence, should the unexpected occur and a conviction be passed.

In regards to Article no. **388** of the Criminal Procedural Code there should be noted that in this stage of the trial lies the pinnacle of the defence efforts. The defence speech should be as pertinent as possible. Little time should be allotted for emotional arguments. It is highly likely that the judge is usually impervious to such attempts. Instead, ample efforts should be directed into the facts of the case and why the prosecutor has failed to unequivocally prove the guilt of the accused. Should the facts be clear, the focus should be on the interpretation of the legal texts, in addressing the necessity for the court to apply only those relevant to the case. After these stages, the punishment and other legal measures that are to be taken shall mandatory complete the list of obligations for the lawyer. No other aspects should be addressed, such as offering irrelevant examples. The speech can be completed by the supportive case law, in order to aid the judge in maintaining a unitary judicial practice.

Relevant to this article is the strategy employed by some attorneys to bombard the court with conclusions, exceptions, requests, recusations, many of which failing to address relevant matters. This option is very dangerous for the client, since the judge, after trying to select the most pertinent aspects, may fail to notice some of them, due to the overwhelming amount of inapplicable information to the case in particular. This practice is very damaging to the cause of the defendant and the reputation that usually accompanies the lawyer can in no way usefully serve future clients.

As to Article no. **2** of Law no. 51 of June 7, 1995 it is imperative to readdress the issue of artificialy prolonging the length of the trial by means of procedural or substancial law based strategies. Indeed, the fact that the client can benefit from the statute of limitations for his crime is a clear indication of fulfilling the duty of providing a most useful defence. However, so is falsifying evidence to serve one's needs and witness tampering. These means can never justify the end. The counsellor is obligated to abide by the legal provisions and his legal statute. Clients shall always come and go, but committing a crime to serve their interests or damagind one's reputation can never be a valid course of action.

Article no. 39 can be viewed as a safeguard for the lawyer, free to emit his opinion on the matter at hand. However, evident difficulties may arise from its interpretation. This freedom can lead to dissservices for the client. As previously indicated, there are cases in which the lawyer expresses his opinion over the course of multiple pages and during very long debates. Indeed, the court is able to limit such interventions, but these practises should be discouraged. In the instances when the opinion of the lawyer is severely irrelevant and also the length of the arguments is unreasoanable, certain measures should be undertaken in order to limit this type of practice. Over the long run, its effects are severely damaging for a large number of clients who receive defences which span over dozens of pages but out of which extremely little actually aids their cause.

Another aspect of interest is that of the obligation to ensure all that he can do to allow for a trial which lasts a reasonable amount of time. In the examples previously mentioned, the length of the proceedings is unorganically altered, in violation of article 2 of Law no. 51 of June 7, 1995.

Article no. **86** of Law no. 51 of June 7, 1995 thus becomes applicable in this particular case, since the attorney, in attempting to provide a most complex defence, fails to respect article no. 2. Indeed, the solution of disciplinary action should be employed with the utmost consideration, but in some cases in which the mannor of the proceedings has reached a very alarming level, in ensuring the right to fair tiral for future clients, the practice should receive due attention and proper sanctions. A proper fulfilment of his role can never allow for any deviation of the main goal of offering a most pertinent opinion for the judge and not bombarding him with useless information.

4. Conclusions

4.1. Summary of the main outcomes

It is evident that the more rules and regulations exist, the easier it is for the counsellor to be in situations where they contradict. The main focus of the article was to identify the ones which may seem more problematic.

As for the aspects which derive from the interpretation of the Criminal Procedural Code, it is important to point out that any requests made during the trial should be as pertinent as possible. The legislation has been modified, soliciting the opinion of the Constitutional Court of Romania no longer attracts a mandatory suspension of all proceedings. But that does not mean that there could be some judges who could interpret the law in such that a way that they see no impediment in suspending. So, requesting the suspension could mean an act of defence, in accordance with Article no. 39, but in violation of Article no. 2 of Law no. 51/1995.

Mounting a proper defence may sometimes mean advising the client not to offer testimony. The importance of knowing when to proceed in this manner and when to employ Article no. 375 of the Criminal Procedural Code cannot be stressed enough. The flair of the lawyer is revealed most often in the way in which he choose which legal battles to engage in. Refusal to capitulate may seem very heroic, but his role in the debate can sometimes mean that embracing defeat is the most useful option for the client.

In regards to witness testimony, the lawyer should always prepare several control questions which may

help the court decide on the credibility of the person who is being questioned. He should always ask the witness whether or not he is sure of what he has expressed. Any waverings are always beneficial for the accused.

He should always focus on the alibi and how the facts of the case relate to the facts presented by the defendant since any uncorroborated pieces of evidence cannot justify the conviction.

Every single time a reasonable amount of doubt can be prooven, every single time some key aspects do not relate to one another, it is mandatory for the court to interpret the evidence in the favour of the defendant. It is here the role of the attorney is of the utmost importance, since most cases are not clear. The court cannot proceed to imprison a person if it is not certain of the evidence presented before itself. Indeed the lawyer should sometimes avoid creating too much doubt since the judge may overwhelmed by too much stimuli and overview some key aspects regarding the defence.

Thus it is of great importance that the ending speech for the accused be as shortest possible and it should also integrate all that is useful in viewing the case from the perspective of the defendant. Failure to refrain oneself from providing the judge with too much unnecessary information may be extremely detrimental to the client. In the long term a significant number of individuals could pay a far too high cost for this error in strategy. It is better to be clear in making one's point, especially in cases where the stakes are so high.

Finally, artificially prolonging the duration of the trial can never be a winning strategy. It can also be very stressful for the client to wait years and years to receive a solution from the court. In preventing this, the lawyer should always endeavour to respect the provisions of Article 2 of law number 51/1995 in regards to a reasonable duration the the trial.

4.2. The expected impact of the research outcomes

The article shall hopefully facilitate an improved communication between the lawyer and the court, in ensuring a proper defence of the fundamental rights of the accused. It is hoped that it shall inspire new research regarding the matter at hand in establishing even more correct courses of action in the interpretation and application of the articles previously analysed.

4.3. Suggestions for further research work.

New research could offer a multidisciplinary approach on the subject, by utilising aspects of Psychology and Philosophy in order to present a more complex perspective.

It could also establish *de lege ferenda* proposals in modifying the content of some of the articles analysed above in order to avoid potential contradictions between the legal texts so that the role of the attorney be simplified.

References

- Law no. 135/2010 regarding the Criminal Procedure Code, published in the Official Gazette of Romania no. 486 of July 16, 2010
- Law no. 51/1995 Published the Official Gazette of Romania no. 98 of 7 February 2011
- Decision no. 15 of 21 September 2015 of the High Court of Cassation and Justice
- Dongoroz, Vintilă, coordonator, "Explicatiile teoretice ale Codului de procedura penala roman. Editia 2. Volumul V, "[Theoretical explanations of the Romanian Criminal Procedural Code], București, 2003, Ch Beck
- Neacșu, Adrian Toni, (2014), ,,Convinge judecătorul.Tehnica și arta convingerii instanței"[Convince the judge. The technique and art of persuading the court], București: Wolters Kluwer
- RADU, Casandra (2016), ,, Consilieri juridici vs. avocați. Avocați pentru avocați și avocați în apărarea consilierilor juridici "[Legal advisers vs. Lawyers. Lawyers for lawyers and lawyers for legal advisers], juridice.ro. https://www.juridice.ro/417931/consilieri-juridici-vs-avocati-avocati-pentru-avocati-si-avocati-in-apararea-consilierilor-juridici.html
- Udroiu, Mihail, ,, Procedură penală. Partea generală. Ediția 3" "[Criminal Procedure. General Aspects. Third Edition], Bucureşti, 2016, Ch Beck

THE CONFIDENTIALITY OF THE MEDICAL ACT IN THE DEPRIVATION OF LIBERTY ENVIRONMENT

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Abstract

Respecting the medical secrecy is one of the essential conditions underlying the protection of private life. Medical information obtained from patients in the context of a physician - patient relationship should be protected by confidentiality. Disclosure of personal health care data without the agreement of the person is a touch brought to private life. One particular feature of the health care system is the healthcare provided to patients in detention. Even though the doctor-patient relationship in the penitentiary environment has a number of peculiarities, it is coordinated according to the same ethical principles as in the public one. The penitentiary physician's duty is not limited to consultation and treatment, he often becomes the prisoner's personal physician, and the means of relationship must respect the fundamental rights of the patient, regardless of his or her status.

In the penitentiary system, there are also many dilemmas arising from the duties of the medical staff, the first of the detainee's personal physician and the second of the penitentiary administration's counselor.

The medical specialist in a penitentiary must take into account that communicating with the patient is essential in the doctor-patient relationship and she must be sincere. In determining the attitude of the patient towards the doctor and the medical act, the context of the first contact with the doctor, the way in which the first medical consultation takes place, is of great importance. Trust is gradually gaining, and medical staff must strive to demonstrate that they can ensure the protection of prisoners' medical records.

Keywords*: medical secret, penitentiary, health condition, detainee, secret.*

Introduction

Exercising certain professions involves, in many cases, getting the relevant professional from another person to have information about it and which, if disclosed to someone else, could cause injury. All this information obtained by a person in the exercise of his profession or practicing his profession falls within the broader concept of professional secrecy. Professional secrecy, though it seems a simple notion, involves many nuances, involves many facets, determined not only by the multitude of professions / professions in which the obligation of professional secrecy is imposed. But the issue of determining the extent of the obligation of professional secrecy is as old as the secret itself. It was born in the context in which it was obvious that the strict application of the principle of professional secrecy can have disastrous consequences[1].

Human health is the ultimate goal of the medical act. The duty of the physician is to protect the physical and mental health of the human being, to alleviate suffering, and to ensure the respect for the life and dignity of the human person, without any discrimination[2].

In order to establish the attitude towards the patient and the medical act, the physician, in the exercise of his profession, prioritizes the patient's interests, whatever the status of the patient. Confidentiality is one of the most important values of the medical act that underlie the doctor-patient relationship, representing, and an obligation, stipulated in olden times, the Hippocratic oath being the basic principle[3]. Hippocrates, the father of medicine, wanted to bring attention to the importance of medical consultation and the status of doctor-patient relationship. This oath that all graduates of a faculty of medicine complete when completing their studies and receiving the right of medical practice and who has become a moral code of any practitioner in the exercise of his / her lifetime profession, gives the moral and ethical view of a physician: Whatever I see and hear while doing my job, or even beyond it, I will not talk about what is no need to be revealed, considering that under such circumstances keeping the mystery is a duty[4]. "

The protection of personal data is a fundamental right enshrined in the Charter of Fundamental Rights of the European Union, in art. 8. These data may be used only for specified purposes and on the basis of the consent of the person concerned or another legitimate reason provided by law.

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[1] Legal Considerations on Medical Professional Confidentiality, Between the Obligation to Preserve and the Disclosure of DrD. Ilie Dumitru lawyer, Bucharest Bar, Universul Juridic Magazine, no.9, September 2016, pp. 85-99

[2] Extract from the Medical Deontology Code of the College of Physicians in Romania 2005

[3] The limits of medical secrecy, DR. MIHAELA-CATALINA VICOL

[4] Legal Considerations on Medical Professional Confidentiality, Between the Obligation to Preserve and the Disclosure of DrD. Ilie Dumitru lawyer, Bucharest Bar, Universul Juridic Magazine, no.9, September 2016, pp. 85-99

Paper content

In Romania, according to the provisions of art. 21 of Law no. 46/2003 on patient's rights, all information about the patient's condition, the results of the investigations, the diagnosis, the prognosis, the treatment, are confidential even after his death. The exceptions to the confidentiality principle set out in the legislation are: situations where the law expressly requires it, if the information is needed by other healthcare providers involved in the patient's care, if the patient is a danger to himself or if the patient is a danger for public health[5].

Any breach of confidentiality (except as permitted by national or international law) is considered to be a violation of professional secrecy, with legal and criminal legal consequences for the physician[6]. Thus, according to Romanian criminal law "the disclosure, without right, of data or information concerning the private life of a person, capable of causing injury to a person, by the one who has become aware of them by virtue of his profession or function and who has the obligation of confidentiality with respect to these data shall be punished by imprisonment from 3 months to 3 years or by fine[7]."

The legal norms speak with the ethical principles of patient rights before talking about the citizen's right to information, which in any civilized society does not rely on the right to self-determination, privacy and medical secrecy (except where the same rights of other individuals are in danger). Deontological and Legal There is no transparency in medical confidentiality (unless expressly required by the law). The medical domain of information covered by the professional secrecy is not a public domain, the data being accumulated being classified[8].

A special approach to the protection of personal data is highlighted in the deprivation of liberty when there may be suspicion of the application of insufficient measures to respect the individual interests of the persons detained.

For any human being, deprivation of liberty is a special situation with a broad resonance in the living environment, both during and after detention, in freedom[9]. The communication "works" differently in the reference public space compared to the penitentiary. Behind the pillars, the written regulation - as opposed to the initial verbal connotation and subsequently codified social relations - regulates the relations between the surveillance staff, the administration and the detainees, as well as the relationships between the "reeducations[10]".

Penitentiary, in the first phase, requires adaptation and integration to a particular pattern of life, driven by entirely different laws. The establishment of inter-human relations is made after other considerations and under other conditions, the value hierarchy acquires another face, passing through successive deformations to the normal social model, unanimously accepted. Inherent adaptive tensions are accumulated, and often the condemned person will not be aware of the culpability of the act done in the existential sense. The notion of freedom is emptied of content, completely disappearing the feeling of belonging to the social, the desire for active integration. The society that blames is also blamed for denial[11]. The peculiarities of the penitentiary environment and the psychology of the custodial persons impose that in the beginning any contact between the personnel and the detainees should have a specific connotation, the mutual mistrust and only after long periods of probation a complete communication can be established.

Once in prison, detainees have to assign specific identities, from their excluded position they have moral values that are apparently opposed to those of ordinary citizens, which would allow them to regain an honorable identity - "we are simply different from you "- they say[12].

The shock of entering the penitentiary is directly proportional to the pre-existing emotional disorder: the more sensitive, the weak, the affective and the socially immature, the sick, in general, suffer the most. Sometime later - a month or two - the victim becomes victimized when the prisoner realizes the magnitude of touch - loss from conviction and begins to imagine the handicap of the legal situation, the failure to satisfy the need for moral, emotional helplessness and dispossession accentuated by the presence the other detainees with whom they can't find affinities at first[13].

During custody, detainees must have access to a doctor at any time, regardless of the detention regime they are subject to. This is especially important when the person has been placed in a solitary confinement regime. The medical service must ensure that the doctor's consultation is promptly performed without justification[14].

Except for emergencies, every medical examination / consultation is done in a medical consulting room to create privacy, privacy and dignity.

[5] Art.22, Art.23 and Art.25 paragraph (2) of the Law no. 46/2003 on patient's rights

[6] Consensus and confidentiality in the medical assistance of women victims of domestic violence Sorin Hostiuc, Cristian George Curca, Dan Dermengiu - Romanian Journal of Bioethics, Vol. 9, Nr. 1, January - March 2011 Page 41

[7] https://legeaz.net/noul-cod-penal/art-227

[8] Course INML - Bioethics Legal responsibility in the medical act. Bioethics as medical science. Confidentiality and consensus in medical practice. Aspects of legislation

[9] http: // www.scritube.com./sociology / environment-penitentiary, accessed on 26.02.2018

[10] Communication in the Romanian concentration area - Dragoş Cârciga

[11] Influence of the penitentiary environment on criminal criminology -Barbu Ana-Maria page 3

[12] LE CAISINE (L.), ,Prison – Une ethnologue en centrale, Editions Odile Jacob, Paris, 2000, p. 78-79.

[13] http: // www.scritub.com - Specialized Penitentiary Intervention - Accessed on 29.02.2018

[14] Health care and medical ethics in penitentiaries - Manual for medical staff and other prison staff, responsible for the welfare of detainees, p.12

Medical confidentiality must be guaranteed and respected with the same rigor as the general population. Detainees should be examined individually, not in groups. No third person without medical specialization (other inmates or non-medical staff) should not be present in the examination room[15]. If medical staff who come in contact with prison-guards communicate openly, with a sincere mood to listen to the needs of detainees before asking them, then they will get a positive feed-back, even if not always from the first consultation.

Communicating with the patient is essential in the doctor-patient relationship and she has to be honest. Often, a "good" doctor is considered to be the one who "speaks", "listens" and "counsels", aspects that become visible in front of numerous titles or diplomas of excellence.[16] In the case of a recalcitrant prisoner, the primary objective is that health professionals involved in direct activities with detainees communicate more with those who have problems because it stimulates their confidence, and the prison doctor tries to restore the patient's calm by approaching the patient's demands, juggling with administrative solutions to pacify the patient. Most of the time, it is NOT necessary or appropriate to ask the inmate who is at risk, about his intentions of self-harm, in conversations that medical staff has with him.[17] The consulting cabinet is the place where the patient expands his or her suffering, and this applies to detainees, and for the physician, this is the most important opportunity to establish the diagnosis and treatment, as well as the physician-patient confidentiality relationship.

In the penitentiary, as in another small community, the doctor occupies a special position, recognized both by the status imposed by his profession and by his personality, through which he gains his social prestige.

The physician's activity is, in this environment, governed by the deontology of his profession, embodied in the set of the behavioral norms of reference.[18] The International Code of Medical Ethics states that "a doctor will keep absolute secrecy about everything he knows about the patient, regardless of his or her status, because of the patient's trust[19]."

The detainee seeks medical assistance by virtue of an acquired social role, such as sick, a role that may be temporary or permanent.

There are four features of the patient in the detention environment:

- Disease can offer the patient the possibility of diminishing tasks and responsibilities; he may gain certain rights, the healing occurring in such cases at the end of the detention;
- the patient does not want healing, he / she asks to confirm the affection he suffers, there is a tendency to exaggerate or to refuse the relationship with the physician who denies the alleged affection;
- Not all patients want to heal because the role of the patient and, implicitly, the rights they gain benefit from them[20];

In the detention environment, the situation where the patient asks the doctor to confirm a certain diagnosis, as well as the prescription of a certain treatment. In this way, the character of the disease is deviant, the disease state of the patient is illegitimate, and the doctor-patient relationship can become conflictual.

In such situations, the physician must maintain a balance between helping and refusing, advising the authorities or continuing the confidential relationship. However, and in this context, the patient must be protected and his / her personal information passed to the physician must remain confidential in accordance with the legal provisions. In this regard, the physician helps the patient for his pathological condition, refusing him for the side that gives him rewards resulting from the disease state, proving to him that the disease state can't be exploited. Thus, the legislator wanted these issues to be foreseen in the executive - criminal law. By art. 72 of the Law no.254 / 2013 on the execution of sentences and deprivation of liberty ordered by the judicial bodies during the criminal trial, it is stipulated that "the medical examination is carried out in confidentiality conditions, with the provision of safety measures, respectively, the presence of the surveillance staff is performed only at the request of the medical personnel (in the case of dangerous detainees, violent, with a history of attack on personnel). But also in this context, detainees should not be handcuffed during the consultation, and surveillance staff should be outside the field of vision and sound when conducting medical examination.

In order to ensure confidentiality, in these cases medical shields are used in front of the consultation bed for the protected medical examination. However, the Council of Europe's Committee on the Prevention of Torture and Inhuman or Degrading Treatment (CPT), in its visits to Romania, has brought to light cases of privacy violations due to the presence of surveillance staff in the consulting cabinet. Another aspect of privacy is the protection of medical records.

According to the provisions of art. 60 of the Law no.254 / 2013 on the execution of sentences and deprivation of liberty ordered by the judicial bodies during the criminal trial "the personal data of convicted

[15] Health care and medical ethics in penitentiaries - Manual for medical staff and other prison staff, responsible for the welfare of detainees, p.12
[16] The Limits of Medical Secrets - Dr. Mihaela-Catalina Vicol
[17] Autoaggressive Behavior - editorial The Medical Directorate and Social Reintegration Division - The National Administration of Penitentiaries in Romania
[18] Doctor-patient relationship in the detention environment - dr.Constantin Ouatu, dr.Beatrice Ioan, dr.Diana Bulgaru Iliescu
[19] The Limits of Medical Secrets - Dr. Mihaela-Catalina Vicol
[20] Doctor-patient relationship in the detention environment - dr.Constantin Ouatu, dr.Beatrice Ioan, dr.Diana Bulgaru Iliescu

persons are confidential, according to the law"[21] even the lawyer or relatives can obtain, data or photocopies related to the medical history, only with the written consent of the convicted person[22]. Thus, medical staff in penitentiaries has all the necessary measures for all medical records to be kept in places that ensure confidentiality, and when presenting to medical investigations outside the penitentiary system or when transfers between prison units are made, the medical file is presented confidentially, in a sealed envelope.

However, in the penitentiary system, there are many dilemmas arising from the duties of the medical staff, the prisoner's personal physician and, respectively, the penitentiary administration's counselor. For example, the request from the penitentiary management to provide surveillance staff, knowledge of inmates diagnosed with HIV / AIDS may be a conflict with the interest of the patient who has the status of detained. In this case, the doctor is faced with a dilemma if he can consider the detainee in his / her book as HIV / AIDS as a danger to public health, given the aggressiveness of such detainees through acts of violence against the staff , blood splashes, bites, etc.), or need to protect the patient by refusing to supply a diagnosis.

We mention that, in the Romanian legislation through the provisions of Law no. 584/2002 on measures to prevent the spread of AIDS in Romania and to protect persons infected with HIV or AIDS patients, stipulates in Article 8 the obligation of confidentiality of data for these patients:

"Keeping the confidentiality of data on HIV-infected or AIDS-sick people is mandatory for: health care staff; employers of these people; civil servants who have access to these data.

Also, in connection with the transfer of detainees with infectious-contagious diseases through the means of transport of the penitentiary system, there were invoked situations of affecting the safety of the transfer missions on the grounds of contagious diseases.

We reiterate that the Patient Rights Act no. 46/2003 (Articles 21 and 22) and the Order of the Minister of Health no. 1410/2016 on the approval of the Rules for the application of the Patient's Rights Law no. 46/2003 (Article 11 (2) and Annex 5 to the Rules) clearly state that medical data may only be communicated with the consent of the patient and only to persons expressly designated by him (to this end, it is not permitted to disclose the diagnosis on documents to which several non-specifically identified people have access). The fact that most infectious-contagious diseases have a high stigmatization and discrimination potential once again supports the need to respect medical confidentiality in the penitentiary environment.

In this condition, even in art. 166 par. (1) GD no. 157/2016 for the approval of the Regulation on the application of Law no. 254/2013 on the execution of sentences and detention measures ordered by the judicial bodies during the criminal proceedings regarding the "Confidentiality of the data regarding the state of health of detainees" stipulates:

"Except the cases expressly provided for by law, health information may be provided to other persons only if the detainees or their legal representatives give their consent free, informed, in writing and in advance." In order to effectively protect the health of staff and prisoners and respect for the confidentiality of medical data, diagnostic codes were used for a short period of time, according to the International Classification of Diseases, WHO revision 10, but from practice that the use of disease codes is by no means a way of secrecy but, on the contrary, coding is done in order to find a faster (and, implicitly, more superficial) diagnosis of a patient.

Early knowledge of a prisoner's infectious status is not a means of protecting the health of the staff, as there are no legal provisions whereby operational incidents are managed differently from infected individuals to healthy ones and the separation criteria can not be decided by the members of the escort, who do not have medical training (even if they know the real diagnosis) [23].

Thus, this configuration was rethought and regulated in the Romanian penitentiary system, by cataloging the detainees as "medical-surgical vulnerable cases", so that the surveillance staff must ensure protection measures in all cases of contact directly with any detainee.

Another issue underlying the confidentiality of professional secrecy is found in the obligation of medical staff to advertise when prison services are abusive, immoral or inmates are subjected to ill-treatment, which poses a potential danger to their lives and health[24].

In such cases, even if the detainee refuses to recognize the abuse for fear of possible repercussions, the medical staff has an ethical obligation to take prompt action, since failure to take an immediate position makes it more difficult to object at a later stage[25]. International codes and ethical principles require reporting of torture or ill-treatment information to responsible bodies[26]. In the Romanian penitentiary system, this aspect is a legal requirement, so if he / she

[21] Art.60 par. (8) of the Law no. 254/2013 on the execution of custodial sentences and measures involving deprivation of liberty by the judiciary in the course of criminal proceedings

[22] Art.60 par. (5) of the Law no. 254/2013 on the execution of custodial sentences and measures involving deprivation of liberty by the judiciary in the course of criminal proceedings

[23] View point Dr. Laurentia Ștefan and Dr. Cosmin Decun at ANP-DSDRP-SPEDT no. 51084 / 11.09.2017 regarding the deficiencies found in carrying out the transfer missions of detainees

[24] The Istanbul Protocol

[25] The Istanbul Protocol

[26] The Istanbul Protocol

finds evidence of violence or the convicted person is accused of violence, the doctor conducting the medical examination has the obligation to record in the medical record the findings and the declarations of the convict in connection with or any other aggression, and to immediately notify the public prosecutor[27].

Another view on the confidentiality of medical data is that of disclosure after the patient's death. This approach is different in the Romanian penitentiary system compared to the national system. If in the matter of the death of a person at large, the national legislation states that "all information on the patient's condition, the results of the investigations, the diagnosis, the prognosis, the treatment, the personal data are confidential even after his death[28], the implementing law - 52 par. (3) of the Law no. 254/2013 on the execution of sentences and detention measures ordered by the judicial bodies during the criminal proceedings that "the spouse or a relative up to the fourth degree or any other person designated by them has access to the individual file, the medical certificate of death and any other act related to the death of the convicted person and can obtain, upon request, photocopies thereof, on request.

In this case, the principle of knowing the truth about the right to health is a matter of professional secrecy. The primary task of a prison doctor and other healthcare workers to ensure the health and welfare of detainees must be highlighted.

Conclusion

The physician-patient relationship materializes, in most cases, through a special relationship, a certain type of affective relationship.

One of the most important issues in the doctor-patient relationship - especially at the beginning but not only - is communication, which is influenced by many factors. One of the special circumstances that influence this relationship is the situation of the patient whose status is offender who executes his custodial sentence. The penitentiary environment is a special environment with specific requirements, and communication in this environment is essential.

In the patient-patient relationship, the personality of the patient is very important, but equally important is the personality and attitude of the doctor towards the patient, by the way of being the doctor, the patient being converted into believing in the value scale of the first and adopt them.

The meeting between the doctor and the patient is a meeting between two different personalities who are in different positions and who take place in different stages, which is why - during the course of the relationship - the tendency must be balancing by adapting the ideas, expectations, parties to those of the other party in order to gain confidence and then medical confession. The doctor-patient relationship detained leaves free personal trends, unconscious feelings, beliefs and prejudices. The patient must be given protection and models to develop his / her potentials so that he / she can cope with changes in his / her existence. It is important that he does not consider himself an object, as there is a risk when he enters the penitentiary system. Respect for confidentiality is essential in order to provide the atmosphere of trust that is required for the doctor-patient relationship; it is the duty of the physician to ensure such a relationship and to decide on how to observe confidentiality rules in a particular case. A doctor in the penitentiary performs his duties as a personal physician of a patient. Health professionals need to look for solutions that promote justice without violating the person's right to privacy[29].

References

- Manual for medical staff and other penitentiary employees responsible for the welfare of detainees - Health care and medical ethics in penitentiaries - Romanian version published with financial support The Romanian version is published with the financial support of the Council of Europe Project "Supporting the Criminal Justice Reform of the Council Project Europe "Supporting Criminal Justice Reform in the Republic of Moldova" funded by the Government of Denmark
- Law no.254 / 2013 on the execution of sentences and detention measures ordered by judicial bodies during criminal proceedings
- Law No. 46/2003 on patient's rights
- Order of the Minister of Health no. 1410/2016 on the approval of the Rules for the application of the Patient Rights Law no. 46/2003
- Istanbul Protocol - Manual for Effective Investigation and Documentation on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Proposed to the United Nations High Commissioner for Human Rights 9 August 1999

[27] Art. 72 paragraph (3) of the Law no.254 / 2013 on the execution of sentences and detention measures ordered by judicial bodies during criminal proceedings

[28] Article 21 of Law No. 46/2003 on Patient Rights

[29] Health care and medical ethics in penitentiaries - Manual for medical staff and other penitentiary employees responsible for the welfare of detainees; The Romanian version published with financial support The Romanian version is published with the financial support of the Council of Europe Project "Supporting the Criminal Justice Reform of the Council of Europe Project" Supporting the Reform of Criminal Justice in the Republic of Moldova ", financed by the Government of Denmark, p.12

- Documents at the level of the Medical Directorate of the National Administration of Penitentiaries in Romania (Dr. Laurenţia Ştefan and Dr. Cosmin Decun at ANP-DSDRP-SPEDT No. 51084 / 11.09.2017, regarding the deficiencies found during the deployment missions for the transfer of detainees; Autoaggressive Behavior - Editorial Medical Directorate and Social Reintegration Division)
- Doctor-Patient Relationship in Detention Area - Dr. Constantin Ouatu - Iaşi Penitentiary, Dr. Beatrice Ioan - IML Iaşi, Dr. Diana Bulgaru Iliescu - IML Iaşi www.bioetica.ro/index.php/arhiva-bioetica/article /download/.../529
- The Limits of Medical Secrecy, essay author DR. MIHAELA-CATALINA VICOL https://www.ziaruldeiasi.ro/opinii/limitele-secretului-medical~ni4mg2
- LE CAISINE (L.),, Prison - One ethnologue en central, Editions Odile Jacob, Paris, 2000, p. 78-79.
- http: // www.scritub.com - Specialized Penitentiary Intervention - Accessed on 29.02.2018
- Law no. 46/2003 on patient's rights
- Consent and Confidentiality in the Healthcare of Women Victims of Domestic Violence Sorin Hostiuc, Cristian George Curca, Dan Dermengiu - Romanian Journal of Bioethics, Vol. 9,Nr. 1, January - March 2011 Page 41
- https://legeaz.net/noul-cod-penal/art-227
- INML course - Bioethics Legal responsibility in the medical act. Bioethics as medical science. Confidentiality and consensus in medical practice. Aspects of legislation
- http: // www.scritube.com./sociology / environment-penitentiary, accessed on 26.02.2018
- Communication in the Romanian concentration camp - Dragoş Cârciga https://foaienationala.ro/comunicarea-spaiul-concentraionar-romnesc.html
- The Influence of the Penitentiary Environment on Criminological Crime Barbu Ana-Maria pag.3 http://www.drept.unibuc.ro/Influence-of-the-Penitentiary-of-criminal-of-pricing-of-criminal-critical - Barbu-Ana-Maria-s289-A527-ro.htm
- The Code of Medical Deontology of the Romanian College of Physicians in 2005
- https://www.universuljuridic.ro/despre-confidentialitatea-informatiilor-si-viata-privata-a-pacientilor/GeorgeCOCA
- Legal Considerations on Medical Professional Confidentiality, Between the Obligation to Preserve and the Disclosure of DrD. Ilie Dumitru lawyer, Bucharest Bar Association, Jurnal Universul Magazine, no. 9, September 2016

LEGISLATIVE MEASURES ON THE ISSUE OF PRISON OVERCROWDING AND IMPROPER MATERIAL CONDITIONS OF DETENTION, FOLLOWING THE ECtHR PILOT-JUDGMENT REZMIVEȘ AND OTHERS AGAINST ROMANIA

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Abstract

This paper deals with the issue of prison overcrowding and improper material conditions of detention.

The first part of the study is developed based on the national standards, followed by a presentation of the international standards (United Nations, Council of Europe, European Union), dwelling especially on the provisions of the European Convention of Human Rights and of the European Prison Rules.

An analysis is made based on the ECtHR judgements regarding prison overcrowding and the infringement of the art. 3 of the European Convention of Human Rights regarding the prohibition of torture or inhuman or degrading treatment or punishment.

Further, the paper focuses on the main ECtHR pilot judgements on overcrowding and material conditions of detention, especially those against Romania. Iacov Stanciu case and *Rezvimeș and others case.*

We will also evaluate the current and possible solutions to solve the issue of prison overcrowding and improper material conditions of detention, namely solutions that will, in the future, avoid convictions in front of the ECtHR: different compensatory remedies for prisoners executing the penalty in overcrowding prisons.

Concluding, the study will attempt to express some recommendations in drafting future legislative measures in order to limit the problem of prison overcrowding.

Keywords: *prison overcrowding; material conditions of detention; ECHR; ECtHR; Romanian legislation.*

1. Introduction

According to art. 3 (prohibition of torture) from the European Convention of Human Rights, ”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[1].

While measures depriving a person of his liberty may often involve an inevitable element of suffering or humiliation, nevertheless, the suffering and humiliation involved must not go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment[2].

The ECtHR has emphasized that a detained person does not, by the mere fact of his incarceration, lose the protection of his rights guaranteed by the Convention. On the contrary, persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Under art. 3 the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured[3].

If the problem of prison overcrowding amounts to a structural problem, in many cases already acknowledged by the domestic authorities or by regional commitees, such as the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (C.P.T.), then the ECtHR will give a so-called ”pilot judgment” by which the Court concludes that the overcrowding in prisons from a certain Member State revealed a structural problem consisting of “a practice that is incompatible with the Convention”[4].

It should be stressd out that in such cases, the respondent State has a legal obligation under Article 46 of the Convention not just to pay those concerned the sums awarded by way of just satisfaction under Article

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[1] 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, available at: https://www.echr.coe.int/LibraryDocs/HR%20handbooks/handbook06_en.pdf, accessed 12.03.2018.

[2] ECtHR, judgment from 20.10.2011, in the case of *Mandić and Jović v. Slovenia*, nos. 5774/10 and 5985/10, para. 73.

[3] ECtHR, *Valašinas v. Lithuania*, no. 44558/98, § 102, ECHR 2001-VIII; Kudła v. Poland [GC], no. 30210/96, § 94, ECHR 2000-XI.

[4] ECtHR, judgment from 22.10.2009, in the case of *Orchowski v. Poland*, no. 17885/04, para. 147.

41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. The respondent State remains free, subject to monitoring by the Committee of Ministers, to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment[5].

2. Prison overcrowding

2.1. Relevant internal legislation

By depriving a person of his or her liberty the authorities assume responsibility for providing for that person's vital needs. The deprivation of liberty in itself bears a punitive character. The state has no authority to aggravate this by poor conditions of detention that do not meet the standards the state has committed itself to upholding[6].

The right to life, as well as the right to physical and mental integrity of persons is guaranteed by article 22 of the Romanian Constitution, which also provides that no one may be subject to torture or to any kind of inhuman or degrading punishment or treatment. Death penalty is prohibited.

The execution of criminal custodial penalties is subordinated to two principles; according to the provisions of Law no. 254/2013 on enforcement of custodial penalties and of measures ordered by the judicial bodies during the criminal proceedings[7] (Law no. 254/2013), art. 4 and 5, the custodial sentences shall be enforced under conditions that ensure the respect for human dignity and it shall be forbidden to subject any prisoner to torture, inhuman or degrading treatment or other ill-treatment. The violation of such provisions shall be punishable under the Criminal Code[8].

According to the provisions of Law no. 254/2013, the execution of the imprisonment or life imprisonment sentences are executed in designated places, called prisons. The execution of sentences in prisons is made by classifying the person into one of the execution regimes provided by Law no. 254/2013: maximum safety, closed, semi-open or open.

The legal provisions regarding the accomodation of the prisoners are set out in art. 34-38:

- the convicted persons serving the sentence in a maximum security regime shall be accommodated, as a general rule, individually;
- the convicted persons that serve the sentence in a closed regime shall be accommodated, as a general rule, together with other prisoners (from the same regime);
- the convicted persons that serve the sentence in a semi-open regime shall be accommodated together and may go unattended to pre-determined areas inside the premises of the penitentiary;
- the convicted persons that serve the sentence in a open regime are accommodated together and may go unattended to pre-determined areas inside the premises of the penitentiary.

The minimum standards regarding the accommodation of the prisoners are regulated in art. 48 para. (3), (4), (7) of Law no. 254/2013. In this sense, the law stipulates that the prisoners are accommodated individually or toghether with other convicted persons. The rooms for accommodation and other rooms intended for prisoners shall have natural lighting and

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[5] ECtHR, *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII.

[6] Association for the Prevention of Torture (APT), *Monitoring places of detention. A practical guide*, (Geneva, April 2004), 139, available at: http://www.apt.ch/content/files_res/monitoring-guide-en.pdf, accessed 12.03.2018.

[7] Law no. 254/2013 on enforcement of penalties and of measures ordered by the judicial bodies during the criminal proceedings, published in the *Official Journal of Romania, Part I, no. 514 of August 14, 2013*.

[8] Art. 281. Submission to ill treatment

(1) Submission of an individual to serve a sentence, security or education measures otherwise than as provided by the legal provisions shall be punishable by no less than 6 months and no more than 3 years of imprisonment and the deprivation of the right to hold a public office.

(2) Submission of an individual who is being withheld, detained or serving a custodial sentence, or security or education measures to degrading or inhuman treatments serve a sentence, security or education measures otherwise than as provided by the legal provisions shall be punishable by no less than 1 and no more than 3 years of imprisonment and the deprivation of the right to hold a public office.

Art. 282. Torture

(1) The act of a public servant holding a public office that involves the exercise of state authority or of other person acting upon the instigation of or with the express or tacit consent thereof to cause an individual pain or intense suffering, either physically or mentally:

a) to obtain from that person or from a third party information or statements,

b) to punish him/her for an act perpetrated by him/her or by a third party or that he/she or a third party is suspected to have perpetrated,

c) to intimidate or pressure him/her or a third party,

d) for a reason based on any form of discrimination, shall be punishable by no less than 2 and no more than 7 years of imprisonment and a ban on the exercise of certain rights.

(2) If the act set out in par. (1) resulted in bodily injury, the penalty shall consist of no less than 3 and no more than 10 years of imprisonment and a ban on the exercise of certain rights.

(3) Torture that resulted in the victim's death shall be punishable by no less than 15 and no more than 25 years of imprisonment and a ban on the exercise of certain rights.

(4) An attempt to perpetrate the offenses set out in par. (1) shall be punished.

(5) No exceptional circumstance, regardless of its nature or of whether it involves a state of war or war threats, internal political instability or any other exceptional state, can be called upon to justify torture. The order of a superior or of a public authority cannot be called upon to justify torture either.

(6) The pain or suffering that result exclusively from legal sanctions and which are inherent thereto or caused by them do not constitute torture.

the facilities necessary to ensure appropriate artificial lighting. Every prisoner shall be provided with a bed and the bedding set.

Furthermore, according to the Order of the Minister of Justice no. 2772/C/2017 for the approval of the Minimum Rules for the accommodation of persons deprived of their liberty[9], the areas intended to accommodate persons deprived of their liberty must respect human dignity and meet minimum sanitary and hygienic standards, taking into account the living area, air volume, lighting, heating and ventilation sources, observing, also, the climate conditions. The setting out of the accommodation rooms in the existing buildings in the places of detention shall be achieved by maximizing the holding spaces, depending on the structural configuration of the buildings, in order to allocate more than 4 square meters (sq.m.) space for each prisoner. In the case of collective accommodation, the ensurance of a personal space of more than 4 square meters shall be carried out with priority for the maximum safety regime and the closed regime.

The accommodation rooms in the prisons to be built, as well as those to be subject to major repairs, upgrades, transformations shall provide a larger area of 4 sq.m. for each prisoner in the case of joint accommodation and 6 sq.m., respectively, where the accommodation is made individually.

In addition, regarding the conditions of accommodation in the Romanian prisons, the Ombudsman, in its special report, pointed out the existence of the following: inadequate accommodation conditions caused by the age of the buildings; infiltrations, moisture, mold in the walls of the rooms; poor ventilation; high-wear of the bedding sets; damaged sanitary facilities; insufficient quantity and inadequate quality of personal hygiene products distributed to prisoners; reduced number of showers and toilets in opposition with the number of prisoners housed in the rooms, and, in some cases, lack of privacy to meet physiological needs; insects and pests; the reduction of the electricity and water supply program in some prisons due to budget constraints; dimensions, arrangements, and sometimes the inappropriate location of walking courts; washing and drying personal belongings in the rooms; the lack of furniture for the preservation of personal belongings[10].

2.2. International standards

a) We note[11] that the issue of prison overcrowding is well covered at the level of universal and regional instruments, the message of international bodies being directed to the effort that Member States need to develop in order to reduce the phenomenon, including by developing alternative sanctions for imprisonment:

- by the Economic and Social Council Resolution from 1997[12] it is requested to the Secretary-General to assist countries, at their request, and within existing resources or, where possible, funded by extrabudgetary resources if available, in the improvement of their prison conditions in the form of advisory services, needs assessment, capacity-building and training and it urges Member States, if they have not yet done so, to introduce appropriate alternatives to imprisonment in their criminal justice systems;
- the Recommendation No. R (99) 22 of the Committee of Ministers of the Council of Europe concerning prison overcrowding and prison population inflation[13] highlights the problem of prison overcrowding as a generalized problem, which requires the need for action plans from the point of view of the prison administrations, as well as from the point of view of the criminal system as a whole, the basic principle being that deprivation of liberty must be applied only as a last resort when the seriousness of the act is so great that any other measure would be ineffective, requiring that national non-custodial sanctions to be put in place. The text contains a number of pertinent advices and suggestions for practical steps to be taken at all levels - legislative, judicial and executive.

Also, the *White Paper on Prison Overcrowding*[14] highlights points that could be of interest for a dialogue that should be initiated and maintained by the national authorities in order to agree on and implement efficiently long-term strategies and specific actions to deal with prison overcrowding as part of a general reform of their penal policies in line with contemporary academic research and realistic expectations of the role criminal law and crime policy should play in society. Also, the national authorities should keep under review to what extent imprisonment is playing an appropriate role in tackling crime and to what extent those who are released are prepared for reintegrating society and for leading crime-free life.

- at European Union level, the direct impact that detention conditions can entail on the proper functioning of the principle of mutual

[9] Order of the Minister of Justice no. 2772/C/2017 for the approval of the Minimum Rules for the accommodation of persons deprived of their liberty, published in the *Official Journal of Romania, Part I, no. 822 of October 18, 2017.*

[10] Romanian Ombudsman, *Annual activity report* 2015 (Bucharest, 2016), 416, available at: http://www.avp.ro/rapoarte-anuale/raport_2015_avp.pdf, accessed 12.03.2018.

[11] R. F. Geamănu, *Mijloace de protecție a persoanelor condamnate la pedepse privative de libertate* (Ph. D. Thesis, Faculty of Law, "*Nicolae Titulescu*" University, 2017, available at the Library of the University), 96-97.

[12] The Economic and Social Council Resolution no. 1997/36 from 21.07.1997 on *International cooperation for the improvement of prison conditions*, available at: http://www.un.org/documents/ecosoc/res/1997/eres1997-36.htm, accessed 12.03.2018.

[13] Recommendation No. R (99) 22 of the Committee of Ministers of the Council of Europe concerning prison overcrowding and prison population inflation, available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016804d8171, accessed 12.03.2018.

[14] European Committee on Crime Problems (CDPC), *White Paper on Prison Overcrowding* (PC-CP\docs 2016\PC-CP(2015)6_e rev7, Strasbourg, 30 June 2016), 5, para. 8, *available at:* https://rm.coe.int/16806f9a8a, accessed 12.03.2018.

recognition of judicial decisions is understandable. Prison overcrowding and allegations of ill-treatment to prisoners can undermine the mutual confidence needed to strengthen judicial cooperation within the European Union.

b) Acknowledging the fact that the persons deprived of their liberty are in a fragile position, it is the duty of the states to ensure the full respect of their fundamental rights, in accordance with their own national legislation and, also, respecting the international standards.

Human rights protection is of paramount importance in the present days. In this respect, special attention needs to be given to the protection of the persons deprived of their liberty as they are in a fragile position and it is the duty of the state to ensure the full respect of their fundamental rights. The European system established by the Council of Europe constitutes a bulwark in protecting the fundamental rights and freedoms of the persons deprived of their liberty[15].

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 (see, *inter alia*, *Price v. the United Kingdom*, no. 33394/96, § 24, ECtHR 2001-VII). 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 (see *Labita v. Italy* [GC], no. 26772/95, § 120, ECtHR 2000-IV) [16].

While there may have been certain past shortcomings in the Court`s jurisprudence on what can be termed "passive" ill-treatment (rather than the actual infliction of physical or psychological ill-treatment), the traditional reluctance of the Court (and of the former Commission) to accept that art. 3 applied to poor material conditions of detention has been shed in favour of a more critical approach to prison regimes[17].

In order to infringe the provisions of art. 3 of the Convention, the **material conditions of detention**[18] must attain a superior level of humiliation or degradation to what is normally implied by the deprivation of liberty.[19] The European Court of Human Rights has not established abstract criteria or standards to qualify a particular act as contrary to art. 3, but rather the assessment of compliance with the provisions of the Convention shall be made according to the circumstances of each case: the duration of the treatment, the physical or psychological effects, the sex, the age, the state of health of the person concerned[20]. The assessment of these conditions is present, for example, in the *Trepashkin* case[21], in which the ECtHR deals with the existing relationship between the recommendations of some international bodies on the minimum space and the analysis made by the Court in its cases. Thus, the Court recognized that violations of art. 3 are to be found in its case-law because of the lack of personal space for persons deprived of their liberty, but it emphasized that it can not establish, as a rule, how much personal space is needed for a prisoner in order to be in accordance with the Convention. Moreover, although the Court takes into account general standards developed by other international institutions (such as the C.P.T.), this can not be a decisive argument in finding a violation of art. 3 of the Convention. Concerning the conditions of detention, ECtHR applies the protection standard offered by art. 3 for all Member States to the Convention, irrespective of the economic or other conditions existing in a State; the lack of resources can not justify detention conditions that are so poor that they can be considered as contrary to art. 3[22]. In other words, the lack of financing of the penitentiary system, even based on real circumstances, is not a cause of non-punishment or irresponsibility for the Member States.

In the *Marian Stoicescu case*[23], the applicant was imprisoned in a penitentiary cell in which he had about 1,35-1,60 sq.m. (perhaps even less, observing the furniture found in the room), personal space inferior to that recommended by the C.P.T. to the Romanian authorities. The lack of adequate personal space, correlated with the applicant's obligation to share the bed with other inmates, the non-drinking water, the fact

[15] R. F. Geamănu, *Use of force and instruments of restraint – an outline of the Romanian legislation in the European context* (The International Conference CKS-CERDOCT Doctoral Schools, Challenges of the Knowledge Society, Bucharest, April 15-16, 2011, CKS-CERDOCT eBook 2011, Pro Universitaria Publishing House, 2011), 112, available at: http://cerdoct.univnt.ro/index.php?option=com_content&view=article&id=54&Itemid=63&dir=JSROOT%2FCKS%2F2011_15_16_aprilie&download_file=JSROOT%2FCKS%2F2011_15_16_aprilie%2FCKS_CERDOCT_2011_eBook.pdf, accessed 12.03.2018.

[16] ECtHR, judgment from 20.11.2012, in the case of *Ghiurău v. Romania*, para. 52-53.

[17] J. Murdoch, *The treatment of prisoners. European standards*, (Council of Europe Publishing, Strasbourg, 2006, reprinted 2008), 200.

[18] See R. F. Geamănu, Condițiile materiale de detenție ale persoanelor private de libertate în lumina art. 3 din Convenția Europeană a Drepturilor Omului și Libertăților Fundamentale (Dreptul Magazine, no. 12/2009, C.H. Beck Publishing House, Bucharest, 2009), 178-190.

[19] Fr. Sudre, *Article 3* in L.-E. Pettiti, E. Decaux, P.-H. Imbert, *La Convention Europeenne des droits de l'homme: Commentaire article par article* (2e edition, Economica Publishing House, Paris, 1999), 171.

[20] See ECtHR, judgment from 16.06.2000, in the case of *Labzov v. Russia*, para. 41; ECtHR, judgment from 24.07.2001, in the case of *Valasinas v. Lithuania*, para. 101; ECtHR, judgment from 09.06.2005, in the case of *II v. Bulgaria*, para. 66.

[21] ECtHR, judgment from 19.07.2007, in the case of *Trepashkin v. Russia*, para. 92.

[22] See ECtHR, judgment from 29.04.2003, in the case of *Aliev v. Ukraine*, para. 151; ECtHR, judgment from 29.04.2003, in the case of *Poltoratski v. Ukraine*, para. 148; ECtHR, judgment from 06.12.2007, in the case of *Bragadireanu v. Romania*, para. 84.

[23] ECtHR, judgment from 16.07.2009, in the case of *Marin Stoicescu v. Romania*, para. 24-25.

that he was entitled to less than an hour's walk per day constitutes, in the opinion of ECtHR, a violation of art. 3 of the Convention.

Regarding the phenomenon of overcrowding and the possible violation of the provisions of art. 3 of the European Convention, it is necessary to highlight the relatively recent approach in the matter - in a decision rendered by the Grand Chamber of ECtHR (the *Muršić case*[24]) it confirmed the standard predominant in its case-law of 3 sq.m. of floor surface per detainee in multi-occupancy accommodation as the relevant minimum standard under art. 3 of the Convention. When the personal space available to a detainee falls below 3 sq.m. of floor surface in multi-occupancy accommodation in prisons, the lack of personal space is considered so severe that a strong presumption of a violation of art. 3 arises. The burden of proof is on the respondent Government which could, however, rebut that presumption by demonstrating that there were factors capable of adequately compensating for the scarce allocation of personal space. The strong presumption of a violation of art. 3 will normally be capable of being rebutted only if the following factors are cumulatively met: the reductions in the required minimum personal space of 3 sq. m are short, occasional and minor; such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities; the applicant is confined in what is, when viewed generally, an appropriate detention facility, and there are no other aggravating aspects of the conditions of his or her detention.

Also, the Court ruled that in cases where a prison cell – measuring in the range of 3 to 4 sq.m. of personal space per inmate – is at issue the space factor remains a weighty factor in the Court's assessment of the adequacy of conditions of detention. In such instances a violation of art. 3 will be found if the space factor is coupled with other aspects of inappropriate physical conditions of detention related to, in particular, access to outdoor exercise, natural light or air, availability of ventilation, adequacy of room temperature, the possibility of using the toilet in private, and compliance with basic sanitary and hygienic requirements. The Court also stressed that in cases where a detainee disposed of more than 4 sq.m. of personal space in multi-occupancy accommodation in prison and where therefore no issue with regard to the question of personal space arises, other aspects of physical conditions of detention referred to above remain relevant for the Court's assessment of adequacy of an applicant's conditions of detention under art. 3 of the Convention.

c) 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[25]. In considering all these aspects, the Court found a violation of article 3 of the Convention under its procedural head in several cases against Romania, as the national authorities failed to fulfilll their obligation to conduct a proper official investigation into the applicant's allegations of ill-treatment, capable of leading to the identification and punishment of those responsible[26].

Concluding, it can be noted that the jurisprudential rules set out by ECtHR with regard to the treatment of detained persons, although simple, are harsh for the authorities. Positive obligations find here a fertile ground for development: not only the procedural obligation to conduct an effective investigation but also the obligations to prevent violations of art. 3 against persons in custody due to their high vulnerability to such treatments[27].

d) *Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules*[28] contains provisions on the accommodation of the prisoners (rule 18): the accommodation provided for prisoners, and in particular all sleeping accommodation, shall respect human dignity and, as far as possible, privacy, and meet the requirements of health and hygiene, due regard being paid to climatic conditions and especially to floor space, cubic content of air, lighting, heating and ventilation.

[24] ECtHR, judgment from 20.10.2016, in the case of *Muršić v. Croatia*, para. 91-177, esp. 136-141.

[25] ECtHR judgement from 26.01.2006, in the case of *Mikhenyev v. Russia*, para. 107-108 and 110.

[26] ECtHR judgement from 12.10.2004, in the case of *Bursuc v. Romania*, para. 110; ECtHR judgement from 26.04.2007, in the case of *Dumitru Popescu (no.1) v. Romania*, para. 78-79; ECtHR judgement from 26.07.2007, in the case of *Cobzaru v. Romania*, para. 75; ECtHR judgement from 05.10.2004, in the case of *Barbu Anghelescu v. Romania*, para. 70; ECtHR judgement from 21.07.2009, in the case of *Alexandru Marius Radu v. Romania*, para. 47, 52; ECtHR judgement from 22.06.2010, in the case of *Boroancă v. Romania*, para. 50-51.

[27] B. Selejan-Guțan, *Spațiul European al drepturilor omului. Reforme, practici, provocări* (C. H. Beck Publishing House, Bucharest, 2008), 121.

[28] Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers'Deputies.

In all buildings where prisoners are required to live, work or congregate: the windows shall be large enough to enable the prisoners to read or work by natural light in normal conditions and shall allow the entrance of fresh air except where there is an adequate air conditioning system; artificial light shall satisfy recognised technical standards.

Prisoners shall normally be accommodated during the night in individual cells except where it is preferable for them to share sleeping accommodation. Accommodation shall only be shared if it is suitable for this purpose and shall be occupied by prisoners suitable to associate with each other.

e) *The Standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (C.P.T.), as they have been mentioned in the General Reports, contain a number of principles with regard to accommodation conditions of the persons deprived of their liberty. According to C.P.T., the issue of what is a reasonable size for a police cell (or any other type of detainee/prisoner accommodation) is a difficult question. Many factors have to be taken into account when making such an assessment. However, C.P.T. delegations felt the need for a rough guideline in this area. The following criterion (seen as a desirable level rather than a minimum standard) is currently being used when assessing police cells intended for single occupancy for stays in excess of a few hours: in the order of 7 sq.m., 2 metres or more between walls, 2.5 metres between floor and ceiling[29].

It should be stressed out that the C.P.T. standards are frequently mentioned by ECtHR in its case law, when referring to the relevant international instruments in the analized cases[30].

2.3. ECtHR pilot-judgement

In view of the significant influx of requests against Romania over overcrowding and material conditions of detention, the European Court of Human Rights considered it necessary in 2012 to address the Romanian authorities under art. 46 of the Convention[31], but without using the pilot-judgment procedure[32].

In July 2012 the ECtHR renderred a ”semi-pilot” judgment in the case of Iacov Stanciu33 in which it pointed out that, despite efforts of the Romanian authorities to improve the situation of the conditions of detention, there is a structural problem in this field. The Court did not imposed a time limit to remedy the deficiencies found[34].

Following the Iacov Stanciu case, on 25 April 2017 the ECtHR gave a pilot-judgment in *Rezvimeș and others v. Romania case*[35] in which it stated that, within six months from the date on which the judgment became final, the Romanian State had to provide, in cooperation with the Committee of Ministers, a precise timetable for the implementation of the appropriate general measures to solve the problem of prison overcrowding and of poor detention conditions, in line with the Convention principles as stated in the pilot-judgement. The Court also decided to adjourn the examination of similar applications that had not yet been communicated to the Romanian Government pending the implementation of the necessary measures at domestic level.

The source of the case is represented by four applications against Romania, by which four Romanian nationals, namely Daniel Arpad Rezmiveș, Laviniu Moșmonea, Marius Mavroian, Iosif Gazsi, seized the Court on 14 September 2012, 6 June 2013, 24 July 2013 and 15 October 2013, relying on Article 34 *of the Convention for the Protection of Human Rights and Fundamental Freedoms*. The case concerned the violation of art. 3 of the Convention concerning the conditions of detention in various prisons and in detention facilities attached to police stations – Police detention facility Baia Mare and the prisons Gherla, Aiud, Oradea, Craiova, Târgu-Jiu, Pelendava, Rahova, Tulcea, Iași, Vaslui (the applicants complained, among other things, of overcrowding in their cells, inadequate sanitary facilities, lack of hygiene, poor-quality food, dilapidated equipment and the presence of rats and insects in the cells). On 15th September 2015 a Chamber with the Third Section of the Court informed the parties that, given the fact that it was a structural deficiency, the Court intended to apply art. 61 of the Regulation and invited them to provide observations in this respect. In accordance with art. 41 and art. 61 § 2 lit. c) of the Regulation, the Court also decided to examine the above mentioned applications with celerity. Both the

[29] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *2nd General Report on the CPT's activities, covering the period 1 January to 31 December 1991* [CPT/Inf (92) 3], Strasbourg, 13 April 1992, para. 43, available at: https://rm.coe.int/1680696a3f, accessed 12.03.2018.

[30] See, for example, ECtHR judgement from 08.11.2005, in the case of *Khudoyorov v. Russia*, para. 98; ECtHR judgement from 01.06.2006, in the case of *Mamedova v. Russia*, para. 52-53; ECtHR judgement from 02.06.2005, in the case of *Novoselov v. Russia*, para. 32.

[31] Art. 46. Binding force and execution of judgments

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution. (…)

[32] R. Pașoi, D. Mihai, *Hotărârea pilot în cauza Rezmiveș și alții împotriva României în materia condițiilor de detenție*, 28.04.2017, available at: https://www.juridice.ro/507966/hotararea-pilot-cauza-rezmives-si-altii-impotriva-romaniei-materia-conditiilor-de-detentie.html, accessed 12.03.2018.

[33] ECtHR, judgment from 24.07.2012, in the case of *Iacov Stanciu v. Romania*, no. 35972/05.

[34] Timetable for the implementation of measures 2018-2024 to resolve the issue of prison overcrowding and conditions of detention with a view to executing the pilot-judgment *Rezmiveș and others against Romania, delivered by the ECtHR on 25 aprilie 2017, adopted by the Romanian Government on 17th February 2018, p. 6, available at:* http://www.just.ro/wp-content/uploads/2018/01/calendar-masuri.pdf, accessed 12.03.2018.

[35] ECtHR, judgment from 25.04.2017, in the case of *Rezvimeș and others v. Romania*, nos. 61467/12, 39516/13, 48231/13 and 68191/13.

Government and the applicants provided observations concerning the application of the pilot-judgment procedure[36].

The Court found that, despite the fact that the measures taken by the authorities up to that date could contribute to the improvement of the living and sanitation conditions in Romanian prisons, coherent and long term measures, such as the implementation of additional measures, had to be put in place in order to ensure the full compliance with art. 3 and 46 of the Convention. The Court also held that, in order to comply with the obligations emerging from its previous judgments in similar cases, **an appropriate and efficient system of internal means of redress had to be created.** When the judgement was delivered the Court found that the applicants' situation was part of a general problem originating in a structural dysfunction specific to the Romanian prison system which affected and can affect in the future numerous persons. Despite the legislative, administrative and budgetary measures taken at domestic level, the systemic character of **the problem identified in 2012 persisted, so the situation found represents a practice which is not compatible with the Convention**[37]**.**

Prison overcrowding is a recurring problem for many prison administrations in Europe. Many of the 47 Council of Europe member states have overcrowded prisons and in many states where the total number of prisoners is lower than the available accommodation places still specific prisons may often suffer from overcrowding. According to SPACE I statistics, in 2012 there was overcrowding in 22 out of the 47 countries of the Council of Europe. In 2013, the number of countries with overcrowding went down to 21, and in 2014 to 13. In 2013, 19 of the prison administrations having overcrowded prisons were the same as in 2012. According to the C.P.T. published reports on visits the number of countries suffering from prison overcrowding is estimated to be higher. This difference is explained by the fact that each country used its own standards to calculate overcrowding when filling in the questionnaire on which SPACE is based. On the contrary, the C.P.T. uses its own standards to calculate overcrowding[38].

Romania's situation regarding prison overcrowding and material conditions of detention is not singular. Thus, with regard to the other member states of the Council of Europe, it should be noted that until now, ECtHR has issued several judgments, finding a structural and systemic problem with regard to material conditions of detention and, thus, an infringment of the provisions set out in art. 3 of the Convention:

- **Poland, following** *Orchowski case*[39]. In 2016, the Committee of Ministers, under the terms of art. 46, paragraph 2, of the ECHR, which provides that the Committee supervises the execution of final judgments of the ECtHR, having examined the action report provided by the government indicating the measures adopted in order to give effect to the judgments including the information provided regarding the payment of the just satisfaction awarded by the Court decided to close the examination thereof[40].
- **Slovenia, following** *Mandić and Jović case*[41] (envisaging only Ljubljana prison), in which the Court encourages the State to develop an effective instrument which would provide a speedy reaction to complaints concerning inadequate conditions of detention and ensure that, when necessary, a transfer of a detainee is ordered to Convention compatible conditions. The case is under the supervision of the Committee of Ministers.
- **Russia, following** *Ananyev and others case*[42], in which the Court encourages the State to produce, in co-operation with the Council of Europe Committee of Ministers, within six months from the date on which the judgment became final, a binding time frame for implementing preventive and compensatory measures in respect of the allegations of violations of Article 3 of the Convention. The case is under the supervision of the Committee of Ministers.
- **Italy, following** *Torreggiani and others case*[43], in which the Court requested Italy to put in place, within one year from the date on which the judgment became final, an effective domestic remedy or a combination of such remedies capable of affording, in accordance with Convention principles, adequate and sufficient redress in cases of overcrowding in prison. In 2016, the Committee of Ministers, under the terms of art. 46, paragraph 2, of the ECHR, which provides that the Committee supervises the execution of final judgments of the ECtHR, having noted with satisfaction the establishment of a system of computerised monitoring of the

[36] Timetable for the implementation of measures 2018-2024 to resolve the issue of prison overcrowding and conditions of detention with a view to executing the pilot-judgment *Rezmiveș and others against Romania, delivered by the ECtHR on 25 aprilie 2017, 3.*

[37] Timetable for the implementation of measures 2018-2024 to resolve the issue of prison overcrowding and conditions of detention with a view to executing the pilot-judgment *Rezmiveș and others against Romania, delivered by the ECtHR on 25 aprilie 2017, 3*.

[38] See European Committee on Crime Problems (CDPC), *White Paper on Prison Overcrowding*, 4, 6, 7, para. 1, 17, 19.

[39] ECtHR, judgment from 22.10.2009, in the case of *Orchowski v. Poland*, no. 17885/04.

[40] *Resolution CM/ResDH(2016)254 Execution of the judgments of the European Court of Human Rights. Seven cases against Poland, adopted by the Committee of Ministers on 21 September 2016 at the 1265th meeting of the Ministers' Deputies, available at:* https://hudoc.echr.coe.int/eng#{"itemid":["001-167361"]}, accessed 12.03.2018.

[41] ECtHR, judgment from 20.10.2011, in the case of *Mandić and Jović v. Slovenia*, nos. 5774/10 and 5985/10.

[42] ECtHR, judgment from 10.01.2012, in the case of *Ananyev and others v. Russia*, nos. 42525/07 and 60800/08.

[43] ECtHR, judgment from 08.01.2013, in the case of *Torreggiani and others v. Italy*, nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10.

living space and conditions of detention of each detainee and an independent internal mechanism of supervision of detention facilities which will allow the competent authorities promptly to take the necessary corrective measures and welcoming the establishment of a combination of domestic remedies, preventive and compensatory, and noted the information provided on their functioning in practice confirming that these remedies appear to offer appropriate redress in respect of complaints concerning poor conditions of detention, decided to close the examination thereof[44].

- **Belgium, following** *Vasilescu case*[45], in which the Court recommended that the respondent State consider adopting general measures. On the one hand, measures should be taken to guarantee detainees conditions of detention in accordance with art. 3 of the Convention. On the other hand, an appeal should be available to detainees to prevent the continuation of an alleged violation or to allow the person concerned to obtain an improvement in his conditions of detention. The case is under the supervision of the Committee of Ministers.
- **Bulgaria, following** *Neshkov and others case*[46], in which the Court held that the respondent State must, within eighteen months from the date on which this judgment becomes final in accordance with art. 44 paragraph 2 of the Convention, make available a combination of effective domestic remedies in respect of conditions of detention that have both preventive and compensatory effects, to comply fully with the requirements set out in this judgment. The case is under the supervision of the Committee of Ministers.
- **Hungary, following** *Varga and others case*[47], in which the Court held that the respondent State should produce, under the supervision of the Committee of Ministers, within six months from the date on which this judgment becomes final, a time frame in which to make appropriate arrangements and to put in practice preventive and compensatory remedies in respect of alleged violations of art. 3 of the Convention on account of inhuman and degrading conditions of detention. The case is under the supervision of the Committee of Ministers.

2.4. Current and possible solutions to tackle the issue of prison overcrowding and improper material conditions of detention

2.4.1. General comments[48]

Based on the current legal framework, there is no possibility of granting compensatory damages by the judge in charge of the supervision of deprivation of liberty where prisoners complain about overcrowding and material conditions of detention. Such complaints will not be admissible because, on the one hand, the judge cannot grant compensations in the special procedure provided in art. 56 of Law 254/2013, and, on the other hand, the supervising judge can only control the measures of the prisons and not of the National Administration of Penitentiaries (N.A.P.). Thus, in this respect, if the judge's analysis reveals that overcrowding is not determined by any measure of the prison administration, but is a structural problem of the system, which is the sole responsibility of N.A.P., the prisoner's request will be rejected.

According to the legal provisions in force [art. 48 para.(8) Law no. 254/2013], in case the legal capacity of accommodation of the prison is exceeded, its director shall be required to inform the Director General of the N.A.P. with a view to transfer sentenced persons to other prisons. The Director General of the N.A.P. shall determine whether the transfer is required, by specifying the prisons to which the transfer of sentenced persons shall be carried out. It follows that the only measure that the prison administration can take in case of overcrowding is the notification of the director of the N.A.P., the only one able to decide the transfer of prisoners in order to avoid overcrowding and return to legal capacity of the prison.

In such cases, as those mentioned above, for the purpose of compensatory damages, prisoners have the option of appealing to the civil court on the basis of civil liability for damages caused by unlawful acts or, if the offending deeds have the form of criminal actions, the civil action may be joined to the criminal one. For example, a court[49] ruled in favour of a prisoner and decided that the Romanian State (through the Ministry of Public Finance) should pay the applicant the amount of 4,500 lei as civil damages. Specifically, in the present case, the court held that the applicant was subjected to detention conditions (in a police detention

[44] *Resolution CM/ResDH(2016)28 Execution of the judgments of the European Court of Human Rights***,** a*dopted by the Committee of Ministers* on 8 March 2016 at the 1250th *meeting of the Ministers' Deputies, available at:* https://search.coe.int/cm/Pages/result_details.aspx ?ObjectID=09000016805c1a5b, accessed 12.03.2018.

[45] ECtHR, judgment from 25.11.2014, in the case of *Vasilescu v. Belgium*, no. 64682/12.

[46] ECtHR, judgment from 27.01.2015, in the case of *Neshkov and others v. Bulgaria*, nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13.

[47] ECtHR, judgment from 10.05.2016, in the case of *Varga and others v. Hungary*, nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13.

[48] R. F. Geamănu, Mijloace de protecție a persoanelor condamnate la pedepse privative de libertate, 252-255.

[49] Vrancea District Court, 1st Civil section, judgment no. 96/2012.

center, but the findings of the court are valid, *mutatis mutandis*, in the case of prisons) contrary to art. 3 of the European Convention (only 2.5 sq.m. of personal space in the detention room, the lack of separation of the non-smokers from the smokers, the toilet did not meet the minimum requirements regarding privacy, the lack of access to the toilet during the night). These conditions were judged by the court as having a strong impact on the state of health and dignity of the person, so it was necessary to award compensating damages.

Regarding the compensatory damages that need to be awarded to prisoners for overcrowding and on the account of the material conditions of detention, the ECtHR ruled[50] that as to the domestic law on compensation, it must reflect the existence of the presumption that substandard conditions of detention have occasioned non-pecuniary damage to the aggrieved individual. Substandard material conditions are not necessarily due to problems within the prison system as such, but may also be linked to broader issues of penal policy. Moreover, even in a situation where individual aspects of the conditions of detention comply with the domestic regulations, their cumulative effect may be such as to constitute inhuman treatment. As the Court has repeatedly stressed, it is incumbent on the Government to organise its prison system in such a way that it ensures respect for the dignity of detainees. The level of compensation awarded for non-pecuniary damage by domestic courts when finding a violation of art. 3 must not be unreasonable taking into account the awards made by the Court in similar cases. The right not to be subjected to inhuman or degrading treatment is so fundamental and central to the system of the protection of human rights that the domestic authority or court dealing with the matter will have to provide compelling and serious reasons to justify their decision to award significantly lower compensation or no compensation at all in respect of non-pecuniary damage.

2.4.2. Measures put in place after the date on which the pilot-judgment was delivered

Regarding the measures put in place by the Romanian state, following the judgment in the Iacov Stanciu case, the Romanian Government adopted in 2012 a Memorandum by which the main lines of action were approved with a view to remedy the issues acknowledged. Also, at the beginning of 2016, the Romanian Goverment approved the Memorandum with the topic *ECHR's intention to apply the pilot-judgment procedure in cases dealing with detention conditions*, followed by the elaboration of the *Plan of Measures attached to Recommendation no. 2 of the Memorandum which aims at improving the conditions of detention and reducing the overcrowding*. Against this background, the National Prison Administration initiated measures for increasing and modernization of the accomodation capacity, according with the timetable approved, and the National Probation Department took measures for strengthening the probation system in order to allow for the implementation of community measures and sanctions[51].

By Law no. 169/2017 on the amendment and supplementation of Law no. 254/2013 a compensatory remedy was created for granting a benefit[52], meaning 6 days to be considered served for a number of 30 days of confinement in improper spaces of detention. Out of the total number of accommodation spaces, namely 187, the Justice Minister's Order established 156 as being improper, that is 83%. Between 19 October and 30 December 2017 a number of 912 persons deprived of their liberty were released on term from the prisons managed by the National Prison Administration, following the application of the provisions of Law no. 169/2017. A number of 2,718 persons deprived of their liberty benefitted of conditional release according with court decisions, following the application of the provisions of Law no. 169/2017[53].

The current regulation of compensatory mechanism leads to different solutions for persons in similar legal situations and raises from this perspective problems of incompatibility with fundamental law, which will probably be considered by the Constitutional Court at the right time. In the same line of reasoning, application of benefits of the law only to persons executing punishments (and as a consequence exclusion of those who served full sentence or were released on probation) creates the appearance of a constitutional conflict, in absence of another compensatory mechanism available to these categories, such as, for example, pecuniary compensation[54].

Of course, the problems tackled in Iacov Stanciu were stredded out in the following pilot-judgment, as the Court gave indications to the national authorities in order to put an end to the overcrowding in prisons problem. The Court, in *Rezvimeș and others case*,

[50] ECtHR, judgment from 24.07.2012, in the case of *Iacov Stanciu v. Romania*, no. 35972/05, para. 196-199.

[51] Timetable for the implementation of measures 2018-2024 to resolve the issue of prison overcrowding and conditions of detention with a view to executing the pilot-judgment *Rezmiveș and others against Romania, delivered by the ECtHR on 25 aprilie 2017, 6, 7*.

[52] For an analysis of the new legal provisions see M. A. Hotca, Un bun început pentru respectarea hotărârii-pilot în cauza Rezmiveș și alții împotriva României – adoptarea Legii nr. 169/2017 privind modificarea și completarea Legii nr. 254/2013, 16.07.2017, available at: https://juridice.ro/essentials/1328/un-bun-inceput-pentru-respectarea-hotararii-pilot-in-cauza-rezmives-si-altii-impotriva-romaniei-adoptarea-legii-nr-1692017-privind-modificarea-si-completarea-legii-nr-2542013, accessed 12.03.2018.

[53] Timetable for the implementation of measures 2018-2024 to resolve the issue of prison overcrowding and conditions of detention with a view to executing the pilot-judgment *Rezmiveș and others against Romania, delivered by the ECtHR on 25 aprilie 2017, 9*.

[54] See, in the volume of this conference, C. N. Magdalena, Compensatory action - a new legislative action imposed on national authorities as consequence of recent case-law of the European Court of Human Rights (The International Conference CKS 2018 Challanges of the Knowledge Society, Bucharest, May 11-12, 2018, 12th Edition, CKS eBook 2018, "Nicolae Titulescu" University Publishing House).
In the study the author analyses some of the problems arising after entry into force of the Law no. 169/2017 and tries to find practical answers based on systemic, teleological and literal interpretation of substantive and procedural provisions.

requested the following measures from the Romanian authorities: to introduce measures to reduce overcrowding and improve the material conditions of detention.; to introduce remedies (a preventive remedy – which had to ensure that post-sentencing judges and the courts could put an end to situations breaching art. 3 of the Convention and award compensation – and a specific compensatory remedy – which had to ensure that appropriate compensation could be awarded for any violation of the Convention concerning inadequate living space and/or precarious material conditions).

2.4.2. Possible legislative measures to ensure an efficient remedy for the damage caused such as a compensatory remedy

I. As provided in the *Timetable* mentioned above, *Romania will asess the prison overcrowding issue by exploring the* possibility of adopting some legislative amendments with a view to **awarding a financial compensation** to persons who have applications pending with the ECtHR or who have the grounds to lodge an application with the ECHR.

II. The study of the legislations of other E.U. member states on prison overcrowding reveals different solutions in terms of awarding financial compensation for the prisoners executing the penalty in conditions that infringe art. 3 ECHR:

- In *Slovenia*, a measure provided by the law for obtaining compensatory remedy for inadequate conditions of detention is available under general civil law provision of art. 179 of the Obligations Code[55] in respect of damage sustained by prisoners. The procedure in which damage can be awarded to prisoners is a judicial (civil) procedure.

As regards prisoners who are still serving their terms, these prisoners can avail themselves of the avenue also provided in art. 84 of the Enforcement of Penal Sanctions Act to claim compensation directly from the person who inflicted the damage, as well as the general civil law avenue provided in art. 179 (in relation to art. 147) of the Obligations Code. Article 84 of the Enforcement of Penal Sanctions Act governs the possibility of obtaining compensation for violation, related to torture or other cruel, inhuman or degrading treatment, as defined in Article 83 (see Paragraph 52) also directly from the person, who caused the damage. The purpose of the provision of Article 84 is to expose direct liability for damages from an individual, who is responsible for violation (torture or other forms of cruel, inhuman or degrading treatment) against the prisoner, in this respect the provision acts as a deterrent. Article 84 is a subsidiary remedy, as in accordance with the general rules of compensation (art. 147 of the Obligations Code on legal persons' liability – meaning the civil law liability of the Republic of Slovenia) – therefore the employee of the prison that caused the damage, as well as his employer - the state - are liable for damages[56].

- In *Bulgaria*, Section 3 of the 2009 Execution of Punishments and Pre-Trial Detention Act prohibits torture, cruel, inhuman or degrading treatment, provides that detention in poor conditions also amounts to such treatment, and gives a nonexhaustive list of circumstances which represent such treatment. The aim of this definition is to serve as clear guidance to the prison administration, the prosecutors and the relevant courts as to when conditions of detention go beyond the normal degree of suffering inherent in detention. The newly introduced procedures, which serve as remedies, clearly refer to that definition. As to the existence of a compensatory remedy, a new procedure has been introduced for awarding compensation. It contains explicit rules for shifting the burden of proof to the prison administration once a *prima facie* case is submitted to the court, a presumption that non-pecuniary damage have occurred due to the poor conditions of detention, and examination of the cumulative effect of the conditions on the detainee. The new provisions respond to the criticism of the Court and are in line with the requirements identified in its case-law[57].
- In *Hungary*, a new compensation procedure has been introduced in the Act No. CCXL of 2013 for the compensation for the grievances caused

[55] (1) Just monetary compensation independent of the reimbursement of material damage shall pertain to the injured party for physical distress suffered, for mental distress suffered owing to a reduction in life activities, disfigurement, the defamation of good name or reputation, the curtailment of freedom or a personal right, or the death of a close associate, and for fear, if the circumstances of the case, particularly the level and duration of distress and fear, so justify, even if there was no material damage.

(2) The amount of compensation for non-material damage shall depend on the importance of the good affected and the purpose of the compensation, and may not support tendencies that are not compatible with the nature and purpose thereof.

[56] Action report. *Communication from Slovenia concerning the Mandić and Jović group of cases v. Slovenia (Application No. 5774/10)*, DH-DD(2017)686, 1294th meeting (September 2017) (DH), para. 56, 63, *available at:* https://rm.coe.int/1680727da8, accessed 12.03.2018.

[57] Action report. Communication from Bulgaria concerning the cases of Kehayov and Neshkov and others v. Bulgaria (Applications No. 41035/98, 36925/10), DH-DD(2018)13, 1310th meeting (March 2018) (DH), 6-7, *available at:* https://rm.coe.int/1680727da8, accessed 12.03.2018. The penitentiary judge shall oblige the state to pay the awarded compensation amount; the organisational unit of the Ministry of Justice shall make arrangements for the payment within 60 days upon the service of the decision.

The right to submit a compensation claim was necessary, for reasons of equity, to be extended for inmates having suffered injury earlier, provided that less than one year has elapsed from the termination of the injurious placement condition to the entry into force of the right to file a compensation claim. Moreover, the right to file a compensation claim shall also be ensured to inmates whose applications complaining about placement conditions allegedly violating the Convention are already registered by the Court, except where the inmate filed his application at a date later than 10 June 2015 and by the date of the submission of the application more than one year has elapsed from the termination of the injury. In respect of such applications the six-month absolute time limit started to run from the day of the entry into force of the amendment, which is 1 January 2017.

by the placement conditions violating fundamental rights, amending the procedures of the penitentiary judge. In elaborating the rules pertaining to this remedy, special attention has been paid to the effectiveness and efficiency requirements specified by the Court: decision shall be taken within a short time, on an objective basis; the decision shall be duly reasoned; the decision shall be enforced without delay; the compensation award shall not be "unreasonable", that is, shall not be too low – but may be lower than the compensation amount likely to be awarded by the Court. Post-conviction inmates and inmates detained on other grounds are entitled to compensation for not having been provided with the inmate living space specified in the law and for any other placement conditions violating the prohibition of torture or cruel, inhuman or degrading treatment, in particular for violations caused by unseparated toilets, lack of proper ventilation or lighting or heating and disinsectisation (henceforth together: placement conditions violating fundamental rights). Compensation shall be granted for the number of days spent in placement conditions violating fundamental rights. The daily compensation tariff shall be minimum HUF 1,200 but maximum HUF 1,600. The proceedings shall be conducted by the penitentiary judge having jurisdiction at the place of the detention or, in case the inmate has already been released, at the place where the penal institution having released the inmate is seated.[58]

- In *France*, although there is no specific legislation regulating on various compensation mechanisms due to prison overcrowding, still art. 22 of the Penitentiary Law of 24 November 2009 states that "***the prison administration guarantees to every detained person the respect of his dignity and his rights".***

To obtain compensation in the case of conditions of detention contrary to human dignity, it is necessary to proceed in two stages: **administrative and then judicial.** The detainee must first make a written request to the director of the prison. Then in case of refusal, appeal to the administrative court. The conditions for the State's responsibility for the conditions of detention have recently been clarified by case law[59] - the detainee has to demonstrate that his conditions of detention are so bad that they disregard the principle of human dignity. In that case, the judge will automatically conclude that there is "moral damage" that the State has to compensate.

III. The drafting of the future legislation should bare in mind the following topics that have to be regulated:
   - the categories of prisoners that may benefit of the compensatory remedy for poor conditions of detention;
   - the institution that can award the compensation;
   - the procedure to be followed (an admistrative one or rather a judicial procedure) and means of appeal;
   - the institution competent to implement the measure;
   - if the case of retroactivity, the past time frame in which compensations may be awarded;
   - the amount of money (or other advantages) that may be awarded as a compensatory remedy.

Also, the future law on compensatory remedy can be developed following the principles and approach set out in Law no. 169/2017: the amount of money to be awarded to a person who served the penalty under improper conditions (and in relation to which the person did not earn any extra days according with art. 55^1 of Law no. 254/2013) shall be determined by multiplying these extra days earned with an amount of money established for each extra day earned.

Another option, just as valid, and, perhaps, more simple to be put in practice is the determination of the total number of days in wich a person served the penalty under improper conditions and then multiply the number with a fixed amount of money.

In any case, the procedure should allow the free access to a court in order for the prisoner to obtain a financial compensation for the execution of the custodial penalty in conditions that infringe art. 3 ECHR. Such a procedure will respect the requirements set out in art. 13 (right to an effective remedy) ECHR: *"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."*

3. Conclusions

Regarding the activity of executing the custodial criminal penalties, in the doctrine[60] it was considered

[58] Action report. Communication from Hungary concerning the cases of Varga and Istvan Gabor Kovacs v. Hungary (Applications No. 14097/12, 15707/10), DH-DD(2017)1012, 1294th meeting (September 2017) (DH), *available at:* https://rm.coe.int/16806b942c, accessed 12.03.2018.

[59] See The Rouen Administrative Court (TA Rouen, March 27, 2008), *available at:* https://actu.dalloz-etudiant.fr/fileadmin/actualites/pdfs/AJDA2008-668.pdf, accessed 12.03.2018.

See, also, Administrative Court of Appeal (CAA) of Douai (1st ch.) 12th November 2009, no. 09DA00782; ord. pdt. [order by the presiding judge] CAA Douai, 26th April 2012, no. 11DA01130, in *Opinion of 22nd May 2012 of the French Contrôleur général des lieux de privation de liberté concerning the number of prisoners, available at:* http://www.cglpl.fr/wp-content/uploads/2012/12/AVIS_surpopulation_20120522_EN.pdf, accessed 12.03.2018.

[60] M. Udroiu, O. Predescu, *Protecția europeană a drepturilor omului și procesul penal român* (C.H. Beck Publishing House, Bucharest, 2008), 380-381.

that the regulation proposed by the Romanian legislator regarding the general conditions for the execution of the custodial measures satisfies the European requirements in the matter. The assessment of a violation of the rights guaranteed by art. 3 ECHR is, however, made in relation to the effective rights and facilities enjoyed, in particular, by the persons deprived of their liberty and not by the abstract rights provided for in domestic law. In fact, there are many places of detention in Romania where overcrowding makes it impossible to secure a bed for every person deprived of liberty or the minimum space for cells where there are more prisoners; providing adequate food, products for body hygiene, access to natural light, ventilation is still a problem.

It should be stressed out that the Romanian legislator makes efforts to comply with the standards imposed at European level, especially in the case where we make a comparative analysis with the provisions of the previous law on the execution of punishments - Law no. 23/1969, which generically stipulated the right of prisoners to rest and walk, without any provisions regarding the accommodation of convicted persons, the dimensions of a room, access to air, ventilation, heat, etc[61].

However, as shown in the paper, efforts need to be pursued in the legislative field in order to raise the standard at the minimum CoE requrements in terms of minimum space required for a person deprived of liberty and prison overcrowding.

Also, observing the ECtHR judgements on overcrowding and material conditions of detention against Romania (*Iacov Stanciu case and Rezvimeș and others case*), it is clear that the Romanian legislator needs to intervene in order to set up a financial compensatory mechanism, which will function along with the already in place mechanism granting a benefit for prisoners, meaning 6 days to be considered served for a number of 30 days of confinement in improper spaces of detention.

In this sense, the study proposes some minimum requirements that have to be observed when adressing the problem of a financial compensatory mechanism for prisoners executing the custodial penalty in overcrowding conditions that infringe art. 3 ECHR.

References

- Criminal Code of Romania
- Law no. 254/2013 on enforcement of penalties and of measures ordered by the judicial bodies during the criminal proceedings
- Order of the Minister of Justice no. 2772/C/2017 for the approval of the Minimum Rules for the accommodation of persons deprived of their liberty
- CoE, Recommendation No. R (99) 22 of the Committee of Ministers of the Council of Europe concerning prison overcrowding and prison population inflation
- CoE, Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers'Deputies
- 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
- B. Selejan-Guțan, Spațiul European al drepturilor omului. Reforme, practici, provocări, C. H. Beck Publishing House, Bucharest, 2008
- C. N. Magdalena, Compensatory action - a new legislative action imposed on national authorities as consequence of recent case-law of the European Court of Human Rights, The International Conference CKS 2018 Challanges of the Knowledge Society, Bucharest, May 11-12, 2018, 12th Edition, CKS eBook 2018, "Nicolae Titulescu" University Publishing House
- Fr. Sudre, *Article 3* in L.-E. Pettiti, E. Decaux, P.-H. Imbert, *La Convention Europeenne des droits de l'homme: Commentaire article par article*, 2e edition, Economica Publishing House, Paris, 1999
- J. Murdoch, *The treatment of prisoners. European standards*, Council of Europe Publishing, Strasbourg, 2006, reprinted 2008
- M. A. Hotca, Un bun început pentru respectarea hotărârii-pilot în cauza Rezmiveș și alții împotriva României – adoptarea Legii nr. 169/2017 privind modificarea și completarea Legii nr. 254/2013, 16.07.2017
- M. Udroiu, O. Predescu, *Protecția europeană a drepturilor omului și procesul penal român*, C.H. Beck Publishing House, Bucharest, 2008
- R. F. Geamănu, Mijloace de protecție a persoanelor condamnate la pedepse privative de libertate, Ph. D. Thesis, Faculty of Law, "Nicolae Titulescu" University, 2017
- R. F. Geamănu, *Use of force and instruments of restraint – an outline of the Romanian legislation in the European context,* The International Conference CKS-CERDOCT Doctoral Schools, Challenges of the Knowledge Society, Bucharest, April 15-16, 2011, CKS-CERDOCT eBook 2011, Pro Universitaria Publishing House, 2011

[61] R. F. Geamănu, Mijloace de protecție a persoanelor condamnate la pedepse privative de libertate, 374.

- R. F. Geamănu, Condițiile materiale de detenție ale persoanelor private de libertate în lumina art. 3 din Convenția Europeană a Drepturilor Omului și Libertăților Fundamentale, Dreptul Magazine, no. 12/2009, C.H. Beck Publishing House, Bucharest, 2009
- R. Pașoi, D. Mihai, Hotărârea pilot în cauza *Rezmiveș și alții împotriva României* în materia condițiilor de detenție, 28.04.2017
- Action report. Communication from Slovenia concerning the Mandić and Jović group of cases v. Slovenia (Application No. 5774/10), 1294th meeting (September 2017)
- Action report. Communication from Hungary concerning the cases of Varga and Istvan Gabor Kovacs v. Hungary (Applications No. 14097/12, 15707/10), 1294th meeting (September 2017)
- Action report. Communication from Bulgaria concerning the cases of Kehayov and Neshkov and others v. Bulgaria (Applications No. 41035/98, 36925/10), 1310th meeting (March 2018)
- Association for the Prevention of Torture (APT), Monitoring places of detention. A practical guide, Geneva, April 2004
- European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 2nd General Report on the CPT's activities, covering the period 1 January to 31 December 1991, Strasbourg, 13 April 1992
- European Committee on Crime Problems (CDPC), White Paper on Prison Overcrowding, Strasbourg, 30 June 2016
- Resolution CM/ResDH(2016)254 Execution of the judgments of the European Court of Human Rights. Seven cases against Poland, a*dopted by the Committee of Ministers on 21 September 2016 at the 1265th meeting of the Ministers' Deputies*
- Resolution CM/ResDH(2016)28 Execution of the judgments of the European Court of Human Rights**,** a*dopted by the Committee of Ministers* on 8 March 2016 at the 1250th *meeting of the Ministers' Deputies*
- Romanian Ombudsman, Annual *activity report* 2015, Bucharest, 2016
- The Economic and Social Council Resolution no. 1997/36 from 21.07.1997 on International cooperation for the improvement of prison conditions
- Timetable for the implementation of measures 2018-2024 to resolve the issue of prison overcrowding and conditions of detention with a view to executing the pilot-judgment *Rezmiveș and others against Romania, delivered by the ECtHR on 25 aprilie 2017, adopted by the Romanian Government on 17th February 2018*
- ECtHR 2001-VIII; Kudła v. Poland [GC], no. 30210/96, ECHR 2000-XI
- ECtHR, judgment from 16.06.2000, in the case of *Labzov v. Russia*
- ECtHR, judgment from 24.07.2001, in the case of *Valasinas v. Lithuania*
- ECtHR, judgment from 29.04.2003, in the case of *Aliev v. Ukraine*
- ECtHR, judgment from 29.04.2003, in the case of *Poltoratski v. Ukraine*
- ECtHR judgement from 12.10.2004, in the case of *Bursuc v. Romania*
- ECtHR judgement from 05.10.2004, in the case of *Barbu Anghelescu v. Romania*
- ECtHR judgement from 02.06.2005, in the case of *Novoselov v. Russia*
- ECtHR, judgment from 09.06.2005, in the case of *II v. Bulgaria*
- ECtHR judgement from 08.11.2005, in the case of *Khudoyorov v. Russia*
- ECtHR judgement from 26.01.2006, in the case of *Mikhenyev v. Russia*
- ECtHR judgement from 01.06.2006, in the case of *Mamedova v. Russia*
- ECtHR, judgment from 19.07.2007, in the case of *Trepashkin v. Russia*
- ECtHR, judgment from 06.12.2007, in the case of *Bragadireanu v. Romania*
- ECtHR judgement from 26.04.2007, in the case of *Dumitru Popescu (no.1) v. Romania*
- ECtHR judgement from 26.07.2007, in the case of *Cobzaru v. Romania*
- ECtHR, judgment from 22.10.2009, in the case of *Orchowski v. Poland*, no. 17885/04
- ECtHR judgement from 21.07.2009, in the case of *Alexandru Marius Radu v. Romania*
- ECtHR, judgment from 16.07.2009, in the case of *Marin Stoicescu v. Romania*
- ECtHR judgement from 22.06.2010, in the case of *Boroancă v. Romania*
- ECtHR, judgment from 20.10.2011, in the case of *Mandić and Jović v. Slovenia*, nos. 5774/10 and 5985/10
- ECtHR, judgment from 10.01.2012, in the case of *Ananyev and others v. Russia*, nos. 42525/07 and 60800/08
- ECtHR, judgment from July 24, 2012, in the case of *Iacov Stanciu v. Romania*, no. 35972/05.
- ECtHR, judgment from 20.11.2012, in the case of *Ghiurău v. Romania*
- ECtHR, judgment from 08.01.2013, in the case of *Torreggiani and others v. Italy*, nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10
- ECtHR, judgment from 25.11.2014, in the case of *Vasilescu v. Belgium*, no. 64682/12.
- ECtHR, judgment from 27.01.2015, in the case of *Neshkov and others v. Bulgaria*, nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13.
- ECtHR, judgment from 10.05.2016, in the case of *Varga and others v. Hungary*, nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13.
- ECtHR, judgment from 20.10.2016, in the case of *Muršić v. Croatia*
- ECtHR, judgment from 25.04.2017, in the case of *Rezvimeș and others v. Romania*, nos. 61467/12, 39516/13, 48231/13 and 68191/13
- Administrative Court of Appeal (CAA) of Douai (1st ch.) 12th November 2009, no. 09DA00782
- Rouen Administrative Court (TA Rouen, March 27, 2008)
- Vrancea District Court, 1st Civil section, judgment no. 96/2012

- https://actu.dalloz-etudiant.fr/
- http://www.apt.ch/
- http://www.avp.ro/
- http://www.cglpl.fr/
- https://www.echr.coe.int/
- https://hudoc.echr.coe.int/eng#
- https://www.juridice.ro/
- http://www.just.ro/
- https://rm.coe.int/
- https://search.coe.int/
- http://www.un.org/

SPECIAL CONFISCATION IN THE CASE OF THE OFFENCE OF MONEY LAUNDERING OF PROCEEDS FROM TAX EVASION

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Abstract

The academic literature and the case-law are concerned with the relationship between the tax evasion offence and the money laundering offence, when the money laundered come from the first offence. More exactly, the question is whether the penalty of special confiscation of the proceeds from tax evasion may still be imposed on a person who committed both offences and is ordered to pay the tax liabilities.

In this article we would like to answer this legal issue, taking into account the relevant legal provisions and case-law.

Keywords: *tax evasion, money laundering, offences, first offence, confiscation.*

1. Introduction

Decision no. 23/2017, published in the Official Journal of Romania, Part I, No 878 of 8 November 2017 deals with the legal issue of whether : "*When interpreting the provisions of Article 33 of the Law no. 656/2002 on preventing and sanctioning money laundering and of Article 9 of the Law no. 241/2005 on preventing and fighting tax evasion, in the case of concurrent offences consisting of the tax evasion offence and the money laundering offence, it is necessary to take the security measure of special confiscation of the amounts of money which were the subject of the money laundering offence and which derive from the commission of the tax evasion offence and to order the defendants to pay the amounts representing tax liabilities due to the state as a result of the commission of the tax evasion offence and, if so, the amount subject to confiscation is represented by the total amount of the expenses which are not based on real operations or by the value of the damage caused to the state budget as a result of the commission of the tax evasion offence provided for in Article 9(1)(c) of the Law No 241/2005?*".

Prior to this Decision, the relevant case-law was not unitary, the following views being expressed, as far as we know:

- The special confiscation, pursuant to Article 33 of the Law no. 656/2002, is not required in conjunction with the obligation to pay the amounts representing the tax liabilities due to the state as a result of the commission of the tax evasion offence;
- The special confiscation, pursuant to Article 33 of the Law no. 656/2002, may be ordered, but only in respect of the assets derived from the commission of the pre-requisite offence (tax evasion);
- The special confiscation, pursuant to Article 33 of the Law no. 656/2002, shall be ordered in respect of the difference between the value of the recycled assets and the value of the assets which are the subject of the tax evasion offence;
- The special confiscation, pursuant to Article 33 of the Law no. 656/2002, shall be ordered in respect of the value of the recycled assets, regardless of whether the active subject was required to pay or not or has actually paid the amounts representing the consideration for the assets which were the subject of the tax evasion offence.

2. Applicable legal provisions

According to Art. 29 of the Law no. 656/2002 :"(1) The following shall constitute money laundering offence and shall be punishable by 3 to 10 years of imprisonment:

a) the change or transfer of assets, knowing that they derive from the commission of offences, for the purpose of hiding or concealing the unlawful origin of those assets or in order to help the person who committed the offence of which the assets derive to circumvent the investigation, the trial or the enforcement of the penalty;
b) The hiding or the concealment of the true origin, location, arrangement, movement or ownership of the assets or of the rights over them, knowing that the assets derive from the commission of offences;
c) The acquisition, the possession or the use of assets, knowing that they derive from the commission of offences".

According to Art. 33 of the Law no. 656/2002: "(1) In the case of money laundering and terrorist

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financing offences, the provisions of Article 118 of the Criminal Code[1] on confiscation of assets shall apply.

(2) If the assets subject to confiscation are not found, their cash equivalent or the assets acquired shall be confiscated instead...

(3) The revenue or other material benefits obtained from the assets referred to in paragraph (2) shall be confiscated.

(4) If the assets subject to confiscation cannot be individualised from the assets legally acquired, assets up to the value of the assets subject to confiscation shall be confiscated.

(5) The provisions of paragraph (4) shall apply accordingly to the revenue or other material benefits obtained from the assets subject to confiscation, which cannot be individualised from the assets legally acquired.

(6) In order to ensure the enforcement of the confiscation of assets, the adoption of the precautionary measures provided for in the Code of criminal procedure is mandatory".

According to Art. 9 para (1) of the Law no. 241/2005:"The following acts committed for the purpose of avoiding the discharge of tax liabilities shall *constitute tax evasion offences and shall be punishable by 2 to 8 years of imprisonment and the prohibition of certain rights:*

a) The concealment of the asset or of the taxable or chargeable source;

b) The omission, in whole or in part, of disclosing in the accounting records or other legal documents, the commercial operations carried out or the revenue obtained;

c) The disclosure in the accounting records or other legal documents, of the expenditures which are not based on real operations or the disclosure of other fictitious operations;

d) The alteration, the destruction or the concealment of accounting documents, memories of ticketing machines or electronic tax cash registers or of other means for data storage;

e) The preparation of double accounting records, using documents or other means of data storage;

f) the circumvention of financial, tax or custom checks by failing to declare, fictively declaring or inaccurately declaring the principal or secondary places of business of the persons checked;

g) The substitution, the degradation or the disposal by the debtor or by third parties of seized assets, in accordance with the provisions of the Code of tax procedure and the Code of criminal procedure".

According to Article 112 of the Criminal Code :"(1) The following shall be subject to special confiscation:

a) assets produced by perpetrating any offence stipulated by criminal law;

b) assets that were used in any way, or intended to be used to commit an offence set forth by criminal law, if they belong to the offender or to another person who knew the purpose of their use;

c) assets used immediately after the commission of the offence to ensure the perpetrator's escape or the retention of use or proceeds obtained, if they belong to the offender or to another person who knew the purpose of their use;

d) assets given to bring about the commission of an offence set forth by criminal law or to reward the perpetrator;

e) assets acquired by perpetrating any offence stipulated by criminal law, unless returned to the victim and to the extent they are not used to indemnify the victim;

f) assets the possession of which is prohibited by criminal law".

[1] Article 118 belongs to the former Criminal Code. Now, it is Article 112 of the Criminal Code. According to Article 112 of the Criminal Code: "(1)The following shall be subject to special confiscation:

a) assets produced by perpetrating any offence stipulated by criminal law;

b) assets that were used in any way, or intended to be used to commit an offence set forth by criminal law, if they belong to the offender or to another person who knew the purpose of their use;

c) assets used immediately after the commission of the offence to ensure the perpetrator's escape or the retention of use or proceeds obtained, if they belong to the offender or to another person who knew the purpose of their use;

d) assets given to bring about the commission of an offence set forth by criminal law or to reward the perpetrator;

e) assets acquired by perpetrating any offence stipulated by criminal law, unless returned to the victim and to the extent they are not used to indemnify the victim;

f) assets the possession of which is prohibited by criminal law.

(2) In the case referred to in par. (1) lett. b) and c), if the value of assets subject to confiscation is manifestly disproportionate to the nature and severity of the offence, confiscation will be ordered only in part, by monetary equivalent, by taking into account the result produced or that could have been produced and asset's contribution to it. If the assets were produced, modified or adapted in order to commit the offence set forth by criminal law, they shall be entirely confiscated.

(3) In cases referred to in par. (1) lett. b) and c), if the assets cannot be subject to confiscation, as they do not belong to the offender, and the person owning them was not aware of the purpose of their use, the cash equivalent thereof will be confiscated in compliance with the stipulations of par. (2).

(4) The stipulations of par. (1) lett. b) do not apply to offences committed by using the press.

(5) If the assets subject to confiscation pursuant to par. (1) lett. b) - e) are not to be found, money and other assets shall be confiscated instead, up to the value thereof.

(6) The assets and money obtained from exploiting the assets subject to confiscation as well as the assets produced by such, except for the assets provided for in par. (1) lett. b) and c), shall be also confiscated".

3. Solution of the legal issue and main considerations

By Decision No 23/2017, the High Court of Cassation and Justice - the formation for solving criminal law issues decided: "In interpreting the provisions of Article 33 of the Law no. 656/2002 on preventing and sanctioning money laundering and of Article 9 of the Law no. 241/2005 on preventing and fighting tax evasion, in the case of concurrent offences consisting of the tax evasion offence and the money laundering offence**, the adoption of the security measure of special confiscation of the amounts of money which were the subject of the money laundering offence and which derive from the commission of the tax evasion offence in conjunction with the obligation of the defendants to pay the amounts representing tax liabilities due to the state as a result of the commission of the tax evasion offence is not required**".

The supreme court has held in the reasoning of the decision: "**Given that the amount of money acquired as a result of the commission of an offence is no longer in possession of the offender, but it has been used for compensating the injured person, the prerequisite of possessing the result of an offence no longer exists and, by default, there is no state of danger, and the security measure of special confiscation is not justified in any way** (...).

In case of a damage resulted from the commission of the tax evasion offence, this must be compensated, the confiscation measure as a result of the money laundering offence being no longer operable, whereas we are in the presence of a single damage, and the simultaneous application of the two measures would result in a double punishment of the person charged and convicted for committing both offences".

4. The effects of the Decision No 23/2017 and other consequences of the concurrent offences of tax evasion and money laundering

4.1. The special confiscation, pursuant to Article 33 of the Law no. 656/2002, shall be excluded if the court ordered „the payment of the amounts representing tax liabilities due to the state as a result of the commission of the tax evasion offence"

It follows from the Decision No. 23/2017 that both the payment of the amounts representing tax liabilities due to the state, as a result of the commission of the tax evasion offence, and the special confiscation measure having the same object may not be ordered.

The assets which may be the subject of the money laundering offence are always assets derived from the commission of offences. It can be said about the object of the money laundering offence that it coincides, partially (when only a part of the assets of criminal origin are laundered) or totally (when all assets of criminal origin are laundered) with the object of the pre-requisite offence (predicate, main).

In other words, **the value of the object of the money laundering offence may be lower or equal to that of the object of the offence from which it is derived. In principle, the value of the object of the money laundering offence may not exceed the value of the object of the main offence.**

There is one exception to this rule. It is the case in which the dirty assets laundered had results [revenue or benefits, in accordance with Article 33(2) of the Law No 656/2002].

For illustration, we offer an example. Let's suppose that a person (the defendant X) is charged, as offender, together with an accomplice (the defendant Y), with the commission of the tax evasion offence [Article 9(1)(c) of the Law No 241/2005] and money laundering offence [Article 29(1)(b) of the Law No 656/2002], consisting in the circumvention of the payment of the VAT (amounting to Lei 38,000) by recording fictitious operations (amounting to Lei 200,000), in the accounting records of the company that he managed, and then used the amount evaded (Lei 38,000) for the purchase of land. In fact, the amount of Lei 200,000 (of lawful origin) was paid by bank transfer into the account of the company that issued invoices concerning the unreal operations, and was subsequently withdrawn from the ATM by the administrator (Y) of this company and then refunded to the perpetrator (X) of the tax evasion offence.

The amount of Lei 38,000 was subsequently used for the purchase of a plot of land, and the amount of Lei 162,000 (the lawful amount) was used for crediting the company. We specify that the company pays the turnover tax.

In such a case, if X did not pay voluntarily the tax liabilities, the court will order him to pay the tax liabilities due to the state as a result of the commission of the tax evasion offence, i.e. the amount of Lei 38,000.

In such a case, the possibility of ordering the confiscation of the amount of Lei 38,000 is excluded, because this amount has already been taken into account for establishing the liability for the damage caused as a result of the commission of the tax evasion offence.

4.2. May the special confiscation be ordered, pursuant to Article 33 of the Law no. 656/2002, in respect of the assets which do not derive from criminal activities?

The answer is definitely no. The special confiscation, pursuant to Article 33 of the Law no. 656/2002, may only be ordered in respect of the assets of criminal origin, i.e. the dirty assets derived from offences and certainly not in respect of assets of lawful origin.

Moreover, it follows very clearly from the operative part of the Decision no. 23/2017 that "**the security measure of special confiscation of the**

amounts of money which were the subject of the money laundering offence and which derive from the perpetration of the tax evasion offence in conjunction with ordering the defendants to pay the amounts representing the tax liabilities due to the state as a result of the commission of the tax evasion offence is not necessary".

Where the dirty money derives from the commission of the tax evasion offence, if the active subject, common to both offences (tax evasion and money laundering), was ordered to pay the amount which represents the value of the tax liabilities, according to Decision No 23/2017, the security measure of special confiscation may no longer be taken against him.

Thus, in the example above, where the amount transferred within the framework of the fictitious operation amounted to Lei 200,000, the application of the provisions on special confiscation is excluded *de plano* because this entire amount had a lawful origin. The fact that, following the bank transfer into the account of the company managed by Y and the disclosure of the fictitious operations in the accounting records, a part (Lei 38,000) of this amount (Lei 200,000) acquired criminal origin does not entail the contamination and the dirtying of the entire amount transferred[2].

4.2. May the special confiscation, pursuant to Article 33 of the Law no. 656/2002, have as their object *clean money*?

The special confiscation, pursuant to Article 33 of the Law no. 656/2002, may not have as object clean money of lawful origin. In the example above, the amount of Lei 162,000, which consists in the difference between the amount transferred and the amount evaded, may not be confiscated, whereas it has a lawful origin.

The only amount that could be subject to special confiscation was the amount of Lei 38,000, which was excluded from the payment to the general consolidated budget, but in this case only provided that the civil party (the state) does not join proceedings as civil party or if the value of its claims are lower than the evaded amount. In our example, taking into account that the defendant X was ordered to pay for the damaged caused by the tax evasion offence, i.e. the amount of Lei 38,000 (amount equal to that of dirty money), the special confiscation measure may not be ordered against him.

4.3. May the special confiscation, pursuant to Article 33 of the Law no. 656/2002, be ordered when the damage consisting in the evaded amount was voluntarily paid during the criminal investigation or trial?

The answer is negative. We have seen above that, according to Decision no. 23/2017, the security measure of special confiscation, pursuant to Article 33 of the Law no. 656/2002, may not be taken if the court ordered the "*payment of the amounts representing tax liabilities due to the state as a result of the commission of the tax evasion offence*".

That being the case, *a fortiori*, the same solution is also valid when the damage consisting in the evaded amount was voluntarily compensated during the criminal investigation or trial.

5. Conclusions

On the basis of the above, it may be concluded that, when the dirty money comes from commission of the tax evasion offence, if the active subject, common to both offences (tax evasion and money laundering), was ordered to pay some amounts which represent the value of tax liabilities, the security measure of special confiscation may no longer be ordered against him, according to Decision No. 23/2017.

The main conclusion of this article is that the security measure of special confiscation, pursuant to Article 33 of the Law no. 656/2002, may not have as object clean money, of lawful origin, but only dirty money. In this case, the security measure may only concern the dirty money and only if the active subject of the offence was not ordered to pay these amounts by way of tax liabilities and only if he did not perform those obligations voluntarily.

After the publication in the Official Journal of the Decision No. 23/2017 on solving the legal issue examined in this article, the case-law began to change according to this Decision.

References

- M.A. Hotca, Criminal law handbook. General part, Universul Juridic Publishing House, Bucharest, 2017
- M. Gorunescu, C. Toader, Extended confiscation - from constitutional litigation in administrative and tax litigation to criminal litigation, in Dreptul No 9/2012
- F. Streteanu, Considerations on extended confiscation, in Caiete de drept penal No 2/2012
- F. Streteanu, Considerations on extended confiscation, in Caiete de drept penal No 2/2012
- D. Nitu, Amendments brought in the field of confiscation by the provisions of the Law no. 278/ 2006 in Caiete de drept penal No 3/2006

[2] Furthermore, the amount of Lei 38,000 may be considered dirty only when the entire content of the tax evasion offence is achieved, namely on the date of disclosure of the fictitious operation in the accounting records, which is committed on the date of the VAT return. The damage to the consolidated state budget is not yet caused up to submission of the VAT return, meaning that there is no black money (dirty, of criminal origin).

CONSIDERATIONS REGARDING THE PREVENTIVE MEASURE OF JUDICIAL CONTROL ON BAIL.

Andrei-Viorel IUGAN[*]

Abstract

The judicial control on bail is one of the five preventive measures provided by the New Criminal Procedure Code. The faulty way of regulating the preventive measure of judicial control on bail has determined an extremely low applicability of this preventive measure in the judicial practice of our country.

Both in doctrine and jurisprudence there is controversy over the procedure to be followed in order to take the measure of judicial control on bail. In a doctrinal opinion it was shown that there is a preliminary stage of admissibility in principle and that the provisions of art. 242 C.P.P. shall be applied by analogy. This is one of the problems we intend to analyze in our study.

In the Western countries legislation, such a measure is widespread, being considered a viable alternative to the deprivation of liberty. The threat of losing a very large amount of money will obviously cause the defendant to weigh heavily the way he respects the obligations imposed by the judicial bodies.

The jurisprudential controversies previously described with regards taking this measure, controversies born from the very wording used by the legislator, prompted many prosecutors to be reluctant to order / take such a measure.

We hope that in the future, the regulation of judicial control will be given greater attention and this preventive measure will truly become a genuine alternative to custodial preventive measures.

Keywords: *preventive measures, bail, judicial control, prosecutor, court.*

1. Introductory notions

Judicial control on bail is one of the 5 preventive measures regulated by the Romanian criminal procedural law. This measure may be ordered during the prosecution, as a rule, by the prosecutor.

The judge of rights and freedoms may also impose judicial control during the criminal proceedings but only if he / she rejects the proposal for preventive arrest / home arrest and takes the measure of judicial control on bail or disposes the replacement of the preventive arrest / home arrest with judicial control on bail (either on the occasion of the rejection of the proposal to extend the preventive arrest / home arrest or on the occasion of solving a separate request for replacement).

The judge of rights and freedoms will never be notified by the prosecutor with a proposal to take the measure of judicial control on bail. In the preliminary chamber procedure, the competence to rule on judicial control on bail lies with the judge hearing the preliminary hearing and at the trial stage with the court.

With regards the conditions to be fulfilled in order for this measure to be taken, we find that while judicial control is a restrictive measure, the conditions are identical to those required for measures of imprisonment or house arrest / preventive arrest.

Thus, for taking this preventive measure, there must be at least one of the following cases:

- The defendant fled or was hiding in order to evade the criminal investigation or trial, or to make preparations of any kind for such acts;
- The defendant tried to influence another participant to the incriminated act, an expert or witness or tried to destroy, alter or conceal evidence or lead another person to have such a behavior;
- The defendant puts pressure on the injured party or tries to make a fraudulent deal with him;
- There is reasonable suspicion that, after the criminal proceedings have been initiated against him, the defendant intentionally committed a new offense or he/she is preparing to comit a new offense;
- If it stemms out of the evidence collected the reasonable suspicion that he /she has committed any of the offenses provided by art. 223(2) Code of Criminal Procedure (C.P.P.) and on the basis of the assessment with regards: the seriousness of the offense, the manner and circumstances of committing the offense, the entourage and the environment from which the defendant originates, the criminal history and other circumstances concerning the person, it is concluded that taking the preventive measure of restricting one's freedom is necessary to remove a state of danger for the public order.

We consider that the legislator's option is open for criticism and we see no justification for the existence of any differences between the conditions for imposing judicial control and the conditions for judicial control on bail. De lege ferenda, we believe that only the general conditions provided for in art. 202 Criminal Code (C.C) should apply: that there is sufficient evidence or sound clues from which it would result a reasonable suspicion that the defendant has committed an offense; that criminal proceedings have been

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initiated; the judicial control on bail is necessary to ensure the proper conduct of the trial, preventing the defendant absconding from prosecution or trial or to prevent commission of another offense; the judicial control on bail must be proportionate to the seriousness of the accusation brought to the person against whom it is taken and necessary to achieve the aim pursued by its disposition; there must be no cause that would prevent the initiation or prosecution of the criminal action; the defendant has been previously heard in the presence of an attorney elected or appointed ex officio.

2. The procedure for judicial control on bail in the course of the criminal prosecution stage

Both in doctrine and jurisprudence there is controversy over the procedure to be followed in order to take the measure of judicial control on bail. In a doctrinal opinion it was shown that there is a preliminary stage of admissibility in principle and that the provisions of art. 242 C.P.P. shall be applied by analogy. At this stage the prosecutor determines the value of the bail and sets the payment term for this amount. Subsequently, after the bail has been paid, the prosecutor would have ordered this preventive measure, setting out the obligations and measures that the defendant must respect[1].

However, jurisprudence is almost unanimous in considering that all steps in ordering the measure of judicial control on bail take place in a single stage. Thus, in a case filed by ICCJ, it was shown that in the case of the replacement of the preventive arrest with the measure of judicial control on bail, the legislator provided for a special procedure distinct from just taking the measure of judicial control on bail. Thus, if in the first situation it is necessary to go through the admissibility phase in principle and to lodge the bail before the replacement (Article 242(10) C.P.P), in the second situation the measure is taken without going through distinctive steps such as the admissibility in principle (art. 216 rap. to art. 212-216 C.P.P.) [2].

Likewise, it has been shown that the measure judicial control on bail is ordered uno ictu by the prosecutor through a reasoned order which shall contain the duration of the measure, the obligations imposed on the defendant, the amount of bail and the conditions of deposit. The legal provisions in force do not provide for a stage of admissibility in principle nor the need to obtain the defendant's consent[3].

The jurisprudence identified at the level of the Supreme Court, since the entry into force of the new Code of Criminal Procedure to this date, shows that, in all cases, the prosecutor has issued ordinances to take the measure of judicial control uno ictu, without passing through the stage of admissibility in principle. The same case-law shows that the court, by examining the lawfulness of the measure, on request of the defense or on its own initiative, did not rely on the absence of the admissibility stage in principle as a vice in the proceedings and the deposit of the bail was not considered a sine qua non condition for the ascertainment of the measure. (...) This procedure of taking the measure of judicial control on bail uno ictu is not inconsistent with the hypothesis of replacing the measure of preventive arrest, separately regulated in the Criminal Procedure Code Article 242, paragraph 10. The abovementioned text is of a special nature - special generalibus derogation. The fact that the text is not applicable in the procedure for the taking of the measure of judicial control on bail also results from a simple systematic interpretation, seeing the place of the norms in the sections of Title V, chapter I. Thus, at the time of replacing the preventive arrest measure with the measure of judicial control on bail, the same legislator introduces an additional condition, the early payment of the bail, at a distinct stage of admissibility in principle. The distinct situation in which the legislator foresees for the stage of admissibility in principle, namely the replacement of the preventive arrest measure, supports the usefulness or opportunity of the early deposit of the bail. The different prerequisites (replacing the preventive custody / taking the measure of judicial control on bail) justify the different optics of the legislator. As a consequence, the measure of judicial control on bail is ordered by the prosecutor by reasoned ordinance, which will contain the duration of the measure, the obligations imposed on the defendant, the amount of the bail and the conditions of the deposit[4].

What distinguishes the judicial control from the judicial control on bail is the obligation to deposit the bail. The most controversial issue with regard to the judicial control on bail is to determine when the bail must be paid, namely whether the measure can be ordered only after the defendant has paid the bail or whether the prosecutor can order the measure and the defendant will subsequently deposit the set amount.

In the doctrine, the first opinion is almost unanimous. It has been shown that the depositing of the set sum is one of the conditions stipulated by the law in order to proceed with the preventive measure; it was found erroneous the practice of some judicial bodies of taking the measure for a certain period by setting of a term for the deposit that begins to run after the beginning of the measure.

This latter interpretation is contradicted by the express provisions of Art. 216 (1) C.P.P. that lists the conditions under which the prosecutor may order

[1] V. Pușcașu, C.Ghigheci, *Proceduri penale*, vol. I, Ed. Universul Juridic, Bucharest, 2017, p. 753-754; also, C. Voicu în N. Volonciu, A.S.Uzlău, *Codul de Procedură Penală comentat,*Ed. Hamangiu, Bucharest, p. 551.

[2] I.C.C.J, court decision from 4.03.2014, unpublished.

[3] I.C.C.J., court decision no. 210 from 14.03.2016, unpublished.

[4] I.C.C.J., court decision no. 286 from 6.04.2016, unpublished.

judicial control on bail. If the defendant does not deposit the sum set as bail, there is no impediment in making a proposal for taking a custodial preventive measure, since the preventive measure of judicial control has already been considered insufficient to achieve the purpose of preventive measures. Moreover, it would be contrary to the principle of "*nemo auditur propriam turpitudinem allegans*" that the guilty pasivity of the defendant in the depositing of the bail would lead to the creation of a more favorable situation for him/her by taking a less restrictive measure of rights[5].

As regards the jurisprudence of the Supreme Court, a single solution was given in this respect. As such, the judge of rights and freedoms found that from the provisions of art. 216 (1) C.P.P. it follows that the deposit of the bail by the defendant is a precondition for the legality, which must be fulfilled in order for the measure of judicial control on bail to be ordered. Even though the abovementioned legal provisions do not stipulate that this measure could be taken by the prosecutor only at the initiative of the defendant, however, since the defendant can not be compelled to deposit the bail, the judge of rights and freedoms finds that this measure cannot be taken during the criminal prosecution stage legally by the prosecutor alone, but only with the consent or at the request of the defendant.

However, without being subjected to a custodial perventive measure, it is logical that the defendant will not be interested in requesting to take the measure of judicial control on bail against him and thus to deposit a bail. He /she would be interested in requesting the application of this preventive measure only if he/ she would had been subject to a measure depriving him/her of his/her freedom; in such a case the replacement of the measure of preventive arrest or of home arrest with the measure of the judicial control on bail would be ordered under the conditions provided by art. 242 (10) and (11) of the C.P.P., either by the judge of rights and freedoms, by the judge of the preliminary chamber or by the Court, and not by the prosecutor. It follows that, during the criminal prosecution, in theory, the measure of judicial control on bail ordered by the prosecutor may be taken, as provided by the provisions of Art. 216 (1) C.P.P. However, in practice, in the absence of the defendant's agreement or request, the consequence is the failure to comply with the condition for prior deposit, and therefore the illegality of the measure, the possibility for the prosecutor to dispose of this measure becomes an illusory one, as it is the case here[6].

The practice of the Supreme Court is in the sense of ordering judicial control on bail also prior to the payment of bail, as such until the defendant makes the deposit, the precautionary measure is manifested as a simple judicial control. It has been shown that the current legislator, following the analysis of previous regulations and its reflections in judicial practice, found the usefulness of reforming the institution. Thus, the current legislator has explicitly and willingly abandoned the admission phase in principle, and the grammatical interpretation of the final sentence of art. 216 (1) C.P.P. can not lead anymore to the conclusion of the need for the early deposit of the bail. Such an interpretation would be tantamount to adding to the law or to enactment, the current legislator's will being to take the measure of judicial control uno ictu and simplify the procedure. Such an interpretation would be tantamount to the enactment of the admissibility procedure in principle according to the structure and conditions of the repealed legal provision, in the context in which the legislator waived this provision and the case-law created in the light of the repealed text. (...) The deposit of the bail, which requires personal actions of the defendant, as successive actions to the obligation imposed by the judicial body, is made after its establishment through the only ordinance that the procedure provides. Asking the prosecutor to issue two ordinances, a first as to establish the bail (no other obligations) and a second for the actual taking of the measure and the determination of the rest of the obligations to be imposed to the defendant, has no coverage in the current legislation and comes in flagrant contradiction with the text requiring the establishment of all obligations, including amount of the bail, through a single act[7].

In another case, the judge of rights and freedoms stated that considering that the measure of judicial control on bail would come into force only after the bail had been deposited would lead to the illogical situation in which a defendant who is subject to regular judicial control complies with all the obligations imposed from the moment the ordinance was issued, while a defendant who is subject to judicial control on bail, hence a heavier preventive measure, would only comply with all the obligations imposed at a later time, after the deposit of the bail. Until the time the defendant deposits the bail, the measure of judicial control on bail has same efects, namely obligations imposed, as the regular judicial control[8].

In our opinion, this latter opinion is also the correct one. Thus, the urgency of preventive measures is taken into account. For example, if the prosecutor considers that it is necessary for the proper conduct of the criminal proceedings that the defendant should not contact certain persons and not leave the territory of the country, it is only natural that such restrictions occur immediately. Allowing the defendant to delay the execution of these obligations until the payment of the

[5] C. Jderu, în M. Udroiu (coordonator), *Codul de Procedură Penală. Comentariu pe articole,* Ed. C.H.Beck, Bucharest, 2017, p. 1046-1047; also, M. Udroiu, *Procedură Penală. Partea Generală,* Ed. C.H. Beck, Bucharest, 2016, p. 681, B. Micu, R. Slăvoiu, A.G. Păun. *Procedură Penală. Curs pentru admiterea în magistratură şi avocatură,* Ed. Hamangiu, Bucharest, p. 196; C. Voicu în N. Volonciu, A.S.Uzlău, quouted work., p. 551.

[6] I.C.C.J., court decision no. 145 from 24.02.2016, unpublished.

[7] I.C.C.J, court decision no. 286 from 6.04.2016, unpublished.

[8] T. Prahova, court decision no. 475 from 6.10.2016, unpublished.

bail would be practically a way of undermining the purpose of the criminal proceedings. Practically, the interpretation given by this last opinion, which we have embraced, is the only one that allows the practical application of the institution of judicial control on bail.

3. Appealing the ordinance to the judge of rights and freedoms

The prosecutor's ordinance throught which the preventive measure was ordered may be appealed through a complaint lodged with the judge of rights and freedoms belonging to the Court that would have jurisdiction to hear the case at first instance.

The period within which the prosecutor's ordinance may be appealed is 48 hours from the communication of the ordinance by which the preventive measure was taken.

The judge of rights and freedoms sets a deadline and orders the defendant's summoning. The complaint will be settled in the council chamber. The complaint must be resolved within 5 days of registration. The citation of the defendant is mandatory, but its absence will not prevent the complaint from being judged. The participation of the prosecutor is mandatory. The judge of rights and freedoms listens to the defendant when he / she is present. The legal assistance of the defendant is mandatory.

The main issue that triggered controversy in practice regarding this procedure is the ability of the judge of rights and freedoms to analyze the amount of bail imposed by the prosecutor. In the doctrine, it has been shown that the defendant can not challenge the amount of the bail fixed by the prosecutor, because the measure can be taken only after the bail has been deposited. If the measure is taken, it means that the defendant has deposited the bail, hence implicitly accepting its value; the dissatisfaction with the amount fixed by the prosecutor can be expressed by the refusal to deposit the bail, which means that the measure will not be taken[9].

As we have seen before, depositing of the bail is not a prerequisite for taking the preventive measure of judicial control on bail, so it can not be argued that the defendant has accepted the amount of the bail. From the examination of the jurisprudence of the High Court it is observed that a unitary practice has been formed regarding the possibility of the judge of rights and freedoms to reduce the amount of the bail in the procedure provided by art. 216 rap. to art. 213 C.P.P.

In another opinion, it was found that, during the appeal procedure, the judge of rights and freedoms has the power to examine only the questions regarding the legality of this preventive measure when dealing with the complaint against the prosecutor's ordinance ordering the measure of judicial control. Therefore, the judge of rights and freedoms can not censor the prosecutor's assessment of the amount of bail imposed but can only check whether the measure has been taken in compliance with the legal provisions[10].

To the contrary, it was found that the judge of rights and freedoms, when examining the complaint, may censure the unlawfulness of the bail, for example if the sum is outside the legal ceilings or groundless related issues relating to an excessive amount in relation to the personal or financial situation of the defendant[11].

In another case, the Supreme Court held that the amount of bail of 500,000 lei (approximately 111,000 EUR), set by the prosecutor, reported to the seriousness of the accusations made to the defendant, to its material situation (which has approximately 53,400 EUR annual total income - 13,400 EUR annual salary income plus 40,000 EUR annual income from other self-employment activities, as evidenced by its latest wealth declaration filed on file), but also to its legal obligations (which are not to be neglected since the defendant has 5 children), is an excessively high value, which is impossible to pay for the defendant. By making a simple calculation, it was found that the defendant could raise this sum if it would save all the income earned over two years, and this entailing no expenditure with daily maintenance and current expenses. A second option for setting the amount of the bail, as provided by the provisions of art. 217 (2) C.P.P., namely the creation of a real, movable or immovable collateral, within the limit of this amount of money, can not be taken into account, since the defendant does not own any immovable or movable property of such a value (other than family jewels, which, in addition to not being in its personal property, have a total value of 40,000 EUR, less than half of the value of the set bail) [12].

On the same issue, another Court has stated that the amount of the bail imposed by the prosecutor, namely 300,000 lei, can be censored in the appeal procedure, and from the analysis of the situation of all the defendants it is established that the bail was set differently for each defendant, without motivating the criteria that were taken into account in establishing the amounts. In the absence of criteria for differentiation between defendants, the judge of rights and freedoms considers that it is necessary to amend the amount set as bail in relation to the seriousness of the accusations made against them and the amount of the prejudice held for each defendant. Therefore he proceeded with the establishment of a set amount of 10% calculated from the amount of the prejudice, for all defendants in accordance with the principle of equal treatment, considering that these amounts are not excessive and impossible to be paid by the defendants. Thus, in

[9] B. Micu, R. Slăvoiu, A. G. Păun, quouted work., p. 197.
[10] I.C.C.J., court decision no. 855 from 4.11.2015, unpublished; also, I.C.C.J., court decision no. 568 from 12.06.2014, unpublished.
[11] I.C.C.J., court decision no. 286 from 6.04.2016, unpublished.
[12] I.C.C.J., court decision no. 145 from 24.02.2016, unpublished.

relation to the situation of the defendant for which an estimated loss of 1.615.680 lei, consisting of profit tax 646.272 lei and VAT 969.408 lei, the judge of rights and freedoms considers that the amount of the bail must be reduced from 300.000 lei to 160,000 lei, taking into account the damage caused to the state budget, as estimated in the preliminary investigation report drawn up by anti-fraud inspectors[13].

In our view, this latter opinion is the correct one, the defendant's ability to challenge the fact that he/she has been forced to pay a sum of money is a clear representation of an appeal against the violation of his /her civil rights and obligations (including property rights); such appeal would enable the defendant to address the situation to a judge, according to art. 6 C.E.D.O. Moreover, the purpose of establishing the procedure regulated by art. 213 C.P.P. is to allow the judge of rights and freedoms to fully analyze the issues covered by the prosecutor's ordinance. Also, given the fact that the judge of rights and freedoms, according to the law, rules on obligations that are often insignificant (for example, that the defendant does not use arms), a fortiori it's obvious that he should be able to analyze if the amount of the bail imposed by the prosecutor, which in some cases also amounts to several millions of lei[14], is not disproportionate.

4. The bail. Notion. Restitution and forfeiture.

Depositing the bail shall be made on the defendant's behalf through a deposit of a sum of money at the disposal of the judicial body or by the creation of a real, movable or immovable collateral, with the same value as the set amount, in favor of the same judicial body. The amount of the bail is of at least 1,000 lei and is determined in relation to the gravity of the accusation, the material situation and the legal obligations of the defendant. The bail guarantees the defendant's participation in the criminal proceedings and compliance with the obligations established by the judicial body that ordered the measure.

The bail is returned when the prosecutor concludes that the case shall not be trialed. In this case, the bail will be refunded even in cases where the judicial control on bail was replaced with the measures of preventive arrest or home arrest, namely if the defendant violated in bad faith his/her obligations or because there was a reasonable suspicion that he/ she intentionally committed a new offense for which criminal proceedings were initiated. There will be no deductions (for example for the judicial costs set in charge of the defendant) from the sum set as bail. However, nothing prevents the prosecutor from taking precautionary measures upon the sum set as bail.

The bail shall also be returned when the Court reaches a final decision, if the measure of judicial control on bail has not been replaced with the measure of home arrest or preventive arrest. The bail shall be returned in full, provided there are no provisions in the Court's decision that out of this sum there wil be deducted, in the following order, compensation for damages caused by the offense, judicial costs or fines.

The bail is seized when the measure of judicial on bail is replaced by the measure of home arrest or preventive arrest, and the defendant / case has been sent for trial. The bail is seized in full insofar as it has not been ordered by the Court to deduct from the amount set as bail, in the following order, compensation granted for the repair of the damages caused by the offense, the judicial costs or fines.

5. Conclusions.

The faulty way of regulating the preventive measure of judicial control on bail has determined an extremely low applicability of this preventive measure in the judicial practice of our country. In the Western countries legislation, such a measure is widespread, being considered a viable alternative to the deprivation of liberty. The threat of losing a very large amount of money will obviously cause the defendant to weigh heavily the way he respects the obligations imposed by the judicial bodies. The jurisprudential controversies previously described with regards taking this measure, controversies born from the very wording used by the legislator, prompted many prosecutors to be reluctant to order / take such a measure. While it is not the subject of the present study, we can not abstain from emphasizing the fact that, although it is theoretically possible to apply judicial control on bail when requesting / extending the preventive measure of preventive arrest or home arrest, practically this is impossible. We hope that in the future, the regulation of judicial control will be given greater attention and this preventive measure will truly become a genuine alternative to custodial preventive measures.

References

- I. Neagu, m. Damaschin, Tratat de Procedură Penală. În lumina Noului Cod de Procedură Penală, Bucharest, Ed. Universul Juridic, 2015
- V. Pușcașu, C.Ghigheci, Proceduri penale, vol. I, Ed. Universul Juridic, Bucharest, 2017
- C. Voicu în N. Volonciu, A.S.Uzlău, Codul de Procedură Penală comentat,Ed. Hamangiu, Bucharest

[13] T. Prahova, court decision no. 475 from 6.10.2016, unpublished.

[14] I.C.C.J., s.pen., încheierea nr. 286 din 6.04.2016, unpublished, the bail established by the prosecutor was 59 000 000 lei (aproximately 13 millions euro);

- M. Udroiu (coordonator), Codul de Procedură Penală. Comentariu pe articole, Ed. C.H.Beck, Bucharest, 2017, p. 1046-1047
- M. Udroiu, Procedură Penală. Partea Generală, Ed. C.H. Beck, Bucharest, 2016
- B. Micu, R. Slăvoiu, A.G. Păun. Procedură Penală. Curs pentru admiterea în magistratură și avocatură, Ed. Hamangiu, Bucharest

LEGAL GUARANTEES FOR ENSURING THE RIGHT OF DEFENCE WITHIN CRIMINAL PROCEEDINGS IN ROMANIA AND THE REPUBLIC OF MOLDOVA

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Abstract

This paper aims at providing a comparative study of the legal framework applicable in the legal systems of Romania and the Republic of Moldova ensuring the exercise of the right of defence in criminal proceedings. A special focus shall be placed on the fair-trial standards developed by the European Court of Human Rights in interpreting the European Convention on Human Rights, as both Romania and the Republic of Moldova are Council of Europe members. The European system of safeguarding the fundamental rights is made whole by the EU standards, which are briefly presented here (while binding for the Member States, the EU model can also serve as a source of inspiration for third countries with which the EU would hold periodic dialogues on various human rights topic). Subsequently, the applicable national provisions of both States, both constitutional and pertaining to criminal procedure law, will be analysed by also making reference to relevant case-law in order to convey the dynamics of the defence rights in practice. The comparative approach is appropriate in the case in point to emphasise the common elements and values shared by the two legislations under examination, stemming from the consistency with the ECHR model of protecting the right to a fair trial, in general, and the defence rights, in particular, while, at the same time, revealing the national legal specificities.

Keywords: *right of defence, criminal proceedings, fair trial, effective defence, ECHR standards*

1. Introduction

1.1. Protecting the Right of Defence at the Supranational Level

The right of defence, as all fundamental human rights, benefits from both a national and a supranational coverage within the applicable legal instruments.

At the supranational level, the concept of "globalisation of human rights" indicates a common set of values and standards promoted notably under the United Nations, of which Romania and the Republic of Moldova are members[1].

Pursuant to Article 11 para. (1) of the 1948 *Universal Declaration of Human Rights* – a key UN legal instrument – "everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial *at which he has had all the guarantees necessary for his defence*" (emphasis added).

The right of defence is also enshrined under Article 14 para. 3 of the 1966 UN *International Covenant of Civil and Political Rights*.

The European model of safeguarding fundamental rights is prominently represented by the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (adopted in 1950), the additional Protocols thereto and the case-law of the European Court of Human Rights.

The European system for protecting human rights is characterized by a jurisdictional duality manifested by the European Court of Human Rights and the Court of Justice of the European Union, functionally complementing one another and being interdependent from the regulatory point of view[2]. The regulatory interdependence is made evident by the primary EU law, such as Article 6 of the Treaty on the European Union, which, under para. 3, provides that fundamental rights, as guaranteed by the European Convention on Human Rights and as resulting from the constitutional traditions of the Member States, shall constitute general principles of EU law. Also, the *Charter of Fundamental Rights of the European Union*, proclaimed in 2000 and presently having the same legally binding force as the EU treaties, expressly acknowledges and greatly relies on the European Convention of Human Rights.

The right of defence is a prominent right under European jurisdiction, as shall be shown herein.

1.2. Protecting the Right of Defence at the National Level

When analysing the level of protection ensured at the national level, there is a clear interrelation with the applicable international legal instruments, which is to be construed according to the following guidelines:

Firstly, *the subsidiarity principle* and *the margin of appreciation doctrine* are concepts of paramount importance in the Convention system.

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[1] Sabino Cassese, "Ruling Indirectly – Judicial Subsidiarity in the ECtHR", *Seminar on Subsidiarity: A Double-Sided Coin? 1. The role of the Convention mechanism; 2. The role of national authorities*, 30 January 2015, http://www.echr.coe.int/Documents/Speech_20150130_Seminar_Cassese_ENG.pdf, 12-13;

[2] Jean-François Renucci, *Tratat de drept european al drepturilor omului* (Bucharest: Hamangiu, 2009), 26.

These are explicitly acknowledged under Article 1 of Protocol no. 15 to the Convention – ratified by Romania in 2015 and by the Republic of Moldova in 2014, pending entry into force – by an additional recital at the end of the Preamble thereof: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention".

Secondly, as per Article 11 para. (2) of the Romanian Constitution[3], the treaties that are *ratified* by Parliament, according to the law, are an integral part of the national law. For example, the European Convention on Human Rights, ratified by Romania by Law no. 30/1994[4], has a "constitutional and super-legislative force" in the domestic legal order[5]. The same binding force applies to the ECHR case-law[6].

Pursuant to Article 8 para. (1) of the Moldovan Constitution, the Republic of Moldova undertakes to abide by the *Charter of the United Nations* and the treaties to which it is a party and to base its relationship with other states on the unanimously acknowledged international law principles and provisions. The European Convention on Human Rights was ratified by the Republic of Moldova in 1997.

Thirdly, in case of conflict between the international pacts and treaties relating to the fundamental rights to which Romania is a party to and the domestic legislation, the former shall prevail. This rule regarding *the prevalence of international legal instruments over the national provisions* is set out under Article 20 para. (2) of the Romanian Constitution and the corresponding provisions within the Moldovan Constitution[7] are to be found under Article 4 para. (2). The Romanian Constitution adds an exception to this rule, namely when the Constitution or domestic laws contain more favourable provisions.

Also, as stated under Article 148 of the Romanian Constitution, following Romania's accession to the EU, the provisions of the EU Treaties as well as the other EU mandatory legislation shall prevail over conflicting domestic provisions.

As shall be further shown, the right of defence is safeguarded by the fundamental laws of Romania and the Republic of Moldova as well as the criminal procedure laws of both these states.

2. The European Standards for Safeguarding the Right of Defence

2.1. The ECHR Standards

The right of defence is enshrined under Article 6 para. 3 ECHR, which provides in favour of any person charged with a criminal offence the following minimum requirements to be complied with (as such, the list is not exhaustive[8]):

a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
b) to have adequate time and facilities for the preparation of his defence;
c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court

As pointed out in the ECHR case-law[9], the guarantees listed above "exemplify the notion of fair trial in respect of typical procedural situations which arise in criminal cases, but their intrinsic aim is always to ensure, or to contribute to ensuring, the fairness of the criminal proceedings as a whole"; they "are therefore not an end in themselves, and they must accordingly be interpreted in the light of the function which they have in the overall context of the proceedings".

Upon analysing the specifics provided under Article 6 para. (3), on the one hand, the national judicial bodies shall take into consideration the subject-matter and purpose of the right to a fair trial as a whole – such as the equality of arms principle and the adversarial nature of proceedings – and, on the other hand, there must be positive measures adopted by the states for ensuring the effective compliance with these guarantees[10].

The legal requirements outlined herein are often construed in an integrated manner. For instance, the right to the notification of the charge overlaps to some extent with the right to adversarial proceedings implied

[3] Republished in the Official Journal of Romania no. 767 of October 31, 2003.
[4] Published in the Official Journal of Romania no. 135 of May 31, 1994.
[5] Corneliu Bîrsan, Convenția europeană a drepturilor omului. Comentariu pe articole – Vol. I. Drepturi și libertăți (București: All Beck, 2005): 100.
[6] Corneliu Bîrsan, Convenția europeană a drepturilor omului. Comentariu pe articole – Vol. I. Drepturi și libertăți, 103.
[7] Published in the Official Journal of the Republic of Moldova no. 1 of August 12, 1994, available at: http://lex.justice.md.
[8] Nuala Mole and Catharina Harby, The Right to a Fair Trial – A Guide for the Implementation of Article 6 of the European Conventionon Human Rights (Strasbourg: Council of Europe, 2006): 58, https://rm.coe.int/168007ff49.
[9] ECHR, Case of *Mayzit v. Russia*, Judgment of January 20, 2005, para. 77 and *Can v. Austria*, Commission report, para. 48, in Council of Europe, The European Court of Human Rights, "Guide on Article 6 of the European Convention on Human Rights – Right to a Fair Trial (Criminal Limb)" (2014): 40, https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf.
[10] Frédéric Sudre, Drept european și internațional al drepturilor omului (Iași: Polirom, 2006): 296.

under Article 6 para. 1, the right provided under Article 6 para. 3.b (the right to adequate time and facilities for preparing the defence) as well as with Article 5 para. 2 (regulating the right to be informed of the reasons of arrest and of the charge imposed) of the Convention[11].

Each element set forth under Article 6 para. 3 of the Convention is covered by a rich case-law developed by the Strasbourg Court.

To exemplify with recent ECHR case-law, we note that, in the case of *Simeonovi v. Bulgaria*[12], the right to a lawyer and the right to be informed of such right was assessed by the Court. The Grand Chamber decided that the right to legal assistance became applicable from the moment of the applicant's arrest, regardless of whether he has been interrogated or subject to any investigative act during the relevant period (i.e. three-day detention after arrest during which no investigative measure took place). In order to reach this decision, the Court made reference to its established case-law, such as reflected in the judgment of September 13, 2016, rendered in the case of *Ibrahim and Others v. The United Kingdom*, stating "that a *criminal charge* existed from the moment an individual was officially notified by the competent authority of an allegation that he had committed a criminal offence, or from the point at which his situation had been substantially affected by actions taken by the authorities as a result of a suspicion against him".

With respect to the right provided under Article 6 para. 3.d of the Convention, in the case of *Kuchta v. Poland*, the applicant and other persons had been convicted and their guilt had been established especially based on the statements of the main co-accused. In this specific case, the absent *witness* (the Court noted that the principles developed with regard to the use of the statements made by an absent witness also apply by analogy to the depositions of an absent co-accused) was solely heard by the investigators and never by a prosecutor or a judge. The absent witness was permitted, upon request, not to appear within the proceedings and his statements were merely read to those present, which did not allow the other accused to interrogate him. The Court noted that the statements in question were instrumental for the conviction of the applicant. As far as the existence of compensatory procedural guarantees is concerned, it was shown that neither the judges nor the applicant could perceive the credibility of the co-accused during his interrogation. In light of the circumstances of the case, the Court found, by the judgment of January 23, 2018, that Article 6 para. 3.d was violated as the applicant had not sufficient and adequate possibility to challenge the statements that were instrumental for his conviction[13].

2.2. The EU Standards

Article 48 of the *Charter of Fundamental Rights of the European Union*[14] states the following: "Respect for the rights of the defence of anyone who has been charged shall be guaranteed".

This right corresponds to Article 6 para. 3 ECHR, having the same meaning as scope as the conventional text, based on Article 52 para. (3) of the Charter[15].

As far as the field of application of the Charter's provisions is concerned, Article 51 para. 1 thereof indicates that these are addressed to the Member States only when implementing Union law.

The secondary EU legislation has been enriched in recent years by a set of directives addressing the fundamental guarantees concerning the right of defence:

- Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings[16];
- Directive 2012/13/EU on the right to information in criminal proceedings[17];
- Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty[18];
- Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings[19];
- Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings[20].

It must be mentioned that on June, 20 2017, the European Union and the Republic of Moldova held the eighth round of the Human Rights Dialogue in Chișinău, the discussions also covering human rights protection in the justice system. The next EU –

[11] Dovydas Vitkauskas and Grigoriy Dikov, *Protecting the Right to a Fair Trial under the European Convention on Human Rights* (Strasbourg: Council of Europe, 2012): 83, https://rm.coe.int/168007ff57.

[12] ECHR, *Simeonovici v. Bulgaria*, judgment of May 12, 2017, in Council of Europe, European Court of Human Rights, *Overview of the Court's Case-Law 2017*, 2018: 34, https://www.echr.coe.int/Documents/Short_Survey_2017_ENG.PDF.

[13] Council of Europe, The European Court of Human Rights, "Examination of witnesses. Conviction based on co-accused's statements with no possibility of cross-examination. Violation – *Kuchta - Poland*", Information Note on the Court's Case Law 214 (2018): 17:18.

[14] As published in the Official Journal of the European Union no. C 202 of June 7, 2016.

[15] *Explanations relating to the Charter of Fundamental Rights*, published in the Official Journal of the European Union no. C 303 of December 14, 2007, p. 30.

[16] Published in the Official Journal of the European Union no. L 280 of October 26, 2010.

[17] Published in the Official Journal of the European Union no. L 142 of June 1, 2012.

[18] Published in the Official Journal of the European Union no. L 294 of November 6, 2013.

[19] Published in the Official Journal of the European Union no. L 65 of March 11, 2016.

[20] Published in the Official Journal of the European Union no. L 297 of November 4, 2016.

Moldova Human Rights Dialogue shall take place in Brussels in 2018[21].

3. Constitutional Protection of the Right of Defence

According to Article 20 para. (1) of the Romanian Constitution, "the constitutional provisions pertaining to the citizens' rights and liberties shall be construed and applied in accordance with the Universal Declaration of Human Rights, with the pacts, and with the other treaties that Romania is a party to".

As the constitutional provisions benefit from direct application, it follows that these international instruments are integrated into the domestic constitutional block[22].

Correspondingly, Article 4 para. (1) of the Moldovan Constitution stipulates that "the constitutional provisions pertaining to the human rights and liberties shall be construed and applied in accordance with the Universal Declaration of Human Rights, with the pacts, and with the other treaties to which the Republic of Moldova is party to".

The right of defence is enshrined within the fundamental laws of Romania and the Republic of Moldova as follows:

The first paragraph under Article 24 of the Romanian Constitution and Article 26 of the Moldovan Constitution, respectively guarantee the right of defence.

The Moldovan Constitutional Court noted that the supreme law guarantees the right and not the obligation of each person to defend themselves[23].

Throughout the proceedings, the parties are entitled to a lawyer, either retained or publicly appointed, as provided under Article 24 para. (2) of the Romanian Constitution and Article 26 para. (3) of the Moldovan Constitution[24].

The Constitutional Court of Romania has pointed out in one of its decisions[25] that, by the Constitution's referring to the parties' access to a lawyer, this means that the lawyer status has been acquired in accordance with the law and this constitutes a strong guarantee preventing the clandestine exercise of this profession, outside the legally constituted bar associations.

The Constitution of the Republic of Moldova comprises, under the same article, two additional provisions regarding the right of defence, namely providing that each individual is entitled to react independently, by legitimate means, to the violation of their rights and liberties [para. (2)]; the interference in the activity of the persons that exercise the defence within the established limits is punishable by law [para. (4)].

4. Protection of the Right of Defence as per the Law of Criminal Procedure

4.1. The Romanian Criminal Procedure Relevant Provisions

The right of defence is established within the Romanian law of criminal procedure as a fundamental principle thereof, as per Article 10 of the Romanian Criminal Procedure Code[26], structured into six paragraphs consisting of various procedural guarantees.

The Romanian Constitutional Court noted that art. 10 of the Criminal Procedure Code is in accordance with the constitutional and conventional provisions regulating the right of defence. Also, it added that the procedural sanction provided under the Criminal Procedure Code for violating the right of defence is, as a rule, the relative nullity, which is applicable only when an effective breach of the rights of the parties and the main subjects in the proceedings was caused that cannot be removed otherwise than by the overturning the act; there are two exceptions, triggering the application of absolute nullity, namely in the case of breaching the provisions pertaining to (i) the presence of the suspect or the defendant, when their participation is mandatory according to the law, as well as (ii) the legal assistance of the suspect and defendant as well as the other parties, provided by a lawyer, when such legal assistance is mandatory[27]. The rules and effects of nullity as a procedural sanction are provided under Articles 280-282 of the Romanian Criminal Procedure Code.

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[21] *EU – Republic of Moldova Human Rights Dialogue*, press release, June 20, 2017, Chișinău, available at: https://eeas.europa.eu/headquarters/headquarters-homepage/28514/eu-republic-moldova-human-rights-dialogue_en.

[22] Corneliu Bîrsan, *Convenția europeană a drepturilor omului. Comentariu pe articole – Vol. I. Drepturi și libertăți*, 101.

[23] The Constitutional Court of the Republic of Moldova, Decision no. 22 of June 30, 1997, published in the Official Journal no. 146/1997, in Klaus Sollfrank, *Constituția Republicii Moldova – Comentariu* (Chișinău: Arc, 2012): 121, available at: http://www.constcourt.md/public/files/file/informatie_utila/Comentariu_Constitutie.pdf.

[24] The Ombudsman of the Republic of Moldova, in the 2016 Report on the observance of human rights, with respect to the right to a fair trial, noted a series of deficiencies pertaining to providing legal aid, such as the lack of response to the legal aid requests, the unsatisfactory quality of defence, the failure to inform the beneficiary of legal aid on the actions carried out or the refusal of the territorial offices of the National Counsel for Legal Assistance to grant legal aid (*Raportul privind respectarea drepturilor omului în Republica Moldova în anul 2016: Dreptul la un proces echitabil*, http://ombudsman.md/ro/content/raportul-privind-respectarea-drepturilor-omului-republica-moldova-anul-2016-dreptul-la-un).

[25] Decision no. 1354 of October 22, 2009, published in the Official Journal no. 844 of December 7, 2009, Tudorel Toader, *Constituția României reflectată în jurisprudența constituțională* (Bucharest: Hamangiu, 2011): 91.

[26] Law no. 135/2010, published in the Official Journal of Romania no. 486 of July 15, 2010, in force as of February 1, 2014, with subsequent amendments and supplements.

[27] The Romanian Constitutional Court, Decision no. 336/2015, published in the Official Journal no. 342 of May 19, 2015, para. 39, in Aurel Ciobanu, Petruț Ciobanu, Teodor Manea, *Noul Cod de procedură penală adnotat* (Bucharest: Rosetti International, 2015): 25.

The content of the right of defence is compound.

The first paragraph of this legal text provides that the parties and the main subjects within the proceedings are entitled to defend themselves or through legal assistance by a lawyer.

Under Romanian criminal procedure law, there are several situations where legal assistance is mandatory. As the Constitutional Court of Romania showed, the right of defence should not be mistaken with the right to mandatory legal assistance as the former is guaranteed by the fundamental law, whereas the latter lies within the remit of the lawmaker[28].

The right of defence is not absolute as it must be exercised within certain limits[29], namely in good faith, according to the purpose for which it was acknowledged by law, as per the final paragraph of Article 10.

The judicial bodies have the corresponding obligation to ensure, throughout the criminal proceedings, the full and effective exercise of the right of defence by the parties and the main subjects within the proceedings, according to para. (5) of Article 10.

As such, the defence rights must be duly made available from the very start of the proceedings. There are various violations that have been generally invoked in the relevant case-law as breaching the right of defence by defendants during the preliminary chamber phase, as points of criticism regarding the conducting of the prosecution, such as: assisting defendants with conflicting interests by the same lawyer; preventing certain lawyers from assisting the defendant; debating whether a defendant arrested *in absentia* required mandatory legal assistance while still at large; failing to hear the defendant throughout in the prosecution phase or hearing him for several hours on end; limiting the defence's access to the criminal prosecution file; a duration of the criminal prosecution phase or between the different stages of the prosecution deemed too short, etc.[30]

Pursuant to para. (2)-(4) of Article 10, the right to have adequate time and facilities for the preparation of the defence, the right to be informed of the nature and cause of the accusation, and the right to silence are ensured.

The parties, the main subjects in the proceedings as well as the lawyer benefit from the right to have adequate time and facilities for the preparation of the defence.

The European Court of Human Rights ruled, in the case of *Beraru v. Romania*, on the violation of article 6 ECHR, among others, on the grounds that, even though the lawyers submitted numerous requests to consult the case file, only in a later stage had they had access to it, they were not provided with a copy of the indictment nor with a copy of the wiretaps or a transcription thereof[31]. In another case against the Romanian State, *Adrian Constantin v. Romania*, the same Court ruled that the right to benefit from the time to prepare the defence has been breached by the court's changing the legal classification directly through the judgment, without previously calling it into question within an adversarial procedure[32].

The right to be informed of the accusation is adapted for the suspect and the defendant as follows: the suspect has the right to be informed immediately and before being heard of the act that is the subject-matter of the prosecution and its legal classification; the defendant has the right to be informed immediately of the act for which the criminal action has been set into motion against him and its legal classification.

Before being heard, the suspect and defendants are warned of their right not to make any statement.

For the judicial bodies, hearing the suspect and the defendant represent an obligation, for the accused this constitutes a right whereby their defence is organised but which they can equally choose not to exercise: hence, the content of the right to silence is established[33].

The privilege against self-incrimination is closely linked to the presumption of innocence contained in Article 6 para. 2 of the Convention[34].

4.2. The Moldovan Criminal Procedure Relevant Provisions

The legally defined term "defence" means, according to Article 6 item 3) of the Criminal Procedure Code of the Republic of Moldova[35], the activity carried out by the defending party within the proceedings aiming at combating the charge, in whole or in part, or mitigating the punishment, defending the rights and interests of the suspected persons ("*bănuite*") for or persons charged ("*învinuite*") with committing offences as well as redeeming the persons unlawfully subject to prosecution. The "defending party" ("*partea apărării*") stands for the persons empowered by law to carry out the defence activity, namely the suspect, the charged person, the defendant, the civilly liable party,

[28] Constitutional Court Decision no. 494 of April 19, 2011, published in the Official Journal no. 494 of July 11, 2011, in Tudorel Toader, *Constituția României reflectată în jurisprudența constituțională*, 91.

[29] Nicolae Volonciu and Andreea Simona Uzlău (coords), *Codul de procedură penală comentat*, 3rd Ed. (Bucharest: Hamangiu, 2017): 35.

[30] Cristinel Ghigheci, *Cereri și excepții de cameră preliminară – Vol. 1. Procedura, regularitatea actului de sesizare, legalitatea actelor de urmărire penală – Comentarii și jurisprudență* (Bucharest: Hamangiu, 2017): 312-347.

[31] ECHR, Beraru v. Romania, judgment of March 18, 2014, in *la Strasbourg asupra procesului penal român* (Bucharest: Universul Juridic, 2017): 138.

[32] ECHR, Adrian Constantin v. Romania, judgment of April 12, 2011, in Ramona Mihaela Coman, Efectele jurisprudenței Curții de la Strasbourg asupra procesului penal român, 139.

[33] Grigore Gr. Theodoru, *Tratat de Drept procesual penal*, 2nd Ed. (Bucharest: Hamangiu, 2008): 379-380.

[34] ECHR, *Saunders c. Regatului Unit*, judgment of December 17, 1996, para. 68, http://www.echr.coe.int.

[35] Published in the Official Journal of the Republic of Moldova no. 104-110 of June 7, 2003, in force as of June 12, 2003, with subsequent amendments and supplements, available at: http://lex.justice.md.

and the representatives thereof [Article 6 item 30) of the Moldovan Criminal Procedure Code].

Article 17 of the Moldovan Code of Criminal Procedure specifically regulates the right of defence. This legal text ensures basic guarantees of exercising this right, namely:

I. the right of the parties that throughout the criminal proceedings they be assisted or represented, as the case may be, by a retained or state-appointed lawyer;
II. the obligation of the criminal prosecution body and of the court to ensure the full exercise of the process rights from which the participants to the criminal proceedings benefit, under the conditions provided by the Code of Criminal Procedure, as well as the right of the suspect, charged person or defendant to qualified legal assistance performed either by a freely-chosen defender or by a state-appointed lawyer who is independent from these bodies;
III. should the suspect, charged person or defendant lack the resources to pay for their defender, they shall be assisted by a state-appointed lawyer without any charge.

As per Article 167 para. (1^1) of the Moldovan Criminal Procedure Code, the criminal prosecution body, within one hour as of the taking into custody of an individual, shall request that the territorial office of the National Counsel for State-Ensured Legal Assistance or other persons empowered thereby assign a lawyer on duty in order to grant legal assistance in case of urgency.

5. Conclusions

Ensuring the effectiveness of the right of defence is unarguably indispensable within present-day criminal proceedings. The right of defence is justified not only for protecting the private interests of the accused, but also the public interest of achieving the objective of justice[36].

Any decision of the judicial bodies that is rendered without giving due consideration to the guarantees of the right of defence in the process is severely flawed and must be sanctioned as such.

Both the Romanian and the Moldovan legislators have made consistent endeavours to comply with the well-established international and regional standards applicable in this field.

However, it is clear that in order for this fundamental right to evolve in regulatory terms, this ongoing compliance effort should continue to be closely monitored so as to prevent and eliminate any practical shortcomings.

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References

- Bîrsan, Corneliu. Convenția europeană a drepturilor omului. Comentariu pe articole – Vol. I. Drepturi și libertăți. București: All Beck, 2005
- Cassese, Sabino. "Ruling Indirectly – Judicial Subsidiarity in the ECtHR", Seminar on Subsidiarity: A Double-Sided Coin? 1. The role of the Convention mechanism; 2. The role of national authorities, 30 January 2015, http://www.echr.coe.int/Documents/Speech_20150130_Seminar_Cassese_ENG.pdf
- Ciobanu, Aurel and Ciobanu, Petruț and Manea, Teodor. Noul Cod de procedură penală adnotat Bucharest: Rosetti International, 2015
- Coman, Ramona Mihaela. Efectele jurisprudenței Curții de la Strasbourg asupra procesului penal român. Bucharest: Universul Juridic, 2017
- Council of Europe, The European Court of Human Rights, "Examination of witnesses. Conviction based on co-accused's statements with no possibility of cross-examination. Violation – Kuchta - Poland", Information Note on the Court's Case Law 214, 2018. https://www.echr.coe.int/Documents/CLIN_2018_01_214_ENG.pdf
- Council of Europe, The European Court of Human Rights, "Guide on Article 6 of the European Convention on Human Rights – Right to a Fair Trial (Criminal Limb)", 2014. https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf
- Council of Europe, European Court of Human Rights, Overview of the Court's Case-Law 2017, 2018. https://www.echr.coe.int/Documents/Short_Survey_2017_ENG.PDF
- Explanations relating to the Charter of Fundamental Rights, published in the Official Journal of the European Union no. C 303 of December 14, 2007
- EU – Republic of Moldova Human Rights Dialogue, press release, June 20, 2017, Chișinău. https://eeas.europa.eu/headquarters/headquarters-homepage/28514/eu-republic-moldova-human-rights-dialogue_en
- Ghigheci, Cristinel. Cereri și excepții de cameră preliminară – Vol. 1. Procedura, regularitatea actului de sesizare, legalitatea actelor de urmărire penală – Comentarii și jurisprudență. Bucharest: Hamangiu, 2017

[36] Cristinel Ghigheci, *Principiile procesului penal în noul Cod de procedură penală* (Bucharest: Universul Juridic, 2014): 174.

- Ghigheci, Cristinel. Principiile procesului penal în noul Cod de procedură penală. Bucharest: Universul Juridic, 2014
- Mole, Nuala and Harby, Catharina. The Right to a Fair Trial – A Guide for the Implementation of Article 6 of the European Conventionon Human Rights, Strasbourg: Council of Europe, 2006. https://rm.coe.int/168007ff49
- Raportul privind respectarea drepturilor omului în Republica Moldova în anul 2016: Dreptul la un proces echitabil, http://ombudsman.md/ro/content/raportul-privind-respectarea-drepturilor-omului-republica-moldova-anul-2016-dreptul-la-un
- Renucci, Jean-François. Tratat de drept european al drepturilor omului. Bucharest: Hamangiu, 2009.
- Sollfrank, Klaus. Constituția Republicii Moldova – Comentariu. Chișinău: Arc, 2012. http://www.constcourt.md/public/files/file/informatie_utila/Comentariu_Constitutie.pdf
- Sudre, Frédéric. Drept european și internațional al drepturilor omului. Iași: Polirom, 2006
- Toader, Tudorel. Constituția României reflectată în jurisprudența constituțională. Bucharest: Hamangiu, 2011
- Theodoru, Grigore Gr. Tratat de Drept procesual penal, 2nd Ed. Bucharest: Hamangiu, 2008
- Vitkauskas, Dovydas and Dikov, Grigoriy. Protecting the Right to a Fair Trial under the European Convention on Human Rights. Strasbourg: Council of Europe, 2012. https://rm.coe.int/168007ff57
- Volonciu, Nicolae and Uzlău, Andreea Simona (coords), Codul de procedură penală comentat, 3rd Ed. Bucharest: Hamangiu, 2017

THE SAFETY MEASURE OF PROHIBITING TO EXERCISE A PROFESSION, IMPOSED BY THE COURT IN CASE OF MAL PRAXIS, MAY ENVISAGE THE PROFESSION OF DOCTOR IN THE WIDER SENSE (AS A WHOLE) OR ONLY THE SPECIALTY THAT OCCASIONED THE COMMITTING OF THE OFFENCE PROVIDED IN THE CRIMINAL LAW

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Abstract

The present paper examines the possibility for the courts of law to order, in case of medical malpractice, the safety measure of prohibiting to exercise the profession of doctor in the wider sense, or only the specialty that occasioned the committing of the offence provided in the criminal law, analyzing the judicial practice regarding this issue. In accordance with Article 450 paragraph (2) of Law no. 95/2006, "disciplinary liability of doctors does not exclude criminal, tort or civil liability".

Between the regulation contained in Article 450 paragraph (2) of Law no. 95/2006 and the safety measure of prohibiting to exercise the profession of doctor, as criminal penalty, there is a close connection, within the meaning that the special law, in particular Law no. 95/2006 derogates from the general criminal law, in particular Article 111 of the Criminal Code in connection with the prohibition of exercising the medical profession.

The disciplinary penalties that may be imposed against doctors for mal praxis are listed in Article 455 of Law no. 95/2006. Article 455 letter (e) sets out, as disciplinary penalty which may be imposed against doctors "the prohibition to exercise the profession or certain medical activities" for a period ranging between one month and one year.

Comparing the provisions of Article 455 letter (e) of Law no. 95/2006 with the provisions of Article 111 of the Criminal Code, it may be noticed that the scope of disciplinary accountability of the doctor having committed the civil mal praxis is more comprehensive than the scope of the safety measure imposed by the criminal court.

Keywords: *medical malpractice, safety measures, criminal law, doctor's criminal liability*.

1. Introduction

In the criminal law literature, it was emphasized that, in committing an offence provided in the criminal law, certain circumstances of the social reality are targeted, which form part of a requisite nexus and which, if left not counteracted, the jeopardy arises that new offences provided in the criminal law would be perpetrated, for instance, a status of poor professional training by the offender who committed criminal offences without intention, because of such poor training, which could be the source of new offences provided in the criminal law[1]. Such a case can also be encountered when dealing with the professional fault of doctors (criminal *mal praxis*), which forms the object of our review. Counteracting such state of jeopardy may be achieved not solely by imposing penalties, but also through specific prevention measures, referred to in the criminal law as safety measures.

In the judicial practice, it was decided that what underlies „the adoption of safety measures provided for in Article 111 of the Criminal Law is the state of jeopardy resulting from the unsuitable and hazardous conditions under which the offender fulfils his profession or job or in which he conducts his activity, during the course of which he committed the offence provided in the criminal law[2]".

Safety measures have been defined as preventive criminal law penalties, stipulated by law, to be adopted by the court of law against individuals who have committed offences provided in the criminal law, with the view to removing a state of jeopardy that could generate new offences provided in the criminal law.[3] In other words, safety measures are coercion means of a preventive nature, aimed at precluding states of jeopardy that could potentially generate offences provided in the criminal law.

Situations that could potentially generate states of jeopardy also include, *inter alia*, the state of inability to perform a profession, such as the medical profession. Such states of jeopardy may not be counteracted by penalties, given that the states themselves result from realities that do not amount to violations of the criminal law, but through specific preventive measures – safety measures.

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[1] Constantin Mitrache, Cristian Mitrache, *Drept penal român. Partea generală*, Universul juridic Publishing House, Bucharest, 2014, p. 259;

[2] Bucharest Court of Appeals, First Criminal Division, criminal judgment no. 767/2000 in *Compendium of judicial practice in criminal matters for 2000 of Bucharest Court of Appeals*, pp. 78-79;

[3] Matei Basarab, *Drept penal. Partea generală*, volume I, 4th edition, revised and supplemented, Lumina Lex Publishing House, Bucharest, p. 312;

Article 108 letter (c) of the New Criminal Code sets forth the safety measure of „prohibiting to hold or perform a profession". The content of this measure is provided in Article 111 paragraph (1) of the Criminal Code, as follows:

"When the offender has committed the offence because of his inability, poor training or for other reasons rendering him unsuitable for holding a certain position, performing a certain profession or job or for conducting another activity, the measure of prohibiting the exercise of the right to hold that position or performing that profession, job, or activity may be adopted".

In the judicial practice, it was decided that what underlies "the adoption of safety measures provided for in Article 111 of the Criminal Law is the state of jeopardy resulting from the unsuitable and hazardous conditions under which the offender fulfils his profession or job or in which he conducts his activity, during the course of which he committed the offence provided in the criminal law[4]".

It follows that, in the case of this safety measure, the state of jeopardy emanating from the offender's inability may be the consequence of poor training (ignorance, lack of experience, superficiality, etc.), lack of skill or dexterity (confusions, errors, uncertainty, etc.) or any other situations that place the individual in the position of being deemed unsuitable (lack of knowledge and necessary skills) for performing the activity during the course of which the offence was committed[5]. If we strictly refer to doctors, examples may be the indifference to the rules of conduct laid down in the Medical Ethics Code, negligence in performing surgery, actions which require the keenest sense of attention, the doctor's fear, not justified by any severe need or his disregard of the risks which the patients face.

The state of jeopardy in cases of criminal professional negligence, in respect of doctors, in ascertaining whether they may continue to perform this profession, after having committed an offence provided in the criminal law, needs to be determined on a case-by-case basis, in consideration of the circumstances in which the offence was committed and in reliance upon the opinion of specialists in relation to the offender's ability to further perform the activity during the course of which he committed the offence.

2. Judicial practice

The matter under review is brought up by certain rulings issued by case-law in relation to the enforcement of the safety measure of prohibiting to exercise the profession against a doctor who has committed a criminal mal praxis offence.

In a certain case, the urological surgeon N.C. was arraigned in 2014 by the prosecutor's office for mal praxis, because by the inappropriate performance of the surgical act, he maimed the patient I.J., and was accused of having committed the criminal offence of unintentional bodily harm, as set forth in Article 196 of the Criminal Code.

The court sentenced the defendant N.C. to one year imprisonment to be served on probation, to pay EUR 125,000 as moral damages and the safety measure of prohibiting to exercise the profession set forth in Article 111 of the Criminal Code. The court ordered the safety measure of prohibiting to exercise the doctor profession, but not in the wider sense, but only that of urological surgeon because, according to the reasons given by the court, the criminal offence was committed in exercising such profession. The court being asked is to know whether the court could have prohibited the defendant from exercising the profession as doctor in the wider sense (as a whole) as a safety measure.

In another case, Pitești Court sentenced, by means of criminal judgment no. 2254 of 18 November 2010[6], the defendant P.L.S., a doctor having the specialty of obstetrics gynecology because, as a consequence of the superficiality shown in approaching this case, he caused bodily injury and infirmity both to the harmed party and to the baby born by her. The court found that, in this case, the provisions of Article 115 of the Criminal Code (previous – note added) applied, concerning the safety measure of prohibiting to exercise the right to hold a position or to exercise a profession or another job.

The court ordered the safety measure as follows: "because by the conduct adopted in relation to the injured party and implicitly in relation to the baby born by her, the defendant acted with severe superficiality in assessing his patient, as a result of inability or lack of skill, rendering him unsuitable for exercising the profession of senior doctor in the specialty of obstetrics gynecology".

This measure is, in the opinion of the court, precisely aimed at preventing a new case of this kind from occurring in the future, to preclude an obvious state of jeopardy generated by the defendant by his superficiality and incompetence in exercising the profession of senior doctor in the specialty of obstetrics gynecology.

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[4] Bucharest Court of Appeals, First Criminal Division, criminal judgment no. 767/2000 in *Compendium of judicial practice in criminal matters for 2000 of Bucharest Court of Appeals*, pp. 78-79;

[5] Vintilă Dongoroz, comment in the paper *Explicații teoretice ale Codului penal român,* Romanian Academy Publishing House, Bucharest, 1969, volume II, p. 296;

[6] It was published in the paper of Roxana Maria Călin, Mal praxis. Liability of the doctor and of the suppliers of medical services. Case-law, Hamangiu Publishing House, Bucharest 2014, p. 271.

3. Do the courts of law have the possibility to order the safety measure of prohibiting to exercise the profession of doctor within the wider sense?

Mention is to be made that in the above-mentioned cases, during the trial, the defendants' counsels have requested the courts of law that the safety measure they would order should be rather nuanced, within the meaning that such measure would not impact their entire medical career, and consequently that the safety measure should not cover the profession of doctor in the wider sense.

The question we should answer is whether the courts of law could order the safety measure of prohibiting to exercise the profession of doctor within the wider sense. In our opinion, this would not be possible, because the criminal law, in particular Article 111 of the Criminal Code, imperatively lays down only the "prohibition of exercising the profession" and not also other activities relating to the medical profession.

In upholding our opinion, we rely on Law no. 95/2006[7] governing the exercise of the medical profession, as special framework law, in the medical field. This law sets forth, in Chapter 3, Section VI, the doctors' liability for disciplinary misconduct, criminal mal praxis amounting to disciplinary misconduct.

In accordance with Article 450 paragraph (2) of Law no. 95/2006, "disciplinary liability of doctors does not exclude criminal, tort or civil liability". The provision quoted above reveals that disciplinary liability also occurs in the case where the doctor is guilty of a mal praxis offence which amounts to criminal offence, under the criminal law. Therefore, in such a case, disciplinary penalties should also be imposed against doctors, in addition to the criminal penalties. Therefore, between the regulation contained in Article 450 paragraph (2) of Law no. 95/2006 and the safety measure of prohibiting to exercise the profession of doctor, as criminal penalty, there is a close connection, within the meaning that the special law, in particular Law no. 95/2006 derogates from the general criminal law, in particular Article 111 of the Criminal Code in connection with the prohibition of exercising the medical profession.

Disciplinary liability of doctors under Law no. 95/2006 shall be determined by the "Disciplinary Panel" operating in the Territorial College of Doctors. The disciplinary penalties that may be imposed against doctors for mal praxis are listed in Article 455 of Law no. 95/2006. Article 455 letter (e) sets out, as disciplinary penalty which may be imposed against doctors "the prohibition to exercise the profession or certain medical activities" for a period ranging between one month and one year.

This regulation reveals that, in the opinion of the author of Law no. 95/2006, there is a clear distinction between the medical profession as such, in substance the specialty in which the doctor trained, as attested to by the degree, and other medical activities specific to medicine in general, which may be conducted by any doctor, such as: diagnosis, treatment and medical care.

In this concept, if, for instance, an urological surgeon commits mal praxis and causes only a civil prejudice to be incurred by the patient, the Discipline Panel may penalize such doctor by prohibiting to exercise the profession as urological surgeon for a period ranging between one month and one year, but the penalized doctor could continue to work, for instance, as doctor in a clinic, an urology office where he may examine patients, prescribe treatments and provide medical care in the field of urology. What the doctor at issue cannot conduct is the profession of urological surgeon during the period of prohibition.

In comparing the provisions of Article 455 letter (e) of Law no. 95/2006 with the provisions of Article 111 of the Criminal Code, it may be noticed that the scope of disciplinary accountability of the doctor having committed the civil mal praxis is more comprehensive than the scope of the safety measure imposed by the criminal court. Thus, whereas, in disciplinary terms, the Discipline Panel may order either the prohibition to exercise the medical profession for a definite period of time, or the prohibition to exercise certain activities which they may conduct, in case of the safety measure set forth in Article 111 of the Criminal Code, the court may only order the prohibition to exercise the medical profession, but not also other activities, and this means prohibition to exercise only the medical specialty of the doctor at issue in the future. In light of this conclusion, it follows that, in the cases referred to as models of case law, the courts have correctly and absolutely legally ordered as a safety measure the prohibition to exercise the medical profession in particular, the specialty in which he committed the offence provided by the criminal law and not the prohibition to exercise the medical profession in the wider sense, that is also the prohibition to exercise other medical activities.

Although the court of law may prohibit, by imposing the provisions of Article 111 of the Criminal Code, only to exercise the medical profession, but not also other medical activities which they could perform after the sentencing ruling becomes final, in fact, having regard to law no. 95/2006, the safety measure of prohibiting to exercise the medical profession, and in particular the specialty in which they committed the offence provided in the criminal law ordered by the court, entails total effects within the meaning that the doctor may no longer exercise the profession, but may no longer exercise other medical activities, either, such as diagnosis, treatment or medical care. In that respect, we believe that Law no. 95/2006 should be amended within the meaning that it may no longer entail such effects in the case of criminal mal praxis.

[7] Law no. 95/2006, on reform in the healthcare field, as subsequently amended and supplemented, was republished in Official Gazette of Romania no. 652 of 28 May 2015, when articles were renumbered.

Please find herein below a brief analysis into certain provisions of Law no. 95/2006, in light of which the doctor against whom the court of law ordered the safety measure of prohibiting to exercise the profession may no longer perform other medical activities, too, and this, in our opinion, is equivalent to a violation of the constitutional principle that all citizens shall be equal before the law.

In accordance with Law no. 95/2006 on the reform in the healthcare field, the medical profession is exercised in Romania in reliance upon the professional title corresponding to the professional qualification, as follows:

a) general medicine doctor;
b) specialist in one of the clinical or para-clinical specialties contained in the list of medical, medico-dentistry and pharmacy specialties in the healthcare network. The exercise of the medical profession is exercised by the College of Romanian College, in reliance upon the issuance of a "certificate as member of the College", based on the official title of medical qualification.

In accordance with Law no. 95/2006, in view of exercising the medical profession, the obligation is laid down in charge of doctors to enroll in the College of Romanian Doctors. When becoming a member of the above-mentioned professional body, the doctor shall automatically observe, in exercising this profession, the "By-Laws of Doctors' College" and the "Code of Medical Deontology", because these documents give rise to several obligations incumbent upon the doctors, the violation of which would result in administrative or disciplinary penalties.

In observance of Article 382 of Law no. 95/2006, doctors who are subject to cases of dishonor or incompatibility may not be authorized to exercise the medical profession. In this regard, Article 382 letter (b) stipulates that a doctor against whom the prohibition to exercise the profession was imposed as a safety measure, for the period indicated in the judgment issued by the court, shall become unworthy of exercising the profession. It derives that the article only refers to the exercise of the profession, and not of other activities, too, as stipulated in Article 455 letter (e). Having regard to the regulation contained in Article 382 of Law no. 95/2006, it may be noticed that the wording is faulty, because the court of law does not order the safety measure stipulated in Article 111 of the Criminal Code to be imposed for a specific period of time, but it is ordered for an indefinite period.

Upon committing the offence provided by the criminal law (mal praxis), in the vision of Law no. 95/2006, the doctor proves a dishonest behavior, and causes prejudices for the good name of the medical body of which they are a member, which, under the law, amounts to disciplinary misconduct. In reviewing such severe disciplinary misconduct, the Disciplinary Panel shall order, as a penalty against the doctor at issue, the withdrawal of the capacity as member of the College of Romanian Doctors for the period of time in which they fall under the scope of the safety measure of prohibiting to exercise the profession.

The decision of the Disciplinary Panel penalizing the doctor by withdrawing their capacity as member in the College of Romanian Doctors for having become unworthy of such capacity shall be delivered to the penalized doctor, to the Executive Office of the College of Romanian Doctors, to the Ministry of Health and to the employer.

When the decision is issued to withdraw the capacity as member in the College of Romanian Doctors, the penalized doctor shall automatically (rightfully) forfeit the authorization to perform the medical profession, in all its regard.

Coming back to the matter at issue, it follows from the considerations detailed herein above that, even if the courts of law order to prohibit the exercise of the profession, consisting in the prohibition to exercise the medical specialty in which the offence provided in the criminal law was committed, in light of the laws governing the exercise of the medical profession, they may no longer exercise the profession or other medical activities, for the period in which they are subject to such safety measure.

In order to return to the medical system, the doctor against whom the safety measure of prohibiting to exercise the profession was imposed may submit a motion to the court of law, to have such measure revoked. The settlement of the motion to revoke such measure shall take place by subpoena delivered to the person against whom the measure was imposed, after having heard their conclusions and the conclusions of the prosecutor.

4. Conclusion

To conclude, doctors do not need to request the court to impose the safety measure of prohibiting to exercise the profession against doctors having committed criminal mal praxis acts, in a more nuanced manner, because the court already does so, in light of its active role, in reliance upon the legal provisions.

References

- Constantin Mitrache, Cristian Mitrache, *Drept penal român. Partea generală*, Universul juridic Publishing House, Bucharest, 2014, p. 259
- Bucharest Court of Appeals, First Criminal Division, criminal judgment no. 767/2000 in *Compendium of judicial practice in criminal matters for 2000 of Bucharest Court of Appeals*, pp. 78-79
- Matei Basarab, *Drept penal. Partea generală*, volume I, 4th edition, revised and supplemented, Lumina Lex Publishing House, Bucharest, p. 312

- Vintilă Dongoroz, comment in the paper *Explicații teoretice ale Codului penal român,* Romanian Academy Publishing House, Bucharest, 1969, volume II, p. 296
- Roxana Maria Călin, Mal praxis. Liability of the doctor and of the suppliers of medical services. Case-law, Hamangiu Publishing House, Bucharest 2014, p. 271
- Law no. 95/2006, on reform in the healthcare field, as subsequently amended and supplemented, was republished in Official Gazette of Romania no. 652 of 28 May 2015, when articles were renumbered

INCRIMINATING THE CONFLICT OF INTERESTS IN ROMANIA: RECENT LEGAL DEVELOPMENTS

Mihai MAREȘ[*]

Abstract

The present paper aims at outlining the evolution of the Romanian criminal law provisions incriminating the conflict of interests, starting from its insertion, as of 2006, into the Criminal Code of 1968, until the up-to-date version of the offence as per the Criminal Code in force, renamed as use of the position for favouring persons, as amended by Law no. 193/2017. In this context, the approaches of the legal text in the well-established case-law of the judicial bodies as well as of the Constitutional Court and legal literature are highly relevant in order to explain the rationale behind the shaping of the legal content of the offence. The diachronic delineation shall be supplemented by elements of comparative law. Where appropriate, reference shall also be made to the administrative type of liability that may be incurred in a conflict of interest case and the relationship thereof with the proceedings in criminal matters or to distinctions between the analysed offence and other offences falling into the category of malfeasance in office or corruption offences. The conclusions of this examination emphasise the need for predictability and proper understanding of the criminological layer in tackling the conflict of interest phenomenon.

Keywords: *malfeasance in office, conflict of interests, favouring, public servant, economic benefit.*

1. Introduction

1.1. Introduction

The conflict of interests offence is placed by the lawmaker in the category of malfeasances in office although part of the jurisprudence considers it appropriate to have placed it in the category of corruption offences as both categories of offences violate the public interests[1].

One of the affirmed values of the 2016-2020 *National Anti-Corruption Strategy*, approved by Government Decision no. 583/2016, is *integrity* (under item 2.1 of Chapter 2), which means that the representatives of public institutions and authorities have the obligation to declare any personal interests tha may conflict with the objective performance of their work duties as well as to make all necessary endeavours to avoid conflicts of interests and incompatibilities.

As rightly pointe out in the literature[2], the present-day incrimination of the conflict of interests under Romanian criminal law takes into consideration the provisions set out under Article 8 of the 2003 UN *Convention against Corruption*, referring to codes of conduct for public officials, specifically the ones stating that "each State Party shall endeavour to apply, within its own institutional and legal systems, codes or standards of conduct for the correct, honourable and proper performance of public functions" and that "Each State Party shall consider taking, in accordance with the fundamental principles of its domestic law, disciplinary or other measures against public officials who violate the codes or standards established in accordance with this article".

2. Incriminating the Conflict of Interests under the Romanian Criminal Code of 1968

The incrimination of the conflict of interests in the Romanian criminal law was brought about pursuant to Article I item 61 of Law no. 278/2006 for amending and supplementing the Criminal Code as well as for amending and supplementing other laws[3] under Article 253[1] of the Criminal Code of 1968.

The Explanatory Memoranda to the draft law that became Law no. 278/2006 explicitly stated the necessity to incriminate such act, that is, to improve the actions of preventing and countering corruption acts, by sanctioning, through criminal law means, the public official who, knowingly and deliberately, achieves personal interests by carryin out public duties. It was noted that, at the time, the provisions incriminating corruption acts under the Criminal Code of 1968 did not cover such a situation, criminal liability being triggered only in cases of bribe-taking, receiving undue benefits or trafficking in influence[4].

The legal content of the offence under this legal text referred to the act committed by a public servant that, in the exercise of his duties, fulfills an act or participates in taking a decision whereby a material benefit was achieved, directly or indirectly, for himself, his spouse, a relative or kin up to the second degree

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[1] Sergiu Bogdan (coord.), Doris Alina Șerban and George Zlati, *Noul Cod penal – Partea specială – Analize, explicații, comentarii* (Bucharest: Universul Juridic, 2014): 461.

[2] Georgina Bodoroncea et. al., *Codul penal – Comentariu pe articole* (Bucharest: C.H. Beck, 2014): 671-672.

[3] Published in the Official Journal of Romania no. 601 of July 21, 2006.

[4] Explanatory Memoranda – Law no. 278/2006 for amending and supplementing the Criminal Code as well as for amending and supplementing other laws, available at: http://www.cdep.ro/proiecte/2006/000/20/4/em24.pdf.

included or for other persons with whom he has had commercial or working relations up to 5 years before or from whom he has benefitted or benefits in terms of services or advantages of any nature.

The punishment provided by law was imprisonment of between 6 months and 5 years and the interdiction of the right to hold public office for the maximum duration.

It was also provided that the incrimination provisions did not apply in cases of issuing, approving or adopting legislation.

3. Incriminating the Conflict of Interests under the Criminal Code in Force

There is continuity in incriminating the conflict of interests offence, under Article 301 of the new Criminal Code[5].

It has been noted[6], at the onset of the application of the new law, that the legal content of the conflict of interests offence was almost identical to the one under the previous law, the differences mainly aiming at improving the wording of the incrimination text.

However, since the entering into force of the current legislation, the offence has been substantially reconfigured, as shall be further shown.

As noted in the literature[7], the current legal text incriminating the conflict of interests has been inspired by the French Criminal Code (Articles 432-12 and 432-13), providing the offence of illegally acquiring benefits, but which is significantly more elaborate than the Romanian legal transplant (*see Section 3 below*).

3.1. The Initial Forms of the Texts of Incrimination

The initial legal content of the offence, as per the first paragraph of Article 301 was the following: the act committed by a public servant who, in the exercise of his work duties, has fulfilled an act or participated in taking a decision whereby an economic benefit has been obtained for himself, his spouse, a relative or kin up to the second degree included or for another person with whom he has had commercial or working relations up to 5 years before or from whom he has benefitted or benefits in terms of advantages of any nature, punishable by law by imprisonment of between 1 year and 5 years and the interdiction of exercising the right to hold public office.

In a similar manner to the previous text of incrimination under the old Criminal Code, the initial form of Article 301 para. (2) of the current Code provided that the first paragraph shall not apply in cases of issuing, approving or adopting legislation.

Pursuant to Article 308 of the Criminal Code, *a mitigated version* of the conflict of interests offence has been inserted into the legislation. This implied the application of the incrimination text to so-called "*private officials*", in which case the legal limits of the punishment would be reduced by a third.

Thus, as per this mitigated version, the provisions under Article 301 of the Criminal Code regarding public officials applied accordingly to the acts committed by or relating to the persons exercising, permanently or temporarily, with or without compensation, a task of any kind (i) in the service of a natural person among those mentioned under Article 175 para. (2) of the same code (i.e. persons assimilated to a public official, namely those exercising a service of public interest invested as such by the public authorities or subject to the control or supervision thereof with respect to the performance of the said public service) or (ii) within any legal person.

The emerging legal jurisprudence criticized this legislative intervention as an "error" as no justification, either from the point of view of criminology or comparative law, could be identified for the Romanian lawmaker's option to significantly widen the scope of the conflict of interests offence[8].

It was not until the Constitutional Court of Romania intervened, settling an exception of unconstitutionality of paramount importance in this matter and causing the amendment of the article providing the offence in question so as to comply with the fundamental law provisions.

Thus, by Decision no. 603/2015[9], the Constitutional Court of Romania upheld an exception of unconstitutionality, ruling that the phrase "commercial relations" within Article 301 para. (1) of the Criminal Code was unconstitutional. By the same decision, the Court found that the phrase "or within any legal person" within Article 308 para. (1) of the Criminal Code with reference to art. 301 of the same Code was also unconstitutional.

This ruling was based on the reasoning that the phrase "commercial relations" lack clarity, precision, and predictability, which is not permitted when restricting individual liberty. Furthermore, the recipients of the rule cannot properly direct their conduct. Consequently, the constitutional provisions relating to the quality of the law and individual liberty, set forth under Article 1 para. 5 and Article 23, were disregarded[10].

At the same time, according to the Constitutional Court, providing that the perpetrator of conflict of interests can also be a private person as per the mitigated version of the offence is excessive as the constraining force of the State by criminal means is

[5] Law no. 286/2009, published in the Official Journal of Romania no. 510 of July 24, 2009, in force as of February 1, 2014.
[6] Tudorel Toader et al., *Noul Cod penal. Comentarii pe articole* (Bucharest: Hamangiu, 2014): 485.
[7] Gavril Paraschiv in George Antoniu and Tudorel Toader (coord.), *Explicațiile Noului Cod penal* (Bucharest: Universul Juridic, 2016): 350.
[8] Sergiu Bogdan (coord.), Doris Alina Șerban and George Zlati, *Noul Cod penal – Partea specială – Analize, explicații, comentarii*, 459.
[9] Published in the Official Journal of Romania no. 845 of November 13, 2015.
[10] See para. 23-25 of Constitutional Court Decision no. 603/2015.

extended in a disproportionate manner over the right to engage in work and economic freedom, without there being any criminological justification in this respect. Consequently, purely private interests are qualified by the lawmaker as public[11].

3.2. The Current Configuration of the Conflict of Interests Offence

Law no. 193/2017 amending the Law no. 286/2009 on the Criminal Code has brought significant changes to the conflict of interests offence[12]:

1. The well-established name of the offence ("the conflict of interests") has been replaced by "using the position for favouring certain persons".
2. The conditions of incrimination have been narrowed down by eliminating the following legal elements from the content of the offence: the public official's participation in taking a decision; the obtaining of the benefit for another person with whom the public official has been in commercial or work relations up to five years before or from whom he benefitted or benefits in terms of advantages of any nature; the manner of obtaining the advantage (directly or indirectly).
3. The interdiction to occupy a public office has been limited to a three-year period.
4. A new hypothesis excluding the application of the first paragraph of Article 301 has been inserted, namely exercising a right acknowledged by law or fulfilling an obligation imposed by law, by observing the conditions and limits provided thereby.

Consequently, the current legal content of the offence, as per the first paragraph of Article 301 is the following: the act committed by a public servant who, in the exercise of his work duties, has fulfilled an act whereby an economic benefit has been obtained for himself, his spouse, a relative or kin up to the second degree included.

As shown in the relevant case-law, although the legal modality consisting in the public official's participation in taking a decision has been eliminated, among the *prima facie* elements, the fulfillment by the public official of an act in the exercise of his work duties has been maintained. Consequently, the latest legislative amendments did not amount to the decriminalisation of the act held against the defendant[13].

The current form of Article 301 para. (2) of the Criminal Code provides that the first paragraph shall not apply when the act or decision refers to (i) issuing, approving or adopting legislation or (ii) exercising a right acknowledged by law or fulfilling an obligation imposed by law, by observing the conditions and limits provided thereby. This is an essential element to be considered when analysing the objective limb of the offence.

Moreover, the law requires two additional elements to meet the constitutive elements of the conflict of interests offence, namely that the act fulfilled by the public official should fall within the remit of his work duties and that this act should actually determine the obtaining of an economic benefit for himself, his spouse, a relative or kin up to the second degree included[14].

The case-law of the Romanian supreme court shows, by making reference to the Constitutional Court Decision no. 2 of January 15, 2014, that the conflict of interests offence does not imply solely the obtaining of undue advantages, but any type of advantage, as what the lawmaker had in view by incriminating this act was to protect the social values whenever the impartial exercise of the public official's work duties could be affected[15].

The offence is punishable by imprisonment of between 1 year to 5 years and the interdiction of exercising the right to hold public office for a three-year period.

By the same amending law, the mitigated version of the conflict of interests offences under Article 308, referring to the commission of the offence by or with respect to "private" officials, has been eliminated.

Before its being adopted, the conformity of the law that eventually became Law no. 193/2017 with the provisions of the Romanian Constitution was verified and the objection of unconstitutionality was dismissed as unfounded. It follows that, in the Court's view, the provisions amending the Criminal Code are in line with the fundamental law provisions, including the ones relating to the relation between international and domestic provisions.

Be that as it may, there are still legal challenged ahead in properly interpreting the text of incrimination relating to the offence of using the position for favouring certain persons.

For instance, the breach of the *ne bis in idem* principle may occur when other, non-criminal, forms of liability are activated for the same act, such as finding a conflict of interests when concluding an agreement, as it has been invoked in a case tried by the High Court of Cassation and Justice[16]. In this particular case, the National Integrity Agency found a conflict of interests concerning an MP and a disciplinary action and sanction followed, namely the reduction of the salary

[11] See para. 32 and 34 of Constitutional Court Decision no. 603/2015.

[12] Mihai Mareș, "Conflictul de interese. Modificarea conținutului legal al infracțiunii. Consecințe", *Pandectele Române* 5 (2017): 169.

[13] The Cluj Court of Appeal, the Criminal Division, decision no. 1101/A/2017 of September 6, 2017, www.rolii.ro apud sintact.ro, in Mihai Mareș, "Conflictul de interese. Modificarea conținutului legal al infracțiunii. Consecințe", 165.

[14] Ilie Pascu in Vasile Dobrinoiu (coord), *Noul Cod penal comentat. Partea specială*, 3rd Ed. (Bucharest, Universul Juridic, 2016): 586-587.

[15] The High Court of Cassation and Justice, The Criminal Division, decision no. 77/RC/2017 of February 22, 2017, www.scj.ro, in Mihai Mareș, "Conflictul de interese. Elemente de tipicitate a infracțiunii. Cerințe esențiale" *Pandectele Române* 5 (2017): 170.

[16] The High Court of Cassation and Justice, sentence no. 88/2015, final by criminal judgment no. 42/2016, Panel of 5 Judges, in Augustin Lazăr, *Conflictul de interese – Teorie și jurisprudență. Studii de drept comparat* (Bucharest, Universul Juridic: 2016): 78.

for a three-month period. The judicial control court considered that this disciplinary ruling did not represent a final ruling so as to hold the *res judicata* principle applicable.

However, when dealing with parallel procedures, it is mandatory to take into consideration the standards developed by the ECHR conventional system when construing the *ne bis in idem* principle[17], which are more nuanced than the Romanian *res judicata* principle. And so, based on the wider European standard, the *ne bis in idem* principle could, in my opinion, be successfully argued in a criminal case when there is a prior final administrative ruling punishing the said conflict of interests. The analysis is to be made *in concreto*.

4. Elements of Comparative Law

As already mentioned, Articles 432-12 and 432-13 of the French Criminal Code (*De la prise illégale d'intérêts*) serve as the source of inspiration for the Romanian text of incrimination[18].

According to the first paragraph of Article 432-12 of the French Criminal Code, the act committed by a person holding public authority or performing a public service mission or by a person holding a public office, to take, receive or keep, directly or indirectly, any interest in a company or in an operation of which, at the time of the act, he has, in whole or in part, the duty of supervising, administering, liquidating or paying, shall be punishable by five years' imprisonment and a fine of € 500,000, the amount of which may be doubled to the amount of the proceeds of the offence.

As per Article 432-13 of the French Criminal Code:

It is punishable by three years' imprisonment and a fine of € 200,000, the amount of which may be doubled to the amount of the proceeds of the offence, the act committed by a person who has been charged, as a member of the Government member, of an independent administrative authority or of an independent public authority holding a local executive function, a civil servant, a military official or a public official within the framework of the duties actually performed by him or supervise or control a private enterprise, either to conclude contracts of any kind with a private enterprise or to formulate an opinion on such contracts, or to propose directly to the competent authority decisions relating to operations carried out by a private enterprise or to formulate an opinion on such decisions, to take or receive a participation by work, advice or capital in one of these companies before expiring a period of three years following the cessation of these functions. The same penalties apply to any participation by work, advice or capital in a private company which owns at least 30% of common capital or has entered into an exclusive or *de jure* agreement with one of the companies previously referred to.

For the purposes of these legal texts, a public enterprise operating in a competitive sector and in accordance with the rules of private law is considered to be a private enterprise.

These provisions are applicable to employees of public institutions, public enterprises, mixed companies in which the State or public authorities directly or indirectly hold more than 50% of the capital and public operators provided for by Law No. 90-568 of July 2, 1990 on the organization of the public service of the post office and France Telecom.

The offence is not constituted by the sole participation in the capital of companies listed on the stock exchange or when the capital is received by devolution succession.

Article 323 of the Italian Criminal Code incriminates the conflict of interests under a different name, namely abuse of office (which is a distinct offence under Romanian criminal law), whereas in other jurisdictions, such as Germany, the act is not incriminated at all[19].

As far as the common law legal systems ar concerned, the American legislation is a noteworthy example as it comprises an extensive set of provisions under Chapter 11, Part I, Title 18 of the *US Code*, which is entitled "Bribery, Graft, and Conflicts of Interest"[20].

5. Conclusions

From a cultural perspective, in accordance with a scholarly opinion[21], I am also of the view that the incrimination of the conflict of interests in Romania also possesses a symbolic dimension, by encouraging a change in the Romanian cultural paradigm to shift from a traditional clan-like view on human relationships to duly observing the primacy of pursuing integrity in achieving the public interest over such purely personal connections.

Nevertheless, when it comes to overly restricting the private dimension through law, as the Romanian Constitutional Court has already shown, the lawmaker must adopt a balanced view so as to comply with the standards ensuring the exercise of fundamental rights.

[17] Mihai Mareș and Mihaela Mazilu-Babel, "CEDO. Cauza A. și B. împotriva Norvegiei. Sancțiuni fiscale și penale. *Ne bis in idem*. Proceduri paralele. Implicații în procesul penal român" *Pandectele Române* 1 (2017): 123 and the following.

[18] The text of the French Criminal Code, updated as of December 16, 2017, is available at: www.legifrance.gouv.fr.

[19] Sergiu Bogdan (coord.), Doris Alina Șerban and George Zlati, *Noul Cod penal – Partea specială – Analize, explicații, comentarii*, 460-461.

[20] The US Code is available at: https://www.law.cornell.edu/. Section 208 on acts affecting a personal financial interest, under Chapter 11, had been invoked in the context of discussing President Donald Trump's handling his financial and business entities following taking office (see Lauren Carroll, "Giuliani: President Trump will be exempt from conflict-of-interest laws", November 16, 2016, http://www.politifact.com/truth-o-meter/statements/2016/nov/16/rudy-giuliani/giuliani-president-trump-will-be-exempt-conflict-i/).

[21] Sergiu Bogdan (coord.), Doris Alina Șerban and George Zlati, *Noul Cod penal – Partea specială – Analize, explicații, comentarii*, 461.

Following the recent legislative developments, the solutions proposed by the participants to the proceedings and ordered upon by the judicial bodies shall be a barometre as to the degree of clarity of the current text of incrimination.

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References

- Antoniu, George and Toader, Tudorel (coord.). *Explicațiile Noului Cod penal*. Bucharest: Universul Juridic, 2016
- Bodoroncea, Georgina et. al., *Codul penal – Comentariu pe articole*. Bucharest: C.H. Beck, 2014
- Bogdan, Sergiu (coord.), Șerban, Doris Alina and Zlati, George. *Noul Cod penal – Partea specială – Analize, explicații, comentarii*. Bucharest: Universul Juridic, 2014
- Dobrinoiu, Vasile (coord). *Noul Cod penal comentat. Partea specială*, 3rd Ed. Bucharest, Universul Juridic, 2016
- Lazăr, Augustin. Conflictul de interese – Teorie și jurisprudență. Studii de drept comparat. Bucharest, Universul Juridic: 2016
- Mihai Mareș, "Conflictul de interese. Elemente de tipicitate a infracțiunii. Cerințe esențiale" *Pandectele Române* 5 (2017): 170-177
- Mareș, Mihai. "Conflictul de interese. Modificarea conținutului legal al infracțiunii. Consecințe", *Pandectele Române* 5 (2017): 165-169
- Mihai Mareș and Mihaela Mazilu-Babel, "CEDO. Cauza A. și B. împotriva Norvegiei. Sancțiuni fiscale și penale. *Ne bis in idem*. Proceduri paralele. Implicații în procesul penal român", *Pandectele Române* 1 (2017): 115-136
- Toader, Tudorel et al., *Noul Cod penal. Comentarii pe articole*. Bucharest: Hamangiu, 2014

ASPECTS OF FORENSIC TACTICS AT THE CRIME SCENE INVESTIGATION OF MURDER CASES

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Abstract

Crime scene investigation is a procedural and criminalistics tactics activity aimed at a direct perception of the place where the crime was committed, at discovering, revealing, holding down, picking up and examining the clues, the evidence, indicating their position and their condition, in order to determine the nature and the circumstances in which the act was committed, as well as the data that are necessary in order to identify the perpetrator.

Specialist authors say that crime scene investigation is that initial action of criminal prosecution which is relevant in the whole of pursuits dedicated to solving an antisocial cause and it involves the immediate, direct and comprehensive knowledge of the place where the criminal act was committed.

According to the provisions of Article 192 of the Code of Criminal Proceedings, crime scene investigation may be reasonably required by the judicial body at any time this is deemed necessary in order to establish the facts about the situation of the place where the crime was committed, to discover and to hold down the clues related to the crime, to determine the position and the condition of the evidence and the circumstances in which the act was committed.

Crime scene investigation, as a procedure or an evidentiary activity, involves the direct perception by the criminal prosecution body or the trial court of the place where the act was committed so as to be able to draw conclusions about its nature, how it was committed, the number of perpetrators, and so on.

Keywords: *Criminal Law, Forensic Tactics, Judicial Body, Probative Activity, Criminal Field.*

1. Introduction

"Human being is the ultimate creation of the world who, with his restless spirit, is always striving for refinement[1]."

Life is the most precious asset of a person and at the same time the indispensable condition for the existence and perpetuation of an individual[2].

Defending one of the greatest values, which creates value itself, has a very special meaning. Endangering a human life is an action that jeopardizes not only the existence of an individual, but the aggregate of social relationships, man being the essence of these relations. Killing means suppressing the history maker, the beneficiary of the goods created together with his fellowmen. To defend this priceless value means that not only the human being is protected, but also the huge mass of social relationships[3].

The acts which affect the life of a person create a danger not only to the existence of the isolated individual, but for all the people taken collectively, therefore the normal course of social relationships could not be possible without protecting this elementary and absolute value – life.

The first document concerned with the protection of human life was the "Declaration of Independence" of July 4, 1776, which solemnly proclaimed the right to life for all people. The same ideas were also asserted by the "Universal Declaration of Human Rights", adopted by the General Assembly of the United Nations on December 10, 1948. Article 3 of the Declaration says that: "Everyone has the right to life, liberty and security of person". This right appears in other documents too, like the European Convention on the Protection of Human Rights and Fundamental Freedoms (Article 2) and the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE[4].

In our country, this right is obviously a guarantee.

Article 22, paragraph (a) of the Constitution of Romania, adopted on December 8, 1991, provides that: "the right to life, as well as the right to a person's physical and psychological integrity are guarantees". With reference to the importance of protecting the social value represented by life, we need to underline that the criminal law materials obviously and certainly show that nothing is more important and more valuable than human life with all the attributes and implications resulting from its protection. We consider human life as a priceless, incalculable value, which cannot be compared to other goods or values defended by criminal law.

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[1] A.Boroi, "Infracțiuni contra vieții" (*Crimes Against Life*), Național Publishing House, Bucharest, 1996, p.5.

[2] T.Vasiliu, D.Pavel, G.Antoniu, and others, "Codul Penal comentat şi adnotat – partea specială" (*The Criminal Code Commented and Annotated – The Special Part*), vol.I, Științifică și Enciclopedică Publishing House, Bucharest, 1975, p.68.

[3] V.Dongoroz, "Explicații teoretice ale Codului Penal român" (*Theoretical Explanations of the Romanian Criminal Code*), vol.III, Academia Română Publishing House, Bucharest, 1971, p.7.

[4] A. Boroi, cited work p.12–13.

2. The meaning of crime scene

Crime scene investigation is an important activity, which together with other prosecution actions contributes to the criminal aim, which is finding the truth.

Specialist authors[5] say that crime scene investigation is that initial action of criminal prosecution which is relevant in the whole of pursuits dedicated to solving an antisocial cause and it involves the immediate, direct and comprehensive knowledge of the place where the criminal act was committed.

Crime scene investigation is a procedural and criminalistics tactics activity which is aimed at a direct perception of the place where the crime was committed, at discovering, revealing, holding down, picking up and examining the clues, the evidence, indicating their position and their condition, for the purpose of determining the nature and the circumstances in which the act was committed, as well as the data that are necessary in order to identify the perpetrator[6].

According to the provisions of Article 192 of the Code of Criminal Proceedings, crime scene investigation may be reasonably required by the judicial body at any time this is deemed necessary in order to establish the facts about the situation of the place where the crime was committed, to discover and to hold down the clues related to the crime, to determine the position and the condition of the evidence and the circumstances in which the act was committed.

Crime scene investigation, as a procedure or evidentiary activity, involves the direct perception by the criminal prosecution body or the trial court of the place where the act was committed so as to be able to draw conclusions about its nature, how it was committed, the number of perpetrators, etc.

The term "crime scene" or the "scene of the crime" (criminal prosecution bodies also called it crime area in their practice) is understood not only as the actual place where a crime was committed, but also other close areas or other places from which data could be obtained about the preparations, the act that was committed and its consequences, including the perpetrator's way in and out of the crime area. According to the provisions of Article 41, paragraph 2 of the Code of Criminal Proceedings, the "crime scene" is the place where the criminal activity took place, in whole or a part of it, or where its result occurred.

In a broad sense, in case of murder, the notion of crime scene is understood appropriately as follows:

- the lot of land, the road section or the room where parts of a human body, or human skeleton, were discovered, as well as their surroundings;
- the place where the primary episode of the act happened, meaning the place where the victim's life was suppressed;
- the place where the victim was abandoned or where the body was dismembered, including its surroundings;
- the place where the victim died, in case that it is not the same as the place of the assault;
- the route followed by the victim after the assault by the place where the victim's body was discovered;
- the ways in used by the offender to get into the crime area, as well as the place he or she used to leave the area;
- the route followed by the offender after leaving the crime area in the direction he or she moved to[7].

In case of dismembered bodies, crime scene investigation involves as many activities like the ones above (different from one another) as the number of body parts discovered, so as, eventually, the crime scene in all its meaning takes shape. In other words, the meaning of crime scene is a sum of the places that make it, where the main sequence is the place where the primary episode happened – the suppression of a life – and the body was cut out.

According to the provisions of Article 195 of the Code of Criminal Proceedings, all the conclusions of the investigation of the crime scene are recorded in a report, to which photographs, drawings, sketches etc. are added.

3. The importance of crime scene investigation

The importance of crime scene investigation comes from the possibility of the criminal prosecution body or of the trial court to perceive directly the circumstances in which the offender acted, the objects he or she used or touched, how they worked, the outcomes, etc. All this helps to get an overall picture of the act, which is available to the judicial body for the purpose of investigating criminal causes.

The specific literature says that crime scene investigation is an evidential procedure with a deep significance in finding the truth, and for some cases (murder, robbery, destruction, serious work accidents, road, railway, ship and air accidents, etc.) a solution is basically inconceivable without this activity. This is because the crime scene is the place with the most clues or data referring to the crime and the perpetrator[8].

This activity of an utmost importance to the forensic investigation of a murder has some specific features such as:

- Crime scene investigation is an initial activity in

[5] C.Suciu, "Criminalistica" (*Criminalistics*), Didactică şi Pedagogică Publishing House, Bucharest, 1972, p.503; I.Mircea, "Criminalistica" (*Criminalistics*), Didactică şi Pedagogică Publishing House, Bucharest, 1978, p.148.

[6] V.Berchesan, C, Pletea, I.E.Sandu, "Tratat de tactică criminalistică" (*Treaty of Criminalistics Tactics*), Police Academy Publishing House, Carpați, Craiova, 1992, p.26.

[7] Collective work, "Tratat de metodică criminalistică" (*Treaty of Criminalistics Methods*), p. 32.

[8] Collective work, "Tratat practic de criminalistică" (*A Practical Treaty of Criminalistics*), Volume I, M.A.I. – I.G.P.– Institute of Criminalistics, Bucharest, The Publishing Service, 1976, p. 25.

the investigation of a murder, which requires the existence of findings related to the situation of the crime scene, in order to discover and hold down the clues related to the crime, to determine the position and the condition of the evidence or the circumstances in which the crime was committed (Article 192 / Code of Criminal Proceedings).

- Crime scene investigation is not only a simple initial act of criminal prosecution and criminalistics tactics, but also an activity of an immediate nature[9].

If the place where a murder was committed holds the most clues or data referring to the crime and the offender, the urgency of the crime scene investigation is required because any delay can lead to a change in its ambience, to a loss or destruction of clues and evidence with negative consequences for the forensic investigation.

- Crime scene investigation is an obligatory activity. This activity is obligatory because the direct perception of the situation at the murder scene cannot be replaced by any other criminal prosecution activity. Its obligatory nature results also from the provisions of the criminal proceedings law, from some internal norms – orders or instructions developed by the Ministry of the Administration and the Interior or by the Prosecution Office attached to the High Court of Cassation and Justice – and from the practice of judicial bodies.
- Crime scene investigation is an activity which, normally, cannot be repeated. The inappropriate crime scene investigation and the deficiencies in materialising the results of this activity cannot be fixed. Once the investigation of the scene where the murder was committed is completed, the scene suffers changes: the members of the team enter the crime area, objects are moved from their initial place, after the team has left those who remain clear up the place in order to return it to its current use.

We should not mistake the unrepeatable nature of crime scene investigation with its interruption, the latter being possible in certain circumstances, such as: the nightfall; the vastness of the scene or some peculiarities which need much investigation time; the sudden appearance of atmosphere events (heavy rain, heavy snowfalls etc); the incomplete knowledge of the land lots or the routes that are covered by the notion of crime scene; the discovery of some source of danger (explosion, fire, etc).

Tactically, the investigation should be resumed by the same team that initiated it, ensuring the continuity of the previous activities and a unitary image of these activities. However, during the interruption, measures will be taken to protect and preserve the clues that have been examined, including the security of the crime scene.

With regard to the tasks or the objectives of crime scene investigation, presented in the specific literature[10], they are as follows:

1. A direct examination of the place where the crime was committed
2. Searching, discovering, holding down, picking up, examining the clues and other evidence
3. Marking the route followed by the criminal (*iter criminis*), the objects on which the criminal acted, as well as the instruments he or she used
4. Determining the places from where some sequences of the crime could have been noticed
5. Identifying the people who have a connection with the investigated crime (perpetrators, people who were threatened, assaulted, other than the murder victim, etc.);
6. Elaborating and checking the versions referring to the crime that was committed, the perpetrators, as well as other circumstances (place, time, motive, purpose, etc.);
7. Determining the causes, the conditions and the circumstances which brought about or were favourable to the crimes, and the necessary preventive measures
8. Taking some measures to limit the damage and to prevent other harmful consequences

An evaluation of the information gathered during crime scene investigation provides data regarding the object and the subject of the crime, the content of the crime (the objective and the subjective aspects), as well as the identification of the wrongdoers. The object of the crime – the judicial one and the material one – takes shape against the background of the social relationships which were violated and the values targeted by the perpetrator.

The clues and the evidence may indicate the genetic profile, the blood type, the height, the weight, the gender of the perpetrator or possibly their identity. The manner in which the murder was committed may indicate some information regarding the transportation, the scatter of body fragments, changes of the ground ascertaining their dragging etc. – an aspect pertaining to the objective side of the crime, the number of perpetrators and so on. The findings allow the judicial bodies to determine the action or the inaction of the perpetrator, the consequence which is socially dangerous, the causality relation etc. With reference to the subjective side, the form of guilt with which the offender acted results from the materiality of the act, as the psychological position of the offender cannot be isolated from the activity by means of which it is accomplished[11].

[9] C.Suciu, cited work, p. 503.
[10] E.Stancu, cited work, p 9–10.
[11] C.Pletea, cited work, p 281.

4. Measures to be taken by the judicial bodies that arrived first at the scene

Pursuant to Article 324, paragraph 1 of the Code of Criminal Proceedings, the criminal prosecution in case of murders as well as other acts with a high degree of social danger provided by law is obligatorily carried out by the competent prosecutor.

According to the provisions of Article 288 of the Code of Criminal Proceedings, the prosecution bodies may take note of a murder that was committed through a complaint, a denunciation, or at the their own initiative when they become aware by any means of a homicide or a suspicion of murder.

Practice has shown that in many cases the police bodies are the first approached in connection with: people who are missing from home, the discovery of a body showing signs of violent death, when body fragments or remains are found, including parts of a skeleton, the death of seriously injured people who were in a hospital etc[12].

Among the urgent measures intended to ensure the preservation of the crime scene there are:

a) Saving the victims and giving first aid. No matter the situation found at the crime scene – even if it is no longer necessary, before picking up the body parts, the officer or the under-officer present at the scene must write down and mark the place and the position of the victim at the time of their arrival. Marking is necessary because the discovery of one part of a body in a specific place requires the search for the other parts within the same perimeter, the forensic practice showing cases where all the parts of a dismembered body were thrown away at relatively small distances one from another[13].

b) Preserving the crime scene. The one arriving first at the scene must undertake some actions so as to exclude the possibility to change, by accident or intentionally, the initial aspect of the crime area. Therefore, he or she must ensure the security of the place where the act was committed and protect the clues and the objects existing in that place. It is possible that the perpetrators or their accomplices are among the strangers who enter the crime area, their purpose being to destroy any possible clues that remained after the act unfolded.

The officer or the under-officer must act tactfully and keep away from the body and the surrounding area all those who have no reason to be there (the "curious" ones and the "thrill seeking").

It is absolutely necessary to observe the rules in force forbidding the police officers or under-officers and any other people, irrespective of their degree, position or capacity, to enter the crime scene if they have no tasks in connection with the crime scene investigation or with saving the victims.

In order to avoid the destruction, the deterioration, the disappearance or the change of the crime objects or clues, the parts of the body and the objects which may carry clues shall be covered with a cloth, with plastic foils, boxes, etc. Moreover, a safety belt shall be placed in order to keep strangers away, using the band with a specific indication, or, if there is no such band, ropes, wire and so on. The measures will be similar in case that the crime scene allows the use of a tracking dog for processing the clue of human scent.

c) Identifying eye witnesses, suspicious people, identifying and arresting the perpetrators or taking measures to chase and catch them. The police officer who arrives first at the crime scene comes into contact with many people. Among those people, except for the curious ones, there may be some who perceived wholly or partially the circumstances of the murder, or who know some details about the perpetrator or the victim. These details which are provided by such people are very important to the cause, beginning with the identification of the victim or the information which can lead to the identification of the victim and the perpetrator, and continuing with their actions before and during the assault, the instrument which the offender used etc. and ending with the actions of the criminal after the killing, the direction to which he or she moved and possibly the means of transportation used to transport the body parts and which helped him or her escape the crime area. Other details may be concerned with the nature of the relations between the perpetrator and the victim, the reason of the conflict, the goods or valuables which were taken from the de victim, other people who were present when the act took place and so on.

If the isolation of witnesses is meant to protect them from any foreign influence which might alter their testimony, isolating the perpetrators from the rest of people is intended to protect those concerned from any possible aggression by those who are present and who are revolted by the act, or by relatives of the victim.

If the perpetrator did not stay or was not identified at the crime scene, depending on the information provided by witnesses and the concrete possibilities existing at the crime scene, the officer or under-officer who first came there can take action to chase and catch the offender or to alert the police in the area where the offender headed to[14].

Announcing the criminal prosecution body of the territory where the murder happened, who has the competence to carry out the crime scene investigation. The police officer who first arrived at the crime scene shall approach the criminal prosecution body that has the territorial competence in the area where the act was committed. The announcement must briefly indicate the nature of the crime, its main aspects, the localisation

[12] E.Stancu, cited work, p. 230.
[13] V.Berchesan, cited work, p. 375.
[14] Collective work, "Tratat de metodică criminalistică" (*Treaty of Criminalistics Methods*), p. 32.

and the extent of the area where the murder was committed or where parts of the body were discovered, the measures taken and their outcomes, as well as other information that can be useful to the team carrying out the investigation.

The one who took the first measures has the obligation to stay at the scene until the investigation team arrive and inform the head of the team on the measures taken by that time and the measures which are under way, the initial aspect of the crime scene, the changes that intervened, who made them and for what purpose, the witnesses and the other people who were identified and the information obtained from them.

The specific literature underlines the special role played by the person who arrives first at the scene, as the subsequent unfolding of the forensic investigation depends to a large extent on their professionalism and how they accomplish their specific duties[15].

5. Preparation for the crime scene investigation. The importance of having the murder crimes investigated

The preparations for carrying out the investigation cover two phases: at the office of the judicial body and at the crime scene.

Among the measures taken before going to the crime scene there are:

5.1. Receiving, recording and checking the announcement.

No matter if there is a complaint or a denunciation, the prosecution body must take down the date and the specific time when the announcement was received, who made the announcement and from where, including the means used to make the announcement. The person receiving the announcement has the obligation to verify the competence and if he or she finds that another body is competent, then he or she immediately has to inform that competent body to carry out the investigation of the crime scene. That body has to proceed to: identify the person who made the complaint or the denunciation; check the announcement to see if the things announced are real and also with regard to the place where the crime was committed, its amplitude and its consequences and so on.

5.2. The technical and material provision.

This activity involves the following: preparing the universal criminalistics tool kit; preparing the DNA testing kit; preparing the set for taking photographs (cameras, films, filters, lamps with blitz etc.); checking the forensic auto laboratory; providing the team with the necessary equipment for filming, video filming, audio recording; providing the members of the team with the materials which are necessary for communication and keeping in touch; preparing other materials (body detectors, or metal or radiation detectors, equipment for filming or taking photographs under water etc.).

5.3. Ensuring the presence of experts, the presence of the lawyer and the assisting witnesses.

The multiple aspects covered by murders and the variety of the issues in various fields of activity require that other experts are also included in the investigation team. For instance, in the presence of the head of the team, they can carry out checks and research using some appropriate devices which are not available to the investigation team[16].

In case of homicides, the investigation team at the scene is made of the prosecutor, the coroner, the criminalists, other police officers usually from the forensic forces and the officer with the tracking dog and specialists in other fields.

The established team shall perform the tasks assigned by the prosecutor, the prosecutor being the one who leads the activities for searching, discovering, holding down and picking up the clues and the evidence.

According to Article 89 of the Code of Criminal Proceedings, when the perpetrator stayed at the crime scene, was chased and caught by the police bodies that first arrived at the scene, or by witnesses, a lawyer must be present for this activity.

With regard to the assisting witnesses, the criminalistics tactic recommends that they are provided before getting to the crime scene.

5.4. Ensuring the operative movement of the team to the crime scene.

The movement to the crime scene must take place with the maximum of urgency, as any delay can create difficulties for the investigation, as well as for the result of subsequent activities[17].

After the arrival at the crime scene and before starting the actual examination, the team must take some urgent measures. Depending on the peculiarities of each case and the consequences of the activities of the offender, the nature and the configuration of the ground that will be investigated, these measures consist in:

- the operative information about the event which took place;
- checking how the one who arrived first at the scene had acted by the time the team arrived, and the outcomes of his or her action, deciding either to continue the measures taken or to complement them by other activities of a maximum urgency, or to start them again;
- determining the modifications that intervened in the initial aspect of the crime scene;

[15] E.Stancu, cited work, p. 231.
[16] Collective work, "Tratat de metodică criminalistică" (*Treaty of Criminalistics Methods*), p. 37.
[17] Collective work, "Tratat de metodică criminalistică" (*Treaty of Criminalistics Methods*), p. 36.

- appropriately marking the area to be investigated;
- identifying the eye witnesses and the people who have no reason to be present in that area or who cannot offer a plausible explanation about the actions taken after the murder was committed (moving parts of the body to another place, cleaning up the place where the crime was committed, being late in announcing the judicial bodies, etc.);
- organising or extending the security measures at the crime scene, including the measures meant to remove any imminent danger (fires, explosions, etc.);
- determining the concrete examination methods;
- all the participants putting on the sterile equipment for carrying out the investigation of the scene.

Marking the place to be investigated is the "key" of the entire activity, and it has the purpose of delimitating the area – the room or the open space where the episodes of the crime took place, as well as its surroundings. Only by acting like that a premise can be created for discovering all the clues and all the evidence that are connected to the cause[18].

Irrespective of the situation at the crime scene, it is recommended that the limits set are broader, having therefore the certainty that no areas which hold clues are omitted.

So, if the homicide took place in a building in an urban area, the investigation must include all the rooms and the annexes (kitchens, hallways, bathrooms, stairs, balconies, lodges, garages, etc.), as well as the common premises. The investigators must not rule out the possibility that, depending on the clues that were discovered and the interpretation of the mechanism involved in their formation or the discovery of the so-called "negative circumstances", as well as on the anticipation of the motive and the purpose of the crime, the investigation is extended to the neighbouring apartments and buildings. A tracking dog can be really useful for processing the scent clue.

In case of rural houses, besides the examination of all rooms, it is necessary to investigate the annexes of the household (the stable, the shed, the barn, the storehouse, the cellar, storehouses for construction materials, the garden, the orchard, slaking pits, etc.), as well as the buildings neighbouring the place where the body parts were discovered, the lands used for agriculture, forestry or fishery, belonging either to the victim, or to other people who are in a conflict with the victim.

If the investigated area is in a field, in the woods or in water, the surface to be examined must be extended so as to cover a distance as long as possible, including roads, paths, passing points (bridges, viaducts), by the bordering localities or highly circulated national or county roadways.

If there are parts of the body that were discovered in water, the investigators must not overlook the banks of lakes, rivers, the roadways leading to them and away from them to the outskirts, the buildings or the establishments in the immediate neighbourhood (houses, motels, campsites etc.).

To conclude, the area may be extended or restrained as appropriate, the final aim being not to overlook any section of land which could contain clues or evidence.

Besides the activities that have been presented, the head of the investigation team must take other measures too, such as:

- organising the data gathering activity which must take place at the same time with the crime scene investigation;
- ensuring that activities continue in the areas which are not affected by the crime;
- ensuring the places, the documents which are important to the cause (registers, records etc);
- removing the sources of danger and ensuring that the investigation takes place in a safe climate;
- informing the members of the team about the results obtained during the first measures and guiding the investigation depending on the information obtained;
- determining how the members of the team keep in touch and how they exchange information;
- ensuring the judicious use of human resources and the cooperation with other bodies;
- ensuring the presence of assisting witnesses, the presence of the lawyer or other people (specialists, interpreter, etc.).

The specific literature and judicial practice often refer to the "investigation of the murder by a team". This is because the particular social danger associated with the crimes against life requires a concentration of all knowledge, expertise and skills of specialists from various fields of activity involved in fighting crime and serving justice.

In order to find out the truth in a particular cause, it is necessary to make a full and operative use of data and information about the murder that was committed. This cannot however be done by a single person, being necessary to corroborate the efforts of several specialists, each of them acting according to his or her speciality in order to achieve the final aim.

The factors called upon to clarify the specific issues of a homicide cannot act separately, inconsistently, as a mode of action like that leads invariably to an unjustified delay of the investigation and the occurrence of miscarriages of justice[19].

Therefore, we can say that the investigation of a murder by a team is established as a methodological rule of forensic investigation, being imposed both by legal provisions and by practical necessities.

[18] Collective work, "Tratat de metodică criminalistică" (*Treaty of Criminalistics Methods*), p. 35.
[19] E.Stancu, cited work, p. 229.

6. The actual investigation of the crime scene

Crime scene investigation, being a laborious, lasting activity, which needs accuracy, calm, cautiousness, physical and intellectual efforts and even sacrifices, requires a lot of attention from those who carry it out. Without excluding the factors which disrupt attention (tiredness, the surroundings, a decreased interest in discovering other clues too etc.), it needs to be equally distributed throughout the duration of the activity. Irrespective of the condition in which it takes place, one must never have prejudices when going to investigate a crime scene. We should not neglect that all possible versions are worthless to the cause as long as they have not been checked and confirmed by the result of the activities carried out and especially by the crime scene investigation[20].

Carrying out the crime scene investigation involves, obligatorily, two phases, namely the static phase and the dynamic phase.

Investigating a homicide in the static phase starts with observing the place where the murder was committed, where the parts of the body were discovered or where a human skeleton was found. The static phase will also start with the preparation measures taken by the prosecutor who leads the investigation team, which are aimed at complementing or checking the measures taken initially by the judicial body that arrived first at the scene.

6.1. The investigation of the crime scene shall start with the following activities:

The coroner determines whether the parts that were discovered belong to a human body. It is obvious that this problem can be definitively solved only after the forensic tests have been completed in case that the external aspect of the parts is much degraded. At least, at a first sight, the following shall be determined: the species, the anthropologic type, the race, whether the body fragments belong to just one person, the existing clues (signs of trauma, prints or other kind of clues). These operations are carried out in the presence of the prosecutor.

Irrespective of the configuration or the nature of the crime scene, the first who enters the crime scene is the criminalist, followed by the head of the investigation team and the coroner. The coroner can formulate conclusions regarding the instruments used to take the human life, the wounds created by those instruments, the objects used by the perpetrator to hack the body, how the body was fragmented (either through cutting, or through breaking or tearing apart).

The clues or the evidence, encountered throughout the route taken by the criminalist and his or her companions, shall be marked with indication numbers and protected so as they are not destroyed by other members of the investigation team.

For the prosecutor to get an overall picture of the crime area, the investigators shall proceed to a general examination of the crime scene, being interested in the forensic and topographic orientation of the investigated perimeter.

By marking the clues and the evidence, the criminalist can have some direct contact, a real perception of the crime scene, which makes it possible to develop some versions regarding the number of perpetrators, the instruments that were used, the existence of micro clues and the places where they need to be looked for, etc[21].

Getting some details about the victim, the act and the people who have knowledge of the murder and the perpetrator, eye witnesses being of a particular interest.

In case of the examination of dismembered bodies, the investigation methods are essentially the general ones, with some peculiarities determined however by the specificity of these cases.

Provided that all the parts making a body were found in the same place or in the surrounding areas, the coroner can estimate the size, the gender, the age, different morphologic particularities, the time of death, the means used to section the body.

If only a part of the body was discovered in the investigation process, the people who can provide information about how that part of the body was found will be interviewed, and the coroner is asked to determine, as much as possible, the age, the size, the cause and the approximate day of the death, the instruments that were used in fragmenting the victim. Another action consists in gathering information from the police units in other districts of Bucharest or other localities with regard to the missing persons and whether they found any body parts in their territory.

In case that the head of a victim was discovered and it is not disfigured, or if the upper limbs or parts of the body that have scars, prostheses, tattoos, warts, professional callosities, some malformations were discovered, all these will be considered when drawing up the report of the external particulars. The investigation task that follows immediately is to discover the other parts of the body, so as, based on them, to identify the victim.

The ascertainment of any possible changes that intervened at the scene, after the murder has been committed, is concerned with the position of the parts of the body and the condition of the objects in the context of the crime area, as well as the changes in the content of some clues.

In order to determine the changes in the surroundings of the crime scene, the investigation team shall call on the people who were present in that place and who knew its initial appearance. If there are no such people, the investigation team shall take a closer look at the crime scene throughout its activity.

[20] Collective work, "Tratat de metodică criminalistică" (*Treaty of Criminalistics Methods*), p. 43.
[21] C.Pletea, cited work, p. 283.

Determining the point where the investigation starts off; usually, it is recommended that the investigation takes place in a spiral, going from the parts of the body towards the periphery of the crime scene, if there are no other circumstances which require the method of centripetal investigation[22].

On this occasion, all the changes that intervened because of the crime shall be examined, taking care not to destroy any clue. Considerable attention shall be paid to the ways in and out the perimeter of the crime scene, because this offers the most numerous possibilities to discover the clues left behind by the offender. Therefore, only the prosecutor and the coroner shall enter the crime area, avoiding the possible destruction of any clues and the change of the position of the objects found with the body.

This rule must be strictly observed because the so-called positional clues (cardboard boxes, strings, plastic bags, buried, dumped in rivers, woods, a turned up car, a drain clogged up with organs, etc.) are especially relevant in clarifying how the crime was committed. As the number of officers entering the crime area increases, so does the risk of degrading the clues and drawing erroneous conclusions with regard to the circumstances in which the act was committed.

Selecting the witnesses who assist in the crime scene investigation. If there are many people holding information, it is possible to select the witnesses based on the quality of the data they have, their personality, their objectivity and position in relation to the investigated cause, thus avoiding useless, collateral data, which have no significance or can slow down the investigation.

Another activity which is specific to the static phase is the processing of human scent with the tracking dog. This operation starts with the clothing on the parts of the body (if any) and the clothes of the offender. We think however that this activity has the value of a rough guide for the subsequent investigation.

Additionally, the use of olfactory clues can also encounter some difficulties due to the entry of numerous people in the examined area.

For a correct evaluation of the existing situation, the investigators shall write down the time they enter the scene to be investigated, the condition of the doors, windows, lighting devices, appliances, the visibility, the atmospheric conditions, the persisting smells, the condition of the ways in, the location of different objects, the position of the body, etc[23].

The investigation in the static phase ends with holding down the positions in which the body fragments were found, their location in relation to different objects in the crime scene, as well as of the other instruments in the crime area. These are held down by taking photos, filming or video recording.

For a full and operative retention of the picture of the entire crime scene it is useful to hold it down using the video devices with which the judicial bodies are provided. In practice, there are cases when video recording serves directly to carefully examine the crime scene and the elaboration of a realistic version with regard to the perpetrator.

Holding down the positions of the body fragments, and of the most relevant picture or objects of the crime scene, corroborated with the data obtained from tactical - forensic investigations carried out by the investigation team, lead to some conclusions with regard to the nature of the act, the time and the circumstances in which the murder was committed, the place where the criminal hacking happened, and possibly, the motive or the purpose of the crime.

The photographs taken in this phase have a guiding role, a sketch, and when there is a danger of disappearance or degradation, photographs of the main objects or of the clues are taken.

In conclusion, in the static phase of the investigation of the body parts, the following are ascertained: their place and position, which parts of the body they come from, the gender, the age and the approximate size, whether the remains belong to the same human body, the kind and the colour of clothes, the objects and the clues in their immediate surroundings.

6.2. The dynamic phase of the investigation is a continuation of the static phase, with specific methods however (a thorough and multilateral examination of each clue, as at this stage the objects carrying any clues are moved and construed (scientifically), this being the most complex stage in which all the members of the team participate.

Determining the scene of a crime is an important step of the dynamic phase, because in the practice of the prosecution bodies there are situations when the crime scene is not always the place where the victim was found. Therefore, a lack of clues or very few clues left behind determine the appearance of negative circumstances. The ascertainment of the crime scene leads to conclusions referring to: the nature of the relationships between the perpetrator and the victim, whether the victim was taken by surprise, whether the victim resisted, finding the circle of suspects, etc.

In case of dismembered bodies, the crime scene is the lot of land on which every segment of the body is discovered, the place where the main episode unfolded being the basis of the crime scene[24].

The investigation starts with the parts of the body (their clothing, other clues, etc.) and the area beneath them, and then the area around them will be examined.

The examination of the body parts involves analysing the clothes, the packing, the components,

[22] I.Mircea, cited work, p. 177.
[23] C.Pletea, cited work, p. 283.
[24] C.Pletea, cited work,p. 285.

how the packing is made, the bonds, the footwear and their body[25].

If the fragments of the found body show traces of clothing, these will be examined in a predetermined order, usually starting with the articles at the exterior of the upper part of the body and continuing with the underwear, the pants and the shoes.

During this operation, the following will be described:

- the existence of every single item of clothing, their size and measure, whether they are typical of the victim's gender and appropriate for the season;
- their position and how they are placed on the body remains;
- the individual characteristics of every item of clothing (for example, is it an item of mass production or tailor-made, the type of cut, the kind of fabric, the lining, the colour, the logo, the brand, any possible monograms, etc.);
- signs of dragging, any recent dirt (dust, mud, etc.) or other signs of violence present on clothing; these clues shall be described in point of: number, location, form, dimensions, the aspect of their edges, lack of substance, the aspect of violence signs imprinted in the fabric they are made of (cutting, tearing, unpicking, perforation, attack with corrosive, caustic substances, burning, pulling apart, etc.);
- the presence, the condition and the position of buttons and other fixing accessories (zippers, bands, strings, straps, belts);
- the socks (the type, the fabric they are made of, the form, the size, the colour, the presence of adhering foreign bodies or substances, whether they were mended or patched up);
- articles of footwear; they will be examined in point of: their kind, their type, the model, the size, the colour, the materials they are made of, the brand, the degree of wearing, the configuration of the sole (the geometry of insertions), characteristic deformations, deposits of foreign substances or bodies, painting, re-painting, the kind of laces, repairs, signs of violence (breaking, friction, scratching, punching, pulling apart).

In other situations, these items of clothing may somehow be missing, because in order to hide and take out the parts of the body without being noticed, the perpetrator packs up these fragments. Therefore, the packing material which was found (bags, boxes, mats, bed sheets, blankets, tote bags, accompanied by strings, belts, ropes, etc.) needs to be examined very carefully, described in the report, photographed and kept as corpora delicti which are valuable and often help identify the killer or killers[26].

The articles of clothing and the accessories belonging to the wrongdoer or the suspect are examined in the same way as in the case of the body. There is also an additional activity aimed at discovering specific clues, such as picking up any kind of biological clues: epithelial cells, secretions, blood, fragments of tissue, biological clues which may come from the victim or from the perpetrator, signs of violence due to the victim's defending himself or herself, papillary clues (digital – palmar and plantar), traces of saliva, cigarette ends, measures taken to remove any marks caused by the crime, etc.

The examination of each body segment shall be performed very carefully by the coroner, in the presence of the prosecutor, describing:

- any signs of violence (number, the location in relation to some anatomical points of reference, their kind, the exterior aspect of the wounds, the shape of edges, any adhering foreign substances or bodies, the inclination of wounds, etc.)
- any particular signs (their kind and type, their location, the form and the aspect, the dimensions, the tint, their congenital or acquired nature, etc.)
- other signs of the crime (deposits of substances, of normal or pathological biologic products, such as: blood, saliva, sperm, hairs, pus, nail fragments, etc., toxic or caustic products and so on).

For bodies of an unknown identity as well as for segments of such bodies, the examination and the description refer additionally to the following aspects: the gender, the apparent age, the size, the most important diameters, the type of body-build, the colour of hair and eyes, the condition of the teeth and the dental formula, the under nail deposit, any signs of putrefaction and its status, the smell (objects can be found inside the mouth cavity, which were used to suffocate the victim or to prevent crying), the position of the body (the inclination of the head, the position of the extremities in relation to the trunk, whether in water, in mud, in the ground, under debris, suspended in a halter etc), the colour of the skin and the mucous membranes, any leak of biological products, marks left by knots and bonds on the parts of the body, whether there are any eviscerations of different organs, etc.

Basically, the dynamic phase of the crime scene investigation is reduced to the following activities:

a) taking detailed photos and filming the clues found on parts of the body and on the clothing, after they were first held down in topographic and forensic terms (describing their nature, form, colour, smell, formation mechanism, etc.), by measuring in relation to other clues, body fragments or other fragments found at the scene;

There are various ways to pick up the clues and the micro clues, as regards the marking of the clue or the carrying object. They can be picked up by wadding, scraping, photographing, with a standard sample in natural size, others with the help of sticky films like folio, and those which need processing in a laboratory are picked up together with their support, if their dimensions allow them to be moved.[27]

[25] Collective work, "Tratat practic de criminalistică" (*A Practical Treaty of Criminalistics*) Volume I, p. 434.
[26] S.P. Mitricev and P.I. Tarasov–Rodionov, "Criminalistica" (*Criminalistics*), Part 2, translated into Romanian, Bucharest, 1954, p. 170.
[27] C. Pletea, cited work, p. 284.

b) taking down the particulars of the body segments;
c) examining the clothing and the footwear of the body;
d) requesting the necropsy in order to determine the cause of death and take samples of blood, saliva, stomach content, secretions and excretions;
e) examining the parts of the body in order to discover lesions, scars, malformations, putrefaction stages, any possible diseases, characteristics of the teeth, etc; taking prints, the toilet and the restoration of the body are performed by the criminalist and the coroner at the office of the forensic body;
f) taking samples of hair and the under nail deposit.

If all the segments were found, the coroner shall proceed to assemble them, reconstructing the whole body, and afterwards the body will be shown to relatives or other people who used to know the victim.[28]

We need to specify that each segment is photographed in the place where it was found (alone, then with its surroundings), then the entire reconstructed body is photographed. Previously, each item of clothing or the parts of clothing are photographed too, as well as the assembled clothing, in which the body will be dressed before taking a photograph.

In case that parts of the body are found buried, the photographs may indicate in succession the stages of exhumation, their aspect and position at each stage of the search, and also after being taken out.

The findings shall be recorded also in a report (with a thorough description of the place where each segment was found, the clothing and that segment, lesions, etc.) and a sketch (for each area where the body segments were found).

The investigation helps obtain the data that are necessary to determine the perpetrator's modus operandi[29], such as: ascertaining the manner in which the murder was committed (with cutting – splitting objects, mechanical asphyxia, physical factors, toxic substances, firearms or explosives, biological or psychological factors); determining the manner in which the clues were destroyed; determining the goods or valuables which belonged to the victim, those taken by the offender and how they were turned to profit.

An essential issue in finding out the truth in a criminal cause is to clarify the negative circumstances, which are characterised by an inconsistency between the condition of the victim at that time, the victim's lesions and the actual situation in the crime area (discovery of a body with deep cut wounds, when there is not much blood around it)[30].

Crime scene investigation is an activity concerned with the scientific investigation of the clues and the objects existing at the crime scene in order to determine the route followed by the offender (the "*iter criminis*"), the traces left behind by the offender, for the purpose of determining his or her personality. It is known that when the perpetrator attains the purpose of his or her action, a relaxation occurs, called partial or total abolition of censure, an aspect which could be used by the investigation team who identify the clues created due to the invocated condition[31].

Among the problems solved by the crime scene investigation there are: the nature of the act that was committed, the place and the time when it was committed, the perpetrators and their capacity, the identity and the age of the person that was harmed; the motive of the act; the conditions and the circumstances which were favourable to the crime and the prevention measures which are necessary.

The determination of the nature of the act requires the identification of lesions, establishing which ones led to the victim's death and which was their succession. The presence of lesions and their morphology help determine the characteristics of the instrument used to commit the murder, which sometimes is abandoned near the victim or in other places far away from the crime area.

The day of the crime is considered a critical time which is determined approximately, depending on several factors, such as: the forensic findings, the aspects resulting from the examination of the crime scene and ascertained after having conducted several prosecution activities.

The factors that may be taken into account in order to determine the day of death could be: the occurrence of rigor mortis, the temperature of the body, the body changes, the examination of the stomach content, the status of decomposition etc.

Determining the identity of the victim is a central issue for the investigation team, an activity which starts at the time of the external examination and continues with the articles of clothing. The operations concerned with the identification of the body are: toilet making, the reconstruction, taking prints, taking biological samples, picking samples of the under nail deposit, making the dental chart, taking photos of the particulars, lining up for recognition etc.

The modus operandi is a faithful representation of the perpetrator's personality.[32] The description of the modus operandi covers the following stages:

- the contact with the crime scene by gathering data about future victims, their routine, the goods they possess, the places where they store them, their family situation, etc.;
- drawing up, theoretically, an action plan and checking its viability, requiring the recognition of the

[28] M. Terbancea, I. Enescu, A. Simionescu, and others, "Ghidul procurorului criminalist" (*Guide for the Criminalist Prosecutor*), Volume I, Helicon Publishing House, Timişoara, 1995, p. 75.
[29] Collective work, "Tratat practic criminalistic" (*A Practical Criminalistics Treaty*), p. 436.
[30] E.Stancu, cited work, p. 235.
[31] C.Pletea, cited work, p. 284.
[32] C.Pletea, cited work, p. 287.

crime scene with a check of the data previously obtained from various sources;

- the manner in which the perpetrator acted to get in, the annihilation of the victim (hitting, immobilisation, use of white arms, firearms, drugs, etc.), taking goods, leaving the crime scene;
- turning the product of the crime to profit.

The motive of the crime is the internal impetus, as an exclusive psychological element, which influences the criminal to commit the act, while the purpose is the result pursued by killing[33].

It is obligatory to record all the findings, no matter whether it is possible to confirm a connection between the clues, the evidence or the various circumstances and versions regarding the manner in which the crime was committed. The results of the crime scene investigation are checked by requesting technical – scientific ascertainment or expertise, or through other specific activities.

6. Conclusions

The crimes against life, although different in point of their legal content, have many common features in forensic terms. Irrespective of the legal description, the body must be discovered and identified, the cause of death must be determined, as well as the place and the time of death, the circumstances which were favourable to the crime, the motive and the purpose of the crime, the identity of the perpetrator and of the people who have useful knowledge for finding out the truth.

Criminalistics provides the judicial bodies with the methods and the technical – scientific means which are necessary for discovering, holding down, picking up and examining the clues of the homicide, and determining the identity of the perpetrator and that of the victim.

Murders are clearly different from other categories of crimes first through the social danger involved which is a special one and the circumstances in which they are committed.

Investigating a murder therefore involves carrying out some complex forensic and scientific investigation activities, under the coordination of a prosecutor.

The prosecutor, in cooperation with the police officers from the forensic service - the "homicide" work line and the criminalistics service, carry out the prosecution acts in order to determine the elements making the crime, the identity of the perpetrator and that of the victim, with the help of the methods of criminalistics.

An important role is also that of the coroner, who investigates the medical aspects and solves the problem referring to the cause and nature of the death, the causality link between the action and its consequences, identifies the victim reconstructing the body based on the discovered fragments, etc.

References

- A.Boroi, "Infracțiuni contra vieții" (*Crimes Against Life*), Național Publishing House, Bucharest, 1996
- T.Vasiliu, D.Pavel, G.Antoniu, and others, "Codul Penal comentat și adnotat – partea specială" (*The Criminal Code Commented and Annotated – The Special Part*), vol.I, Științifică și Enciclopedică Publishing House, Bucharest, 1975
- V.Dongoroz, "Explicații teoretice ale Codului Penal român" (*Theoretical Explanations of the Romanian Criminal Code*), vol.III, Academia Română Publishing House, Bucharest, 1971
- C.Suciu, "Criminalistica" (*Criminalistics*), Didactică și Pedagogică Publishing House, Bucharest, 1972
- I.Mircea, "Criminalistica" (*Criminalistics*), Didactică și Pedagogică Publishing House, Bucharest, 1978
- V.Berchesan, C, Pletea, I.E.Sandu, "Tratat de tactică criminalistică" (*Treaty of Criminalistics Tactics*), Police Academy Publishing House, Carpați, Craiova, 1992
- Collective work, "Tratat practic de criminalistică" (*A Practical Treaty of Criminalistics*), Volume I, M.A.I. – I.G.P.– Institute of Criminalistics, Bucharest, The Publishing Service, 1976
- S.P. Mitricev and P.I. Tarasov–Rodionov, "Criminalistica" (*Criminalistics*), Part 2, translated into Romanian, Bucharest, 1954
- M. Terbancea, I. Enescu, A. Simionescu, and others, "Ghidul procurorului criminalist" (*Guide for the Criminalist Prosecutor*), Volume I, Helicon Publishing House, Timișoara, 1995

[33] Idem.

METHODOLOGICAL PARTICULARITIES REGARDING CRIMINAL INVESTIGATION OF CRIMES RELATED TO MARKET ABUSE, FACTS CRIMINALIZED IN THE CAPITAL MARKET LEGISLATION

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Abstract

The interest in investigating the issue of techniques for investigating capital market crimes is based on several considerations:

Research is timely and responds to the imperative of the moment, to combat these crimes. It is to be noticed the novelty and the diversity of the issues addressed in the context in which this criminal field is little researched and known both as a modus operandi and as an investigative technique, although it is constantly expanding and amplifying.

Investigating capital market offenses is emerging as one of the major challenges addressed to the judicial authorities.

Keywords: *capital market crimes; criminal investigation; market abuse; methodological particularities.*

The capital market field is a highly controversial one because of its relative novelty in our country, the special technique it presents, and the seriousness of some crimes that can be committed through it.

The capital market plays a particularly important role in any free trade economy, i.e. to engage available capital reserves[1], other than those provided by loan institutions, in the economic circuit.

The capital market is the part of the financial market in which financial instruments are issued and traded in accordance with the legal regulations[2]. Currently, the functioning of the financial instruments markets, as well as the formation and functioning of the bodies operating on these markets are regulated by Law no. 31/1990 regarding companies, Law no. 297/2004 regarding the capital market and Law no. 24/2017 regarding issuers of financial instruments and market operations, these two normative acts representing the general framework and, obviously, the secondary legislation represented by regulations and instructions issued by the Financial Supervisory Authority (hereinafter referred to as ASF) or its predecessor, the National Securities Commission (NSC)

All offenses defined by Law no. 297/2004 imply that the anti-social behaviors described by the criminalization rules have been manifested within or in connection with some operations on the capital market.

We note from the beginning that the body with special attributions in this area is the Financial Supervisory Authority.

ASF is the national authority with powers of supervision, investigation and control in the field of market abuse, the criminal sanction of this behavior being obviously the exclusive competence of the judicial bodies.

ASF supervises the market in order to prevent, detect and sanction market abuse.

But what is market abuse? To answer this question, we will have to focus on art. 108 of Law no. 24/2017, from which it results that this notion refers to the abusive use of inside information, the unauthorized disclosure of inside information or market manipulation.

It should be noted that prior to the entry into force of Law no. 24/2017 (01.04.2017), the market abuse provisions applied only to the regulated financial instrument markets but following the transposition into national law of the provisions of Directive 2014/57/EU *on criminal sanctions for market abuse*, they are now also applicable to multilateral trading systems.

The elaboration of a methodology for investigating capital market crimes implies the systematic identification and analysis of the operating methods used by authors (perpetrators), the in-depth knowledge of the market mechanisms, malpractice and economic and financial "engineering" found in the practice of judicial bodies[3].

The new and sophisticated operating methods implemented by capital market authors, based on teamwork of the teams comprising of specialists with rigorously established tasks, have led to appropriate mutations in the design and conduct of an investigation in this area, transforming teamwork from a professional option to a criminal prosecution imperative: how to act by using specialized teams or investigative units[4].

In the European doctrine and practice, there is a particular interest in the development of pro-active or special investigative techniques designed to perform ante-delictum investigations or special investigations,

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[1] M.Hotca, N.Neagu, M.Gorunescu, A.Sitaru, A.L.Galetschi –Ghidul penal al omului de afaceri –Ed.Hamangiu -2015, pg.275

[2] Art 1 din Legea nr.297/2004 stabilește cadrul legal al pieței de capital

[3] Manual de Anchetă în Mediul Economico-Financiar, București, 2009, pg.22

[4] The Public Prosecutor for Series Economic Crime, Denmark, Parchetul Național Anticorupție, România, A.Lazăr, S.Alămoreanu, Jurgen Dehn, Helmit Brandau

including before a particular offense has been committed or discovered[5].

In order to proceed with the investigation of the criminal offenses that are incidental to market abuse, we must first of all know who the capital market players are. From the general legal framework applicable to this field, we find that the participating entities are the following:

I. ISSUERS – "open" joint-stock companies whose stocks/bonds are traded on a stock exchange;
II. INVESTORS - natural or legal persons holding capital surplus;
III. INTERMEDIARIES - financial investment service companies or banks, the ones that connect issuers with investors or investors among themselves;
IV. COLLECTIVE INVESTMENT UNDERTAKINGS - investment management companies, depository of financial assets, open-end investment funds, investment companies, closed-end investment funds, closed-end investment companies;
V. INVESTMENT CONSULTANTS - authorized natural or legal persons;
VI. FINANCIAL AUDITORS - authorized natural or legal persons;
VII. MARKET OPERATORS;
VIII. REGULATED MARKETS AND MULTILATERAL TRADING SYSTEMS;
IX. STOCKHOLDER REGISTERS;
X. DEPOSITORY;
XI. CUSTODIANS;
XII. COMPENSATION FUND;
XIII. SUPERVISORY/REGULATORY AUTHORITY.

We note that each of these remains a "trace" which must be identified, researched, interpreted and administered, of course, in the criminal trial.

In the following we will briefly refer to a possible method of investigating the market manipulation offense, if the financial instrument refers to the stocks issued by a company, as defined by art. 120 of the Law no. 24/2017, namely:

1.

a) making a transaction, placing a trading order or any other behavior that gives or is likely to give false or misleading indications regarding the offer, demand or price of a financial instrument, a spot commodity contract or an auctioned product that is based on emission allowances or that sets or is likely to set the price of one or more financial instruments, a spot commodity contract, or an auctioned product based on an abnormal or artificially emission allowance unless the reasons why the person who participated in the transactions or placed the trading orders acted as such in accordance with the applicable legal provisions and those transactions or trading orders are in accordance with market practices accepted at the trading venue in question, as they have been approved pursuant to the provisions of art. 13 of Regulation (EU) No. 596/2014;
b) carrying out a transaction, placing an order or any other activity or conduct that influences or is likely to influence the price of one or more financial instruments, a spot commodity contract or an auctioned product based on emission allowances, by resorting to a fictitious process or any other form of deception or artifice;
c) the dissemination of information by the media, including the internet or by any other means, which gives or is likely to give false or misleading signals concerning the offer, demand or price of a financial instrument, of a spot commodity contract or auctioned product based on emission allowances or setting the price of one or more financial instruments, a spot commodity contract, or a auctioned product based on emission allowances at an abnormally or artificially level, including the dissemination of rumors, when the persons who carried out the dissemination obtain, for themselves or for others, benefits as a result of the dissemination of the information in question and provided that these persons knew or ought to have known that they are false or misleading; or
d) the transmission of false or misleading information or the provision of false or misleading entry data or any other behavior manipulating the calculation of a reference index, provided that the person who carried out the transmission or supply of that information or data knew or ought to have known that they are false or misleading.

2. For the purposes of the provisions of para. (1), the following are considered to be market manipulation operations:

a) the conduct of a person or persons acting jointly to secure a dominant position over the demand or offer of a particular financial instrument, spot commodity contract or auctioned product based on emission allowances that has or is likely to has the effect of directly or indirectly setting the sale or purchase price or the creation of other unfair trading conditions;
b) the purchase or sale of financial instruments at the time of the opening or closing of the market which has or is likely to have the effect of misleading investors acting on the basis of the prices displayed, including opening and closing prices;
c) the placement of orders at a trading venue, including their cancellation or modification, by any available means of trading, including electronic means such as algorithmic and high frequency trading strategies, and which has one of the effects referred to in letter a) or b) by:

[5] Manual de Anchetă în Mediul Economico-Financiar A.Lazăr, S.Alămoreanu, Jurgen Dehn, Helmut Brandau, București, 2009,pg.45

I. interrupting or postponing the operation of the trading system in that trading venue or creating the conditions for such effects to occur;
II. causing difficulties for others to identify the actual orders in the trading system in that trading venue or likely to generate such effects, including by introducing orders that result in overloading or destabilizing the order book; or
III. creation or likelihood of creating a false or misleading signal about the offer, demand or price of a financial instrument, in particular by introducing orders to initiate or accentuate a particular trend;

d) benefiting from the regular or occasional access to media, electronic or traditional media by expressing an opinion on a financial instrument, a spot commodity contract or an auctioned product based on emission allowances or indirectly in relation to its issuer provided that the financial instrument, the spot commodity contract or the auctioned product based on emission allowances was already owned and subsequently profited from the impact of the opinions expressed concerning that financial instrument, spot commodity contract or auctioned product based on emission allowances, without at the same time making that conflict of interest public in a fair and efficient manner;

e) the purchase or sale of emission allowances or related derivative instruments on the secondary market prior to the auction conducted in accordance with the provisions of Regulation (EU) No. 1031/2010, which has the effect of setting the auction price for the auctioned products at an abnormal or artificial level or misleading the bidders.

The market manipulation offense is, in essence, a kind of offense of deceit, and that is why, as a rule, the manipulator seeks to obtain a material benefit from other market participants. However, there are cases where the manipulator does not necessarily pursue a material benefit, but, as it is pointed out in art. 121 para. (1) let. b, he/she may pursue the transfer of stocks held on behalf of other persons for the purpose of circumventing the articles of association of the issuer which, for example, limits holdings to a certain percentage of the share capital. This is precisely why, by the rule of criminalization, the legislator has determined that the market manipulation offense is a crime of danger and not a damage, although in some cases the damage can be located.

We believe that at this point it is appropriate to make it clear that the market manipulation offense may be even a means of crime, for example for offenses of embezzlement, offenses provided and punished by art. 279 para. 1 let. a and let. b of Law no. 31/1990 regarding companies, money laundering or even tax evasion.

A first problem that arises in investigating this crime, obviously after knowing the issuer whose stocks have been the object of manipulative actions (in practice the issuer's stock exchange symbol) is to establish what the clues that make us believe that a crime of a criminal nature has been committed. This problem finds the answer in the law itself, namely false or misleading indications regarding the offer, demand or stock price, etc.

Next, it is necessary to establish how the manipulative action was carried out, namely whether through transactions or order placements that could have resulted in a significant increase/decrease of the price/volume of the traded stocks, the dissemination of information by means of mass media, including the internet, that give or are likely to give false or misleading indications as to the demand, offer or stock price, the dissemination of false information, etc.

The next step in the criminal investigation is to establish with certainty who is the subject/are the subjects of the crime of manipulation.

At this point, to identify transactions or orders, the market operator, for example the Bucharest Stock Exchange, should be required to report the trading report for the issuer whose stocks were subject to the manipulative process. It is mandatory to indicate the period for which this report is requested because, as a rule, the manipulative process may involve several material acts. From the trading report we can extract more information, namely:

I. The date and time of the transaction;
II. The volume of stocks involved in the manipulative process;
III. Price variation;
IV. The type of market on which the manipulative transaction was made;
V. If the transaction is bilateral or not;
VI. The transaction intermediary/intermediaries.

If, from the transaction report cannot be identified the transaction having a manipulative effect, we can conclude that the manipulative operation had the premise of trading orders entered into the electronic system managed by the market operator, orders which were subsequently either deleted or withdrawn, but were likely to give false or misleading indications as to the offer, demand or stock price.

After identifying the intermediary/intermediaries, since they are currently operating global accounts, the financial investment services company will be required to file the records of all those customers that, during the research period, traded the issuer's stocks under the manipulation operation.

It is relevant to obtain, in addition to the brokerage agreement and its annexes, the trading orders, the bank statements relating to the settlement of the transactions, and the account statements issued by the stockholders' register regarding the stockholdings. A particular peculiarity is encountered when the manipulator resorts to the services of a custodian agent, the latter being the one to whom one must resort in order to obtain the account statement for the stockholdings.

It should also be noted that in the criminal investigation that is carried out in a case of manipulation, relevant information may be obtained from the current reports that the issuers or intermediaries are obliged to transmit to the market where the stocks are traded for certain events set by the legislator. At the same time relevant information can be obtained from the stockholders register or depositary.

Of course, special investigative methods may be used in the investigation (art. 138 and the following of the Code of Criminal Procedure), which may be used only in a strictly determined legal framework with the authorization of the judge of rights and freedoms, in order to collect the evidence.

ASF analyzes the financial flows underlying the financing of transactions, natural or legal persons involved in transactions.

During the investigation, ASF may request and analyze the following:

- The trading orders underlying the transactions as well as the information on the internal client accounts stored at the ASF level and received from the broker;
- Cash flows evidenced by account statements period investigated and for the clients involved;
- Details of the bank account, including the account holder, the real beneficiaries recorded in the documents related to the opening of the accounts of the persons with the right of signature to the persons holding the power of attorneys and the account managers;
- Account history for the targeted persons and the justificatory documents for the operations underlying the stock records;

References

- M.Hotca, N.Neagu, M.Gorunescu, A.Sitaru, A.L.Galetschi –Ghidul penal al omului de afaceri, București, Ed.Hamangiu -2015
- Manual de Anchetă în Mediul Economico-Financiar, București, 2009
- The Public Prosecutor for Series Economic Crime, Denmark, Parchetul Național Anticorupție, România
- A.Lazăr, S.Alămoreanu, Jurgen Dehn, Helmut Brandau, Manual de Anchetă în Mediul Economico-Financiar, București, 2009

SPECIFIC ASPECTS OF THE OFFENSE OF LEAVING THE PLACE OF THE ACCIDENT

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Abstract

The legislator has adopted the respective texts of law to the new social realities once with the repeal of the criminal segment of GEO no. 195/2002 relating to the circulation on public roads, republished and the introduction of this one in the content of the New Criminal Code.

The offence of leaving the place of the accident, actually found in the content of the provisions of art. 338 of Criminal Code is one of the eight offences against the safety on public roads.

Knowing important modifications, the legal text may appear relatively ambiguous if we refer to the old indictment, meaning that certain factual situations remained outside the criminal law. We will analyse in this regard the obligations that arise to the driver in case of a traffic accident, bringing into question even the decriminalization of the prohibition of the consumption of alcohol after the road event.

Furthermore, we will treat even aspects related to the causes of special no imputation that, on a closer analysis, can create problems of interpretation. Through the phrase "it does not constitute the offence of leaving the place of the accident when only material damages occurred after the accident", the legislator has chosen to indict this offence even if the victim has evaluable lesions within 1-2 days of medical care, on condition that for the same fact, in the old regulation, 10 days were required or it was an oversight of the legislator that it is to be resolved at some point?

Keywords: *accident, driving, circulation, Criminal Code, offence, road.*

1. Introduction

The new regulation stipulates the offense of leaving the place of the accident or its modification or deletion of its traces is regulated as follows:

1. Leaving the place of the accident, without the authorization of the police or the prosecutor who carries out the investigation of the place of the deed, by the driver of his vehicle, by the driving instructor undergoing the process of training or either by the examiner of the competent authority found during the practical tests of the examiner in order to obtain the driving licence involved in a road traffic accident, is punished with imprisonment from 2 to 7 years.
2. The same penalty is penalized even the deed of any person to change the status of the place or to delete the traces the road traffic accident that has resulted in killing or the injury of bodily integrity or health of one or more people, without the consent of the research team on the spot.
3. It does not constitute an offense the leaving of the place of the accident when:

a) only material damage has occurred after the accident;
b) the driver of the vehicle, in the absence of other means of transport, carries himself the injured people to the nearest healthy unit able to provide medical assistance and to which he declared his personal identification and the number of registration plate or the registration of the driven vehicle, recorded in a special register, in case he returned immediately to the place of accident;
c) the driver with priority of circulation regime notifies the police as soon as possible and after the end of the mission he will be present at the headquarters of the police whose jurisdiction the accident occurred in order to draw up the documents of infringement;
d) the injured leaves the place of the deed and the driver of the vehicle notifies immediately the nearest police station.

In relation to the old regulation, we mention the fact that this one conditioned the existence of the offense of gravity and the consequences of the occurred accident, while the new infringement does not make any difference in this regard. They are excluded from the existence of the crime the situations of leaving the place of the accident that caused only material damage, this circumstance representing a special supporting cause.

The leaving of the place of the accident must be also done without the authorisation of the competent authority.

If the author had to disobey the consent of the police that carried out the research at the place of the deed in the old regulation, the new Criminal Code provides expressly that the consent of the leaving the place of the accident may be given by the police or the

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prosecutor who carried out the research on the place of the accident[1].

Analysing further, we notice that due to the lack of the phrase "if the accident occurred as a result of a crime" (in the new regulation) the material element does not find one of the previous normative variants, and consequently, the driver involved in an accident will not be punished when leaving the place of the accident occurred due to the commitment of an offense (accident in which resulted only material damage).

In a simple form, the offense takes over some of the provisions of the old regulation, with a series of differences. The qualified active subject of the law must be involved in a traffic road accident; the new regulation no longer brings provisions relating to the seriousness or the extent of the traffic accidents which mean that the leaving of the place of any sort of accident may lead to the existence of the infringement. Of course, we refer to those that had as a consequence a minimal bodily injury or of health of a person except that sometimes, even a single day of medical treatment, aspect established by a forensic certificate, will be able to lead to the meeting of typical elements.

Related to this thing, it is important to remember the decision of the HCCJ no. 66 of 15th October 2007 relating to the understanding of the phrase the injury of bodily integrity or the health of one or more people, contained in the provisions of article 89 para. (1) of GEO no. 195/2002.

The practice of the law courts experienced a variety of solutions in relation to the meaning of the phrase "the bodily injury or health of one or more people", contained in article 89. Para. (1) of EO no. 195/2002, republished, which criminalise the offense of leaving the place of the accident.

Thus, some of the courts have ruled in the sense that the deed of the driver of a vehicle of leaving the place of the accident in which he was involved, without the consent of the police who carried out the investigations, meets the constitutive elements of the offense provided in art. 89 para. (1) of GEO no. 195/2002, republished, without having relevant the number of days of medical treatment necessary for the cure of wounds.

Other courts, on the contrary, considered the phrase "the injury of bodily integrity or health of one or more people" refers only to the injuries that required for healing more than 10 days of medical care and the other consequences provided in the old regulation in the provisions of art. 182 para. (2) of the old Criminal Code. Thus, these courts have acted that whenever did not happened one of these consequences the typical elements of the analysed offense are not met because it lacks the condition that the injury of bodily integrity or health have had consequences required by law.

Under these circumstances, we can notice that the problem of law subject to the interpretation of the magistrates of the Supreme Court of Justice dealt with the meaning of the above mentioned phrase, thus, by the recalled decision, the High Court of Cassation and Justice stated that the offense of leaving the place of the accident, within the text of law, cannot be considered as committed if they are not met even the objective conditions imposed by the definition given to the injury of bodily integrity of manslaughter by art. 184 of the old Criminal Code, respectively, over 10 days of medical care.

Regarding the current situation, we consider that relative to the provisions of art. 338 of Criminal Code the meaning of the term "injury" in the content of the provisions of art. 75 of GEO no. 195/2002 and the philosophy which has been the basis for the decision no. 66 of 15th October 2007 of HCCJ (above mentioned) are incomplete.

In this respect, the High Court of Cassation and Justice has been delegated by the Bacau Court of Appeal in order to solve this problem of law.

They have put into question, in this way, whether to be met the constitutive elements of the offense of leaving the place of the accident provided by art. 338 para. (1) of Criminal Code with reference to the provisions of art. 75 (b) of GEO no. 195/2002 concerning the public roads, republished, it is necessary that the victim of the accident show lesions recorded in a medical act, measurable outcomes (injury) in a number of days of medical treatment or not, in any case, if there is necessary the existence of a forensic certificate; and what is meant by the term of injury provided by art. 75 (b) of GEO no. 195/2002, from a legal point of view, taking into account that the explicative Dictionary of Romanian language defines the wound as being "an internal or external breakage of the tissue of a living bring, under the action of a destructive agent; injury, wound."

The analysis drawn by the rapporteur judge of HCCJ for the meeting of January 25, 2018 outlines the idea that the interpretation and application of the provisions of art. 338 para. (1) of the Criminal Code regarding the offense of leaving the place of the accident, the term of "injury" provided by art. 75 (b) sentence II of GEO no. 195/2002 should be interpreted in the sense of "traumatic lesions or affecting the health of a person whose seriousness is assessed by days of medical treatment (at least one day)."

We do not share this point of view of the rapporteur judge, as the old regulation clarified by the decision no. 66 of 15th October 2007 (Appeal in the interest of the law) we appreciate it much closer to the juridical-objective reality, but HCCJ, in the panel to solve a problem of law will decide, but we as practitioners of the law, of course, will own those laid down.

[1] Tudorel Toader, Maria-Ioana Michinici, Anda Crisu-Ciocinta, Mihai Dunea, Ruxandra Raducanu, Sebastian Radulet, Noul Cod penal, Comentarii pe articole, Ed. Hamangiu, 2014.

2. Pre-existing conditions

The constituent elements of this offense must be linked with other legal provisions such as those from the content of the art.6 of GEO no. 195/2002, republished, regarding the traffic on public roads or the performance of those from the content of art. 79 of GEO no. 195/2002, republished, relating to the traffic on public roads.

According to the article 75 of GEO no. 195/2002, the traffic accident is defined as being the road event which occurred on a road open to the public traffic or had the origin in such a place, which had a result the death, injury of one or more people or the damage of at least one vehicle or other material damages and in which it was involved at least one moving vehicle.

The special literature has shown that the concept of traffic accident exclude the intentional acts (which might constitute separate offenses), referring only to car incidents occurred by manslaughter, with random character[2].

At a first glance overview on the incriminating text, we find that there are two types of crime, one type of criminal [para. (1)] and the other assimilated [paragraph. (2)]. The type variant involves the leaving of the place of the accident, without the authorisation of the police or the prosecutor who carries out the investigation of the place of the deed, by the driver of his vehicle by the driving instructor, found in the process of training, or by the assessor of the competent authority, found during the practical examination in order to obtain the driving licence, involved in a traffic accident.

The assimilated version consists in the deed to change the status of the place or to delete the traces of the traffic accident which has resulted in killing or the injury of bodily integrity or health of one or more people, without the approval of the research team on the place of the spot.

In the content of paragraph (3) there are four special supporting causes related to the commitment of the offense of leaving the place of accident which will be analysed in a future section.

The allowed situation in the case of committing this offense is constituted by the production of a car accident, of course, prior to the performance of the material element of the analysed offense. The accident must accomplish the conditions set by GEO no. 195/2002 republished to have impact in the case of this offense[3].

It is generally understood by *car accident"* an event occurred within the road traffic, due to the breaking of the road traffic during driving or by breaking the norms relating to technical verification of vehicles produced by swabbing, knocking, tipping over, falling of the load or any other way, and which has resulted in the death, the injury of bodily integrity or health of the people, the damage of goods or which interrupts the traffic. "[4]

We will not find in the presence of the offense of leaving the place of the accident or the changing or the deletion of the traces of this one in the case in which the accident (the premise situation) has been consumed, for example, in a courtyard (private property as well as other area that cannot enter under the term "public road"), even if the material element committed by the respective author folds exactly on the rule of incrimination.

The legal object of the offenses provided by article 338 of NCC is constituted by the social relations related to *the traffic safety on public roads*, "whose existence and normal conduct involve the criminalization of the facts of leaving the place of accident by the driver of his vehicle by the driving instructors, found in the process of training or by the assessor of the competent authority, found during the practical tests to obtain the driving licence, involved in a car crash, without the consent of the prosecutor or the police that carries out the research of the place of the crime. "[5]

The obligation of the drivers to remain at the place of the accident appears justified by the necessity to establish the causes that have caused the accident, to identify the guilty people responsible for producing it, and, consequently, to call these ones to account, according to the law[6].

We can say in subsidiarity that committing such crimes brings prejudice even to the social relationships concerning the administration of justice, because it is complicated the activity of finding the truth and the good conduct of the criminal investigations. They are also affected the relations arisen as a result of the obligation for the granting of first aid to the victims of the traffic accidents[7]. We could say under the latter aspect that the act provided in art. 338 of the new Criminal Code could be confused with the act provided by art. 203 of Criminal Code (leaving without help a person in difficulty), the difference consisting in that the offense provided by art. 203 may have as active subject only a person whose activity was not endangered the life, the health or the bodily injuries of the victim while the active subject of the offense provided by art. 338 is just the person involved in the traffic accident[8].

Regarding the material subject, on the hypothesis provided by article 338 para. (1) of NCC this one lacks,

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[2] Mihai Adrian Hotca, Maxim Dobrinoiu, Infracțiuni prevăzute în legi speciale. Comentarii și explicații, Editura C.H. Beck, București 2010, p. 518;
[3] Alexandru Ionaș, Alexandru Florin Măgureanu, Cristina Dinu, Drept penal. Partea Specială, Ed. Universul Juridic, 2015, București, p. 508;
[4] Alexandru Boroi, Drept penal. Partea specială, Ed. C.H Beck, București, 2014, p.585;
[5] Vasile Dobrinoiu, Ilie Pascu, Mihai Adrian Hatca, Ioan Chis, Mirela Gorunescu, Norel Neagu, Maxim Dobrinoiu, Mircea Constantin Sinescu, Noul Cod Penal comentat. Partea Specială, Ediția a II-a, revăzută și adaugită, Ed. Universul Juridic, București, 2014, p.731;
[6] Idem;
[7] Idem;
[8] Idem, p.732;

but on the hypothesis provided by para. (2) it exists, consisting of any element (object) as modified, deleted or removed from the place of the accident.

The active subject of the typical version provided by the paragraph (1) is qualified, the offense subsisting only in the case of the driver of the vehicle, of the driving instructors, found in the process of training, or the examiner of the competent authority, found during the practical exam to obtain the driving licence, involved in a traffic accident.

Some authors state, however, that the active subject of this crime is directly, and can be represented by any person who satisfies the conditions of criminal liability[9].

The qualification of the active subject shall not be subject only to the quality of the driver of the vehicle, but also by his involvement in a road traffic accident, within the framework of the typical version.

If we analyse through the perspective of the assimilated version provided by the paragraph (2), the active subject loses his qualification, the offense can subsist having as active subject any person who commits one the ways of the material element.

The criminal participation is possible in all its forms stating that in the case of the variant provided in para. (1) the accomplice is not possible due to the nature of the offense. We say this because the conditions of the accomplice for this crime cannot be fulfilled. When there are more drivers of vehicles involved in a road traffic accident, these ones committing subsequently to the accident, the material element provided by the art. 338, we will not retain the institution of the accomplice but a separate offense for each of them.

Taking into account the nature of these offenses, we believe that the legal people may respond to criminal law as a participant (complicity, instigation or improper participation).

Thus, in the situation in which a driver, the manager of a building company, while driving his the car from the work causes a road traffic accident resulted with the death of a person, is helped by other employees of the company sent to the place of the accident by the governing bodies in order to delete the traces of the accident (helped with a bull-excavator, of a legal person, to move the victim's car) , we will retain in addition to other incident crimes in the present case and complicity to leaving the place of the accident for the legal entity or ,depending on the case, the improper participation to the commitment of this offense in the situation in which the employees are unaware of the fact that there had been a traffic accident with victims.

In another situation, if an employee of a transport company of values causes a road traffic accident resulting with the injury of bodily integrity of a person and leaves the place of the accident in order to continue the transport, at the determinative instigation of the collective governing entity, we will find ourselves in the situation of instigation to commit the offense of leaving the place of the accident by the legal entity.

The main passive subject of this criminal liability is *the state*. The secondary passive subject is constituted by *the injured person by the road traffic accident.*

3. The constitutive content

3.1. The objective side

The offense provided and punished by art. 338 para. (1) can be accomplished by leaving the place of the accident without the consent of the police or the prosecutor who carries out the investigation the place of the deed, by the people referred to in the text of incrimination, involved in a road traffic accident.

As far it concerns the offense contained in the provisions of para. (2), the material element of this one is achieved through the deed to modify the condition of the place or to delete the traces of the traffic accident that resulted with the killing or injury of bodily integrity or health of one or more people, without the consent of the investigation team on the spot.

The obligation imposed on the driver of any vehicle involved in a traffic accident, with the exceptions listed in para. (3) to remain at the place of the accident is justified by the necessity to establish the causes that have caused the accident, to identify the people responsible for producing the accident and to call them to account to penal liability.

The place of the accident means the area of land where the action or inaction took place and has caused the accident, where the injury has been produced (fatal or with harmful consequences for bodily injuries or health) and where different traces are printed that are relevant for the determination of the causes of the accident[10].

Leaving the place of the traffic accident means the removal and the departure of the person involved in the area (area of land) where the road event (accident) occurred in question.

In relation to cognitive processes which determine the driver to undertake such action, we can retain the attempt to evade from the penal liability (e.g. the r the driver is under the influence of beverages or other substances or as a result of the accident the injury of bodily integrity or the death of one or more people occurred).

The fear of the crowd may represent another reason promoter of committing the penal deed, but in such situation we believe that criminal liability will not be held.

The change of status of the place of the traffic accident consists in changing or transforming the elements of the surface of the land on which the traffic accident occurred and had as result the killing or the

[9] Viorel Pașca, Petre Dungan, Tiberiu Medeanu, Drept penal parte special. Prezentare commparativă a Noului Cod Penal și a Codului Penal din 1968, Ed. Universul Juridic, 2013, p.209;

[10] Idem;

injury of bodily integrity or health of one or more people. For example, by introducing and creating some non-existent traces or by removing of some objects resulting from the accident[11].

Deleting the traces of the traffic accident involves an activity of elimination or removal of signs left by the road event which has resulted in killing or injury of bodily integrity or health of one or more people.

We notice that frequently the commitment of the offense of leaving the place of the accident knows, in fact, the achievement of the typicality by the action of continuing the way or by the action of stopping, the investigation of the situation by the guilty driver of producing it and continuing the road.

Thus, if the driver proceeds to leave the place of the accident with the vehicle involved in the accident, we consider that it is necessary to retain a contest of offenses between the offenses referred to para. (1) and (2), the status of the place being modified and the traces of the road accident being removed. On the other hand, the driver who abandons the vehicle after the traffic accident and leaves, on foot or by other means of transport, the place of the accident will be responsible for committing the offense provided and punished by art. 338 para (1).

In other words, whenever the commitment of the material element of the offense provided by paragraph (1) shall be carried out by using the vehicle involved in the accident, it will be as an incident the contest of offenses consequential connection.

The incriminator text provides an essential requirement attached to the material element, namely that the leaving of the place of the road traffic accident to be carried out *without the consent of the police or of the prosecutor who carries out the investigation of the place of the deed*[12].

Another essential requirement affects the driver's involvement in a road traffic accident, which means that he must have a certain role in the occurrence of the road event.

Analysing the hypothesis provided in paragraph (1), (2) and the special supporting causes from the content of paragraph (3), we could say that under the incidence of art. 338 of Criminal Code not all the traffic accidents are included, thus, "leaving the place of the accident in order to create a state of danger for the protected social values by the incrimination of this deed and, therefore, to justify the intervention of the criminal liability, it is necessary that the road traffic accident to present certain seriousness and also a certain significance. Moving away from the place of the accident, as well as the modification of the status of the place or deletion of the traces of the accident fall under the incidence of criminal law only if after the road traffic accident occurred the killing or the injury of bodily integrity or health of one or more people, and also without the consent of the investigation team on the spot[13]. "

The first instance court held essentially that on 26th .03.2015, around 08.50, the defendant got behind the wheels of the vehicle, wanting to head for the place of work. While he was performing the manoeuvre of reverse, the defendant injured a victim who was on the sideway of the boulevard. Following the accident, the defendant got out of the car and noticed that the person who was hit was sitting on the sidewalk having a bruise and a wound at the right cheekbone. The defendant has proposed the injured person to take him to hospital, but this one refused. Under these conditions, got behind the wheel of the vehicle and left the place of the accident without the consent of the police.

Following the reports of forensic discovery, it was established that the victim suffered injuries that required 3-4 days of health care.

The defendant has requested his acquittal on the grounds that the deed was not committed with guilt prescribed by law or intentionally, claiming that the form of guilt would have been the negligence, reported also to the attitude of this one with regard to his insistence for the transportation to the hospital of the injured person, remained at the place of the accident until the driver's departure, fact which has reinforced the belief that there is no form of norm violation broken from the point of view of the safety on public roads.

The same court of first instance considered that the existence of the fault without provision cannot be held, meaning that the defendant had not provided the result of his deed, given the fact that it was obvious that he committed a road traffic accident, within the acceptation of law circulation (art. 75 of GEO no. 195/202), and as an experienced driver (owner of the driving licence since 1995, as a result of the auto registration sheet), may not plead any excuse as regards the unfamiliarity with the legal provisions and the obligations which were his due.

The defendant noticed that the person who had hit was hurt, but however he did not notify immediately the police and left the lace of the accident, having the representation of the socially dangerous result of his deed.

On the other hand, by proceeding to a comparative analysis of the two successive text of law, the court concluded that for the meeting of the constitutive elements of the offence it is no longer necessary to satisfy the condition that the deed shall have the following result: „killing or the injury of bodily integrity or the health of one or more people", as provided by article 89 of GEO no. 195/2002, so that the decision was left without consequence, by the will of the legislature.

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[11] Vasile Dobrinoiu, Ilie Pascu, Mihai Adrian Hotca, Ioan Chis, Mirela Gorunescu, Costica Paun, Norel Neagu, Maxim Dobrinoiu , Mircea Constantin Sinescu, op. cit, 2014, p.735;

[12] Vasile Dobrinoiu, Ilie Pascu, Mihai Adrian Hotca, Ioan Chis, Mirela Gorunescu, Costica Paun, Norel Neagu, Maxim Dobrinoiu , Mircea Constantin Sinescu, op. cit, p.734;

[13] Alexandru Boroi, op. cit., p.586;

Under these circumstances, it was appreciated by the trial court that in law, the deed of the defendant meets under the aspect of the objective and subjective nature, the constitutive elements of the offense of leaving the place of the accident, provided by the art. 338 paragraph 1 of the Criminal Code.

To those shown, the court noticed that, beyond any reasonable doubt that the deed really exists, it is an offence and it has been committed by the defendant, so that the court ordered his conviction.

The defendant has made an appeal in legal terms against this decision requiring the acquittal on the basis of article 396 paragraph 5 in relation to article 16 para. 1 (b) of the Criminal Procedure Code since he had no intention of leaving the place of the accident, he tried to help the injured person, had no time the representation that he violates a legal standard.

Examining the documents and the works of the file in the context of the invoked critics, Bucharest Court of Appeal, in complete disagreement with the majority held that the appeal in question was founded.

As it was constantly shown in the doctrine, both under the influence of previous rule and the new Penal Code, the offence provided by article 338 of the Criminal Code is committed only intentionally, which may be direct or indirect. The realization of the act of negligence does not constitute an offence.

There is an intention, for example, when the offender realizes that by leaving the place of the accident a state of danger for the safety of the road traffic is created and, at the same time, the activity of the judicial authorities related to that accident is prevented or hindered.

Even in everyday speech, as it is set in the Explanatory Dictionary of Romanian Language, (which the legislation cannot ignore), the terms "leaving the place of a deed" have certain connotations of hit-and-run offence to ensure his escape, in order not to be discovered or to make difficult or ruin the finding out the truth, and such attitude is always based on punishable intention.

Or, in this case, the whole attitude of the defendant to get off the car, to talk to the injured person, offering to take him to the hospital, to wait, to make sure that the person moves alone, and the caused injuries are very minor and to only after then, they are incompatible with the detention of the intention of committing the offence which is retained in charge.

The minimal injuries suffered by the hit person, his conscious refusal to be taken to the hospital, the fact that he was the first to leave the place of the accident in a good physical condition created the defendant the belief that he may leave a his turn without breaking the law.

This subjective representation constituted an offence of the defendant, regarding the criminal provisions, the lack of the intention as a form of guilt leading to the not meeting of the constitutive elements of the offence provided by the art. 338 paragraph 1 of Criminal Code. Therefore, The Court of Appeal from Bucharest criminal division II, in complete disagreement with majority, ordered the acquittal of the defendant for the commitment of the offence provided by the article 338 paragraph (1) of Criminal Code because the deed was not committed with the form of guilt required by law, mainly on the basis on art. 17 related to art. 396 paragraph (5) of Criminal Procedure Code combined with article 16 paragraph (1) letter (b) sentence II[14].

Of course, the analysed offences will be committed even in a real contest with conventional convexity, in the situation in which the material element provided by the paragraph (2) shall be carried out in order to hide the traces of the accident and implicitly of the offence of leaving the place of the accident in the normative version covered under paragraph (1). In such case, the commitment of the second offense will be familiar with the form of guilt of direct intention due to the fact that it has a special purpose, that of hiding the commitment of the first offense.

In the case of committing the offense provided by article 338 par. (1) from Criminal Code, the immediate consequence consists of the creation of a state of danger for the social relationships regarding: the safety of driving on public roads, the arising relations as a result of the obligation of granting the first aid and the social relations regarding the carrying out of the justice.

For the reunification of the objective side of the offenses regarding the safety of driving on public roads, especially of the offense provided and punished by article 338 par. (1) from Criminal Code, there must be a causal link between the action that which constitutes the material element and the specific result, report of causation which results *ex re* (from the nature of the deed). Related to the offense provided by par. (2), the casual link must be proved.

In the case of the infringement provided by paragraph (2), the immediate consequence will be constituted by the damage of the social relationships relating to the safety of driving on public roads and the social relationships relating to commitment of the justice.

3.2. Subjective side

The offense provided by the article 338 par. (1) from the Criminal Code will be able to be committed only intentionally, which can be direct or indirect. The situation is similar to and in the case of the situation provided by par. (2).

There is a direct intention when the offender realizes that by leaving the place of the accident it is created a state of danger for the safety of driving on public roads and also prevents or makes difficult the activity of judicial bodies linked to that accident, but not related to another deed that constitutes an offense.

[14] Curtea de Apel București – Secția a II-a penală, decizia Penală nr. 1257/A din data de 19.09.2016;

Consequently, for the existence of the offense, it is not necessary the intention of the avoidance of following, but of running some useful findings to find the truth[15].

There is an indirect intention if the driver passes over an obstacle that could be even a person, this one not being able to realize exactly (due to weathercast conditions, to speed, etc.), then continued on his way. Thus, the respective driver provides the result of his deed and, even he does not follow the commitment of the offense, he accepts the possibility of producing the result which is socially dangerous.

If the commitment of the offense under the form of the real contest of conventional connection, above described, the commitment of the second offense will always meet the form of guilt of the direct intention, thus there will be the special purpose, that of hiding the commitment of the first offense, but, generally, the mobile and the purpose of the commitment of offense are not relevant in order to retain or not the offenses provided and punished by the article 338 from the new Criminal Code, these ones may have relevance in the case of individualisation of the case.

Analysing further the defendant's psychological process of the defendant at the time of committing the offense provided and punished by the article 338 par. (1) from the Criminal Code, we cannot neglect the aspects related to the commitment of the offenses as a result of a fear. We will not discuss the fear of being taken to criminal liability or the fear of finding other offenses, but about the fear inspired by the specific objective of the factual situation.

Thus, from this perspective we recall the criminal decision no. 97/R/20210 pronounced by the Court of Appeal of Bacau, case in which the defendant argued in hid defence the commitment of the deed as a result of some fear created by the people found at the place of the accident that was not received by the court resulting the fact that at the moment or producing the accident, this one had an alcoholic saturation in blood of 1.90%, and under the aspect of the subjective side it was demonstrated his intention of leaving the place of the accident in order to hide the drunkenness.

The problem becomes even more interesting because there may really be situations in which the author of the criminal deed eave the place of the accident due to the fear created by people found on the spot, by eyewitnesses, relatives to the victim, etc.

By penal decision no. 176/1993 of the Court of Bucharest, criminal section I, it was argued that there will be no state of necessity if the defendant left the place of the accident which occurred in order to save himself and the people in the vehicle created by a group of gypsy people who, gathered at the place of the accident, started to throw stones on his car because the serious danger which requires with necessity an action of save is determined by a random and not an attack from the part of one or more people.

We criticise the decision of the court on the grounds that the danger may come from accidental causes but also from deed committed intentionally or negligence, the danger being able to create even from the conduct of the offender.

3.3. Forms, penalties

The preparatory acts are not punishable but possible, the legislator considering that these ones do not present a degree of enough social danger in order to have criminal relevance. The consumption of the offence takes place the moment when the material element is fully made. We also mention that the attempt is not criminalized although it is possible in the case of analysed crimes.

Regarding the incriminating system, the commitment of the offences provided by article 338 para. (1) and (2) are punished with imprisonment from 2 to 7 years.

3.4. Special supporting causes

According to the article 338 (3) of the new Criminal Code, the leaving of the place of the accident does not constitute on offence when:

a) only material damage occurred following the accident.

We must point out related to this hypothesis that if the accident resulted with at least one person who suffered an injury of bodily integrity or health or has undergone some simple physical sufferance (minor), the specific justified cause no longer finds incidence.

b) the driver, in the lack of other means of transport, carries himself the injured people to the nearest medical care able to provide the necessary medical assistance and where he declared his personal data of identification and the number of registration of the driven vehicle, recorded in a special register, if he returns immediately to the place of the accident.

This case of inexistence of the offence is not anything else than a particular application of the state of emergency as a supporting cause. We appreciate that the legislator did not define the meaning and the sense of the word "immediately", but we will appreciate it as a period of time when a person who committed a car crash and carries the victims to a medical care must return to the place of the accident so the term will receive a special connotation depending on the particular circumstances of the cause[16].

Exemplifying in this regard, in relation to the criminal law, by the penal sentence no. 178 of 5th December 2016 of the Court from Bolintin Vale village, which remained final by the rejection of the appeal, the Court held the deed of the person of carrying immediately the victim after the commitment of the car

[15] Vasile Dobrinoiu, Ilie Pascu, Mihai Adrian Hotca, Ioan Chis, Mirela Gorunescu, Costica Paun, Norel Neagu, Maxim Dobrinoiu , Mircea Constantin Sinescu, op. cit, p.736;

[16] Vasile Dobrinoiu, Ilie Pascu, Mihai Adrian Hotca, Ioan Chis, Mirela Gorunescu, Costica Paun, Norel Neagu, Maxim Dobrinoiu , Mircea Constantin Sinescu, *op. cit*, p.737;

crash, but not to the nearest medical care, without returning to the place of the accident, meets the constitutive elements of the analysed offence, the defendant not being present under the incidence of some special supporting cause.

c) the driver of the vehicle with priority circulation regime notifies immediately the police, and he presents to the headquarters of the police whose jurisdiction occurred the accident after the mission, in order to draw up the documents on the findings.

In this case, the text of the law governs the situation of the drivers of vehicles with priority regime driving. E.g.: The vehicles of the Ministry of Internal Affairs, Ministry of Defence, the Romanian Intelligence Service, the Border Police, the Protection and Guard Custom Service, those intended for the extinguishing fires, ambulances, etc.

d) the victim leaves the place of the accident, and the driver of the vehicle announces immediately the event to the nearest police station.

4. Aspects of procedural penal law

In the case of committing this crime, the criminal proceedings will be initiated **ex officio.** The competence of carrying the criminal offence ids the responsibility of to the criminal research bodies of the judicial police. The competence of judgement in the first instance returns to the Court.

Of course, from those set out above, we find applicability only I the situation in which the quality of the person does not arise another level of competence. Thus, if the person who commits the crime has the quality of, or example, a lawyer, the competence in the first instance will return to the Court of Appeal.

5. Legislative no concordance, following, as a result of Decision no.3/2014 of the High Court of Cassation and Justice and of the decision 732/2014 of the Constitutional Court of Romania

All the offences provided I the previous normative act have equivalent in the content of the New Criminal Code, even if changes subsist sometimes, the deeds forbidden by law do not remain the same.

As we previously mentioned, once with the coming into force of the codes, the road offences provided by GEO no. 195/2002 met their correspondent in the content of the new Criminal Code, in title VII., Offences against the public safety.

We noticed that even though the offence provided by article 90 from GEO no. 195/2002, namely:

(1) The deed of the driver or of the instructor, found in the process of training, or of the assessor of the competent authority, found during the evolution of the practical tests of the exam in order to obtain the driving licence, alcohol consumption, products or narcotic substances or drugs with similar effects to these ones, after causing a car crash that has as a result the killing or the injury of bodily integrity or health of one or more people, up to biological samples or to the test with a technical means approved and verified by the metrological or up to the establishment with the approved technical means of their existence in the exhaled air , it is punished with imprisonment from 1 to 5 years, it has constituted an integrated part in the text of incrimination of the offence provided and punished by the article 336 from Criminal Code under the influence of driving a vehicle under the influence al alcohol or other substances:

(1) driving on public roads a vehicle for which the law provides the obligation of owning the driving licence by a person who, at the moment of collecting the biological samples**,** the driver has an alcoholic impregnation of over 0,80 g/l of pure alcohol in blood is punished with imprisonment from 1 to 5 years or by fine.

We can easily notice that by the phrase *at the moment of collecting the biological samples*, from the article 336, the legislator transposed the ideology of the incrimination of the art. 90 from GEO no. 195/2002.

It is prohibited by art. 90 the consumption of alcohol, products or narcotic substances or drugs with similar effects to these ones, after causing a car accident which had a result the death or the bodily injury or health of one or more people, up to the collecting of the biological samples or up to the testing in order to establish those values with an approved means, the article 336 from New Criminal Code proposed as for committing the offence of driving a vehicle under the influence of alcohol or other substances that the relevant value al the alcohol or the level of intoxication with forbidden substances to be the one from the first collection of biological samples in this matter.

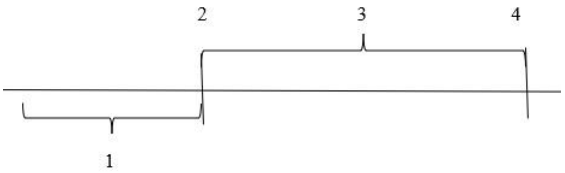
Thus, in the old regulation, with the assumption that a driver (*who was not under the influence of alcoholic beverages or other substances similar effects to these ones)* has committed a car accident (with human victims), it is forbidden to this one to under the incidence of committing the criminal offence, the consumption of alcohol or other substances up to the moment of the collection of biological samples. Otherwise, this one would have answered criminally for the commitment of the offence provided and punished by art. 90 of GEO no. 195/2002 and the establishment of the factual situation in terms of the alcoholic impregnation of blood or the consumption of other substances at the time of the committing the accident or driving a vehicle, they were calculated backward, by the collection of two biological samples taken every one hour, thus, establishing the descendent or ascendant curve relevant to the forensic biologists.

1. The moment of driving the vehicle- with criminal relevance to the commitment of the offence of

driving a vehicle under the influence of alcoholic beverages until the date of 1st .02.2014;
2. The moment of committing the accident;
3. The time interval until the arrival of the bodies of criminal investigation and *the time interval prohibitive for the consumption of alcohol or other substances,* with criminal incidence for the commitment of the offence provided and punished by article 90 from GEO no. 195/2002.
4. The moment of collecting the biological samples.

We notice that the article 90 from GEO met its implementation only for the time interval shown at point 3. Of course, this one has another particular application in the situation when the driver leaves the place of the accident, but this situation does not interest for what we will further present.

In the new legislative version, the driver is no longer prohibited, *in law*, by the consumption of alcohol after the accident, but from the interpretation of article 336 from New Criminal Code, the biological sample with criminal relevance would be the first, so, a similar difficult situation for the driver as the one from the old regulation. The driver would have responded criminally under the aspect of the committing the offence provided and punished by article 336 no matter the fact that at the moment of committing the car accident has already been under the influence of alcoholic beverages or forbidden substances or he has taken them after the commitment of the car accident, but until the moment of collecting the biological samples. Thus, we can notice the legislative analogy.



1. the moment of driving the vehicle – without criminal relevance for the commitment of the offence of driving a vehicle under the influence of alcoholic beverages or other substances, at the date of 1st .02.2014 and until the moment of the publication of the Decision of Constitutional Court of Romania no. 732/16th .12.2014;
2. The moment of committing the accident;
3. The period of time up to the arrival of the bodies of criminal investigation, period which is no longer prohibiting, in law, regarding the consumption of alcohol or other substances.
4. The moment of collecting the biological samples with criminal relevance for the commitment of the offence provided and punished by article 336 from New Criminal Code;

No matter the time that would have been when the driver of the vehicle under the influence of alcoholic beverages or would have consumed, the only moment with criminal relevance is constituted by the point 4, and the only incident offence may be constituted by article 336 from New Criminal Code.

We may say the old regulation was tougher in terms of committing of a contest of the offence of driving a vehicle under the influence of alcoholic beverages or other substances and the consumption of alcohol or other substances after the accident. As shown above, in the case of the new regulation, in this situation we could have retained only an offence.

On several occasions, the doctrine and practitioners denied the effectiveness of the incriminating text of the article 336 of New Criminal Code.

At the same time, the admission of the unconstitutional exception of the phrase "the time of the collection of biological samples" makes that the offence provided by article 90 from GEO no. 195/2002 which was introduced later in the content of the text of incriminating provided by article 336 from New Criminal code (as shown above), to be decriminalized.

6. Conclusions

The offence of leaving the place of the accident was one of those that has met changes once with the coming into force in the content of New Criminal Code.

Relating to the former regulation, we noticed the courts no unitary the law in the terms of the interpretation of the provisions relating to "injury of bodily integrity or health of one or more people", from the content of article 89 from GEO no. 105/2002. The High Court of Cassation and Justice ruled by the Decision LXVI (66) of 15th October 2007 in this direction, settling these aspects in terms of the understanding of the phrase in the spirit and the understanding of the terms from a legal point of view, not literary. Therefore, the offence in order to be incident, it was necessary that the victim has suffered assessable injuries in at least 10 days of medical care or other necessary consequences in order to be able to be brought the incidence of the offence of bodily injury by negligence.

We notice that due to the new form incrimination, the attorneys charged with the application according to the law have faced real difficulties in adopting solutions regarding the legal analysed provisions.

The Decision of the High Court of Cassation and Justice of 15th October 2007 remaining without echo in the new form of the regulation, we can't wait for the new legislative solution that the Supreme Court will pronounce.

Due to the fact that the criminal law appears as a subject according to the social relationships, being associated with the mirror and the values of the current community, the future decision of HCCJ will repeal or confirm us the fact if, at least under this aspect, the perception the road crime, related to the provisions of article 338 of Criminal Code suffered other approach, being evident, at least referring to the way of writing of the offence that the incriminating provisions are much more severe.

References

- Tudorel Toader, Maria-Ioana Michinici, Anda Crisu-Ciocinta, Mihai Dunea, Ruxandra Raducanu, Sebastian Radulet, Noul Cod penal, Comentarii pe articole, Ed. Hamangiu, 2014
- Mihai Adrian Hotca, Maxim Dobrinoiu, Infracţiuni prevăzute în legi speciale. Comentarii şi explicaţii, Editura C.H. Beck, Bucureşti 2010
- Alexandru Ionaș, Alexandru Florin Măgureanu, Cristina Dinu, Drept penal. Partea Specială, Ed. Universul Juridic, 2015, București
- Alexandru Boroi, Drept penal. Partea specială, Ed. C.H Beck, București, 2014
- Vasile Dobrinoiu, Ilie Pascu, Mihai Adrian Hatca, Ioan Chis, Mirela Gorunescu, Norel Neagu, Maxim Dobrinoiu, Mircea Constantin Sinescu, Noul Cod Penal comentat. Partea Specială, Ediția a II-a, revăzută și adaugită, Ed. Universul Juridic, București, 2014
- Viorel Pașca, Petre Dungan, Tiberiu Medeanu, Drept penal parte special. Prezentare commparativă a Noului Cod Penal și a Codului Penal din 1968, Ed. Universul Juridic, 2013
- Curtea de Apel București – Secția a II-a penală, decizia Penală nr. 1257/A din data de 19.09.2016

PHASES OF THE ROMANIAN CRIMINAL PROCEEDINGS AS PER THE PROVISIONS OF THE NEW CODE OF CRIMINAL PROCEDURE

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Abstract

According to the provisions of the Code of Criminal Procedure of 1968, a typical structure of the criminal proceedings included three phases: criminal prosecution, judgment and enforcement of final criminal decision; each such phase was delimited by certain proceedings-related acts and, within each of these phases, certain categories of judicial bodies exercised their duties.

Upon the coming into force of the New Code of Criminal Procedure, the criminal proceedings, along with the criminal prosecution, judgment and enforcement of the criminal decision, include a new phase, namely the preliminary chamber. The purpose of the procedure in the preliminary chamber is to verify, after the indictment, the competence and legality of seizing the court, as well as to verify the legality of evidence gathered and the procedural acts undertaken by the criminal prosecution bodies.

Keywords: *proceedings phases, criminal prosecution, preliminary chamber, judgment, enforcement of final criminal decisions.*

1. Introduction

The phases of the criminal proceedings are divisions thereof, including a complex of activities, successively and progressively undertaken in a coordinated manner, having their own objects and ending by their own solutions[1].

The notion of proceedings phase shall not be mistaken for the notion of proceedings stage. In this respect, the proceedings stages are various steps of conducting the criminal proceedings, within the distinct phases it undertakes. Thus, the proceedings stages are subdivisions of the phases of conducting a criminal proceeding; they have their own function, forming, within the main activities, a unitary set of activities (for instance, within judgment of the means of challenge, which is a stage of the judgment phase, several means of challenge may be successively used – appeal, recourse in cassation, challenge for annulment, revision – and each of them is a proceedings stage)[2].

2. Content

The division of a criminal proceeding into several phases may be found in modern legislations, and the history of the criminal proceedings records, in this respect, process constructions which do not include such a structure[3].

In this respect, the adversarial legal system was characterized by the freedom of producing (meaning gathering) evidence, oral arguments and publicity of judgment. The initiative of the proceedings belonged to the accuser (the victim of the offence or any other person), who had the obligation to produce the evidence, and the accused person had the right to counter-evidence. The evidence and counter-evidence was discussed orally and publicly and the court's role was passive, limited to the settlement of the criminal case based on the evidence presented. This system operated, in several versions, in Antiquity and in the first period of the Middle Ages[4].

The inquisitorial system was characterized by features opposed to the adversarial system. Thus, the accusation, defence and judgment were no longer distinct activities, and the criminal proceedings were initiated ex officio by the body having the obligation to gather the evidence and judge the case. Also, the procedure was in writing and secret, the only party to the proceedings was the accused person, and the supply of evidence had a formal nature, the cases being usually settled without debates. This system, used in rudimentary forms as early as the Antiquity, appears in its typical form upon the consolidation of the central

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[1] Volonciu N., Tratat de procedură penală, Partea general (Treaty of Criminal Procedure. General Part), volume I, Paideia Publishing House, Bucharest, 1993, p. 21.

[2] Antoniu G., Volonciu N., Zaharia N., *Dicţionar de procedură penală (Dictionary of Criminal Procedure),* Ed. ştiinţifică şi enciclopedica, Bucharest, 1988, p. 255.

[3] Mateuţ Gh., Tratat de procedură penală. Partea generală (Treaty of Criminal Procedure. General Part), volume I, C.H. Beck Publishing House, Bucharest, 2007, p. 135-149.

[4] Neagu I., Tratat de procedură penală. Partea general (Treaty of Criminal Procedure. General Part), Universul Juridic Publishing House, Bucharest, 2010, p. 26.

power in the Middle Ages and upon the organization of canonical inquisitorial justice[5].

Also, the mixed system (eclectic) used the aspects it considered useful from the other two systems, and it included a preliminary phase of the criminal proceedings, regulated according to the inquisitorial system (ex officio, secret and written procedure) and a phase of judgment applying the rules of the adversarial system (oral arguments, audi alteram parem rule). However, the mixed system does not strictly apply the rules of the other two systems, including various deviations therefrom, and each criminal proceedings legislation established regulations with their own particulars.

According to the provisions of the Code of Criminal Procedure of 1968, the typical structure of a criminal proceedings included three phases: criminal prosecution, judgment and enforcement of final criminal decisions; each such phase was delimited by certain proceedings-related acts and, within each of these phases, certain categories of judicial bodies exercised their duties.

Upon the coming into force of the New Code of Criminal Procedure, the criminal proceedings, along with the criminal prosecution, judgment and enforcement of the criminal decision, include a new phase, namely the preliminary chamber. The purpose of the procedure in the preliminary chamber is to verify, after the indictment, the competence and legality of seizing the court, as well as to verify the legality of evidence gathered and the procedural acts undertaken by the criminal prosecution bodies.

These subdivisions of the criminal proceedings correspond to the particulars of the activities which have to be undertaken for a good settlement of the criminal case.

2.1. Criminal prosecution – distinct phase of the criminal proceedings

Each proceedings phase solves problems whose settlement is crucial for the progress of the criminal file to the next phase. Among the phases or subdivisions of the criminal proceedings, the criminal prosecution has a special place, because of its own finality and function.

The criminal prosecution is the first phase of the criminal proceedings and consists in the set of activities undertaken by the criminal prosecution bodies in order to gather the necessary evidence on the existence of the offences, the identification of the offenders and establishment of their criminal or civil liability, in order to establish whether the judgment should be initiated or not against them[6].

Incipient forms of criminal prosecution, as a distinct phase within the criminal proceedings, appeared in the inquisitorial system, in Western Europe, in the 13th century, when the so-called investigation appeared, conducted on the initiative of the royal power agents[7]. The presentation of the Public Ministry in the legal literature underlined that, initially, the prosecutor's duty was to take care of the material interests of the king and, later on, they started searching the guilty persons and bringing them to justice[8].

Numerous authors underlined the importance of the criminal prosecution phase within the criminal proceedings. In this respect, it was presented that the need to counteract the criminal activity led to the establishment of specialized bodies to undertake specific activities in a phase preceding the judgment[9].

Also, the existence of the criminal prosecution as a distinct phase of the criminal proceedings is also justified by the fact that, in the modern age, offences are committed by using new and increasingly better methods and techniques, and sometimes the criminal activity turns into organized crime[10]. All these aspects led to a focused concern of the state to fight against the criminal phenomenon.

For this purpose, it was necessary to establish some bodies specialized in discovering the offences, identifying and catching the offenders in order to bring them to justice. These bodies have a well-determined competence according to the law, and they conduct their activity within the criminal prosecution phase. According to the criminal proceedings-related provisions, the criminal prosecution is a phase whose contents and performance are strictly limited to what is necessary to achieve the purpose of this proceedings phase and of the criminal proceedings in general[11].

Besides the fundamental rules of the criminal proceedings, several basic rules may be identified for the criminal prosecution phase, which are specific to it[12]. In this respect, the criminal prosecution is not public; however, there are acts of criminal prosecution in which the public may participate to a certain extent (for instance, the participation of assistant witnesses in certain procedures related to the evidence).

The criminal prosecution is also characterized by the absence of the audi alteram partem rule (meaning the existence and exercise within this activity of two opposite sides or functions – accusation and defence);

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[5] Lorincz A. L., *Drept procesual penal (Criminal Trial-related Law)*, Universul Juridic Publishing House, Bucharest, 2009, p. 12.

[6] Theodoru Gr., Moldovan L., *Drept procesual penal (Criminal Trial-related Law)*, Ed. Didactică şi Pedagogică, Bucharest, 1979, p. 194.

[7] Neagu I., Tratat de procedură penală. Partea general (Treaty of Criminal Procedure. General Part), Universul Juridic Publishing House, Bucharest, 2010, p. 27.

[8] Tanoviceanu I., *Curs de procedură penală română (Course of Romanian Criminal Procedure)*,"Atelierele grafice Socec, Societate Anonimă", Bucharest, 1913, p. 29.

[9] Volonciu N., *Drept procesual penal (Criminal Trial-related Law)*, Ed. Didactică şi Pedagogică, Bucharest, 1972, p. 239.

[10] Dincu A., *Criminologie (Criminology)*, Tipografia Universităţii Bucureşti, 1984, p. 125-128.

[11] Neagu I., Tratat de procedură penală, Partea specială (Treaty of Criminal Procedure. Special Part), Universul Juridic Publishing House, Bucharest, 2010, p. 20.

[12] Mateuţ Gh., *Procedură penală, Partea special (Criminal Procedure. Special Part)*, volume I, Lumina Lex Publishing House, Bucharest, 1997, p. 107-108.

as an exception, there are also "islands" of application of the audi alteram partem rule throughout this proceedings phase (for instance, debate on the proposal of provisional arrest of the suspect or defendant).

The absence of the audi alteram partem rule confers efficiency and mobility to the criminal prosecution, which features are absent in the judgment phase, because the criminal prosecution bodies have the possibility to undertake the criminal prosecution acts at the most appropriate time, on the date and at the place corresponding to the concrete requirements of the file[13].

Also, the criminal prosecution is preponderantly written, since most of the acts within this proceedings phase are made in writing. In the criminal prosecution phase, the parties may raise exceptions, file requests or memoranda only in writing. Although the written form is not a requirement for validity, but only a requirement for evidence, it may be said that, as compared to the judgment phase (characterized by its oral nature), the criminal prosecution mainly has a written character.

2.2. Preliminary chamber – distinct phase of the criminal proceedings

The criminal cases follow the procedure in the preliminary chamber only if the court was seized by an indictment. If the court is seized by an agreement for admission of guilt, the criminal case shall go directly to the judgment phase, without following the preliminary chamber procedure.

The preliminary chamber procedure includes a written debate between the defendant (not the civil party, the party liable under the civil law or the injured party) and the prosecutor.

According to Art. 54 of the New Code of Criminal Procedure, the preliminary chamber judge is a judge who, within the court and according to the court's jurisdiction:

a) verifies the legality of the indictment ordered by the prosecutor;
b) verifies the legality of evidence gathered and the procedural acts undertaken by the criminal prosecution bodies;
c) settles the complaints against the rulings of non-prosecution or non-indictment;
d) settles other situations expressly provided by the law.

The preliminary chamber procedure is regulated by the provisions of Arts. 342-348 of the New Code of Criminal Procedure.

The purpose of the procedure in the preliminary chamber is to verify, after the indictment, the competence and legality of seizing the court, as well as to verify the legality of evidence gathered and the procedural acts undertaken by the criminal prosecution bodies.

The duration of the preliminary chamber procedure is of maximum 60 days from the date of registration of the case with the court (Art. 343 of the New Code of Criminal Procedure). We consider that this term is a recommendation and, if it is exceeded, no procedural sanctions may occur.

For the judgment of the file, certain communications have to be made. Thus, according to Art. 344 of the New Code of Criminal Procedure, the certified copy of the indictment and, as the case may be, its certified translation (in the case of a foreign defendant) shall be communicated to the defendant at the place of his arrest or, as the case may be, at the address where he lives or at the address where he requested the service of process.

As a novelty, the preliminary chamber procedure introduces the regulation of a written procedure regarding the submission of requests, exceptions and the employment of a defence lawyer. Thus, the institution of preliminary chamber emphasizes the written character for the settlement of the criminal case from the standpoint of the object presented in Art. 342 of the New Code of Criminal Procedure.

Along with the communication of the certified copy of the indictment and, as the case may be, of its certified translation, the defendant shall be presented with certain proceedings-related guarantees. In this respect, the defendant's attention is drawn on the object of the procedure in the preliminary chamber, on his right to hire a defence lawyer, the term within which he may file, in writing, requests and exceptions on the legality of evidence gathering and procedural acts undertaken by the criminal prosecution bodies. The term is established by the preliminary chamber judge, depending on the complexity and particulars of the case, but it may not be shorter than 20 days.

As regards the appointment of the ex officio defence lawyer, according to Art. 344 para. 3 of the New Code of Criminal Procedure, the preliminary chamber judge takes measures for his appointment, in the cases provided by Art. 90 of the New Code of Criminal Procedure. In the current form of the criminal proceedings-related provisions, the interpretation may be that only the provisions of Art. 90 letters a) and b) of the New Code of Criminal Procedure are applicable; the hypothesis under Art. 90 letter c) is not applicable because it refers to the judgment phase[14], and the preliminary chamber is a distinct phase of the criminal proceedings.

As regards the solutions that the preliminary chamber may order, they are expressly provided in Art. 346 of the New Code of Criminal Procedure.

Within the preliminary chamber procedure, the judge issues a court report supported by reasons, in the court chambers, with the participation of the defendant and the prosecutor.

According to Art. 346 para. 3 letter a) of the New Code of Criminal Procedure, the preliminary chamber judge shall return the case to the prosecutor's office if: the indictment is not prepared according to the rules and such irregularity was not remedied by the prosecutor

[13] Theodoru Gr., Moldovan L., *Drept procesual penal (Criminal Trial-related Law)*, Ed. Didactică și Pedagogică, Bucharest, 1979, p. 196.
[14] *The New Code of Criminal Procedure*, Ed. Hamangiu, Bucharest, 2014, p. 48.

within the term provided in Art. 345 para. 3, if the irregularity entails the impossibility to establish the object or limits of the judgment. The preliminary chamber court report establishes the irregularity of the notification act, according to the text of the law; the case is returned for the remedy of the act for notification of the court. Such a ruling was regulated by Art. 300 of the Code of Criminal Procedure of 1968.

Also, the preliminary chamber judge returns the case to the prosecutor if it excluded all the evidence gathered during the criminal prosecution (for instance, establishing a breach in respect of a proof which led to all the evidence deriving from that proof, may lead to the return of the file to the prosecutor, since the entire evidence gathered during the criminal prosecution is excluded), as well as if the prosecutor requests the case to be returned, according to Art. 345 para. 3, or fails to answer within the term provided by the same provisions [Art. 346 para. 3 letters b) and c) of the New Code of Criminal Procedure].

In all the other cases when irregularities of the notification act were found, when it excluded one or some of the gathered evidence (excluded evidence cannot be taken into consideration upon the judgment of the case on the merits) or sanctions, according to Arts. 280 – 282 of the New Code of Criminal Procedure the criminal prosecution acts undertaken in breach of the law, the preliminary chamber judge shall order the initiation of the judgment.

As regards the means of challenge, the criminal trial-related law expressly regulates the means of appeal by a challenge, which shall be filed within 3 days from communication of the court report supported by reasons issued by the preliminary chamber judge. The challenge may concern the settlement of the requests and exceptions, as well as the rulings provided in Art. 346 paras. 3-5 of the New Code of Criminal Procedure (but not the hypothesis regulated in Art. 346 para. 6 of the new regulation)[15].

2.3. Judgment – important phase of the criminal proceedings

The notion of judgment receives two meanings in the criminal trial-related terminology[16]. Thus, in a narrow sense, the concept of judgment refers to the logical operation whereby the panel of judges settles the criminal case with which it was seized, while, in a broad sense, the judgment means one of the phases of the criminal proceedings, consisting of a set of activities primarily undertaken by the court of law.

The notions of criminal "case", "cause" or "matter" mean the substantive fact for which the criminal proceedings takes place; this refers to the material criminal law dispute. The concept of "criminal case" should not be mistaken for the notion of "proceedings", the latter notion referring to the set of activities undertaken for the settlement of the criminal law dispute[17].

The judgment is considered, in its broad sense, as the central and most important phase of the criminal proceedings[18], because its object is the final settlement of the criminal case. The importance assigned to the judgment phase is also justified by the fact that, within such, the court of law verifies the entire activity related to the proceedings, undertaken by all the other participants, both before the judgment of the case and during its judgment.

Also, the importance assigned to this phase of the proceedings is also reflected in the regulations establishing the principle of separation of state powers, and, implicitly, the independence of the judiciary power. In this respect, the Constitution of Romania provides in Art. 124 that "Justice shall be rendered in the name of the law" and that "Judges shall be independent and subject only to the law". Also, according to Art. 1 para. 2 of Law no. 304/2004 on the judiciary organization, "The Superior Council of Magistracy shall be the guarantor of the independence of justice".

The purpose of the judgment phase is to find the truth in respect of the fact and the person which were notified to the court, in order to issue a lawful and grounded ruling.

Throughout the judgment phase, the court of law shall verify the legality and grounds for the criminal accusation pressed by the prosecutor, as well as of the civil claim filed by the civil party, making a decision which shall solve the criminal and civil sides of the criminal proceedings. The decision of the criminal court may be subject to judiciary control by exercising the means of challenge by the parties or the prosecutor.

The acts of judgment are jurisdictional acts whereby the activity of judgment is undertaken in order to achieve the purpose of the criminal proceeding and consist in decisions that the court of law orders during the proceedings in respect of the settlement of the criminal or civil action[19].

There is also a need to analyze **the specific principles of the judgment phase**.

Besides the fundamental principles of the criminal proceedings, which are also applicable in the judgment phase, there is a set of principles specific to this phase: publicity, direct nature, oral arguments and audi alteram partem rule.

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[15] *Idem*, p. 206.

[16] Dongoroz V., Kahane S., Antoniu G., Bulai C., Iliescu N., Stănoiu R., Explicații teoretice ale Codului de procedură penală român. Partea special (Theoretical Explanations of the Romanian Code of Criminal Procedure), volume II, Ed. Academiei, Bucharest, 1976, p. 119; Neagu I., Tratat de procedură penală, Partea specială (Treaty of Criminal Procedure. Special Part), Universul Juridic Publishing House, Bucharest, 2010, p. 175.

[17] Pop Tr., *Drept procesual penal (Criminal Trial-related Law),* volume IV, Tipografia Națională, Cluj, 1948, p. 182.

[18] Kahane S., *Drept procesual penal (Criminal Trial-related Law),* Ed. Didactică și Pedagogică, Bucharest, 1963, p. 242.

[19] Udroiu M., Procedură penală, Partea generală. Partea specială (Criminal Procedure. General Part. Special Part), C.H. Beck Publishing House, Bucharest, 2013, p. 528.

Regulated in Art. 290 para. 1 of the Code of Criminal Procedure of 1968, the principle of publicity of the judgment phase is established in Art. 352 of the New Code of Criminal Procedure. The publicity of the court session is the basic rule of the criminal trial consisting in the performance of the judgment of a criminal case in public session. The court sessions have a public nature, any person being allowed to participate, including the press.

The presence of the public allows it to become aware of the modality in which the act of justice is rendered and ensures the guarantee of a control by such public or by the press on the modality of rendering justice[20].

It is not required that a public is effectively present in the courtroom upon the performance of the trial, but it is necessary that the public may have access to the court session. In other words, the proceedings in this phase of the criminal proceedings take place "with open doors"[21].

Being an important guarantee of the objectivity and impartiality of the judgment, the publicity of the court session is expressly provided in the Constitution of Romania (according to art. 127, the court sessions are public, except for the cases provided by the law), as well as in Law no. 304/2004 on the judiciary organization (according to Art. 12, the court sessions are public, except for the cases provided by the law; decisions shall be issued in public session, except for the cases provided by the law).

There are exceptions from the principle of publicity of the court session, which are situations expressly provided by the law in which the publicity is no longer mandatory.

Also, according to Art. 351 para. 1 of the New Code of Criminal Procedure, the judgment of the case is made before the court formed according to the law and takes place in a session, orally, directly and according to the audi alteram partem rule, this regulation being similar to the one provided in Art. 289 of the Code of Criminal Procedure of 1968.

The direct nature consists in the obligation of the court to directly perceive, without any intermediate, the means of evidence produced in the case, as well as the arguments of the prosecutor or of the parties in the criminal trial. By this direct nature, the court has direct contact with all the evidence.

The principles of audi alteram partem and of oral arguments blend with the principle of direct nature, according to which the judge "directly perceives, without any intermediate, the entire activity of the parties and of the secondary participants in the trial; directly hears the parties, the witnesses, without any intermediate (...). The entire debate takes places before the eyes and ears of the judge and of the parties. Consequently, the judge is in the position to perceive and assess the elements of the debate and the evidence, de visu et de auditu, in the session, in the presence and under the control of the concerned parties and even of the participating public. And the judge can ground his conviction only on what he saw and heard in the debate and on what was discussed there"[22].

In order to ensure such direct nature, the principle of continuity of the panel of judges was regulated, according to which the judgment of a criminal case is made throughout the entire criminal trial, by the same panel of judges to which the case was randomly assigned. In this respect, the principle of continuity of the panel of judges implies that "the entire debate takes place before the eyes of the same judges, in an uninterrupted, continuous manner, so that the judges have a detailed documentation of each moment of the debate and form a unitary opinion on the entire proceedings under debate"[23].

The audi alteram partem rule, as a principle specific to the judgment phase, refers to the fact that the evidence gathered during this phase is submitted foe discussions by the participants in the session, thus emphasizing the different trial-related positions of the parties[24].

The audi alteram partem rule is in close connection with the principle of equality of arms, as parts of the right to a fair trial and involve the right of each party to become aware of all the acts in the file or the observations, reports presented to the judge and to discuss them before such judge in order to influence the decision of the court of law, within a procedure based on the audi alteram partem rule which does not put any of the parties at a disadvantage[25].

Also, the principle of oral arguments consists in the fact that the entire activity of the proceedings conducted in the judgment phase takes place orally.

The oral arguments is not only a modality of holding the court session, but, it should be also understood taking into account the legal effects it produces in the judgment phase, being an imperative requirement for its validity, because, upon issuing a decision, the court shall take into consideration not only what was recorded, but also what was discussed orally in the debate stage.

2.4. Enforcement of the criminal court decisions – phase of the criminal proceedings

For the settlement of a criminal law dispute arising from the perpetration of an offence, it is required to initiate the criminal proceedings,

[20] *Idem*, p. 19.

[21] Neagu I., Tratat de procedură penală, Partea specială (Treaty of Criminal Procedure. Special Part), Universul Juridic Publishing House, Bucharest, 2010, p. 177.

[22] Pop Tr., Drept procesual penal. Partea special (Criminal Trial-related Law. Special Part), volume IV, 1946, p. 214.

[23] Idem.

[24] Lorincz A. L., *Drept procesual penal (Criminal Trial-related Law)*, Universul Juridic Publishing House, Bucharest, 2009, p. 353.

[25] Udroiu M., Procedură penală, Partea generală. Partea specială (Criminal Procedure. General Part. Special Part), C.H. Beck Publishing House, Bucharest, 2013, p. 533.

consequently, a criminal law relationship is born in relation to such proceedings. However, the substantive criminal law dispute is considered settled only after the completion of the criminal proceedings, by reestablishment of the breached order of law, namely by holding the persons guilty of having committed the offence liable under the criminal law.

In order to ensure the completion of the criminal proceedings and to hold the guilty persons liable under the criminal law, it is not sufficient to issue a court decision, but its enacting terms have to be enforced.

The enforcement of the final criminal decisions is an activity included in the proceedings, conducted ex officio, whereby the enacting terms of a final criminal decisions are enforced. According to the internal organization regulation of the courts, the criminal enforcement bureaus include at least one delegated judge concretely in charge with the activity of criminal enforcement.

The last phase of the criminal proceedings has the purpose to transpose in life the final criminal decision and to achieve the purpose of the criminal law and of the criminal trial-related law[26]. The enforcement of the criminal decisions is characterized by its own principles such as: mandatory nature, enforceability, jurisdiction and continuity[27].

Within the criminal proceedings, the enacting terms of the final criminal decision have to be enforced, which provide the coercion of the sentenced persons, so that they effectively incur the applied criminal sanctions.

In the criminal trial-related literature, numerous authors claim the autonomy of this stage of the criminal proceedings[28], however, there are also opinions according to which the rules on the enforcement of the criminal decisions fully belong to the autonomous branch of the executive criminal law[29].

Also, it was shown that only a certain part of the enforcement activities is included in the phase of enforcement of the criminal decisions, namely the activities initiating the beginning of the enforcement, and thus, the service of the sentence is different from the enforcement of the sentence[30].

While the regulation of the enforcement of the criminal decisions falls under the exclusive application of the rules of the criminal trial-related law, the proper service of the criminal sanctions falls under the application of the rules of substantive law, which are included in the Criminal Code and in Law no. 275/2006 on the enforcement of the penalties and measures ordered by the judiciary bodies during the criminal proceedings.

The proceedings phase of enforcement is subsequent to the moment when the criminal court decision remains final and, according to Art. 554 of the New Code of Criminal Procedure, it starts with the first judicial activities undertaken at the enforcement court by the judge delegated with the enforcement.

The final limit of this proceedings phase ends with the effective service of the sentences or of the orders included in the court decision.

3. Conclusions

The article analyses the phases of the Romanian criminal proceedings, namely: the criminal prosecution, the preliminary chamber, the judgment and the enforcement of the criminal court decisions. Also, for each of the phases are underlined the specific rules applied and the principles.

The phases are presented according to the provisions of the New Code of Criminal Procedure and by the relevant jurisprudence in the field.

References

- Volonciu N., Tratat de procedură penală, Partea general (Treaty of Criminal Procedure. General Part), volume I, Paideia Publishing House, Bucharest, 1993
- Antoniu G., Volonciu N., Zaharia N., Dicționar de procedură penală (Dictionary of Criminal Procedure), Ed. științifică și enciclopedica, Bucharest, 1988
- Mateuț Gh., Tratat de procedură penală. Partea generală (Treaty of Criminal Procedure. General Part), volume I, C.H. Beck Publishing House, Bucharest, 2007
- Neagu I., Tratat de procedură penală. Partea general (Treaty of Criminal Procedure. General Part), Universul Juridic Publishing House, Bucharest, 2010
- Lorincz A. L., Drept procesual penal (Criminal Trial-related Law), Universul Juridic Publishing House, Bucharest, 2009
- Theodoru Gr., Moldovan L., Drept procesual penal (Criminal Trial-related Law), Ed. Didactică și Pedagogică, Bucharest, 1979
- Tanoviceanu I., Curs de procedură penală română (Course of Romanian Criminal Procedure),"Atelierele grafice Socec, Societate Anonimă", Bucharest, 1913

[26] Neagu I., Tratat de procedură penală. Partea general (Treaty of Criminal Procedure. General Part), Universul Juridic Publishing House, Bucharest, 2010, p. 27.

[27] Dongoroz V., Kahane S., Antoniu G., Bulai C., Iliescu N., Stănoiu R., Explicații teoretice ale Codului de procedură penală român. Partea special (Theoretical Explanations of the Romanian Code of Criminal Procedure), volume II, Ed. Academiei, Bucharest, 1976, p. 294-302.

[28] Kahane S., *Drept procesual penal (Criminal Trial-related Law),* Ed. Didactică și Pedagogică, Bucharest, 1963, p. 314.

[29] Pop Tr., *Drept procesual penal (Criminal Trial-related Law),* volume IV, Tipografia Națională, Cluj, 1948, p. 3.

[30] Neagu I., Tratat de procedură penală, Partea specială (Treaty of Criminal Procedure. Special Part), Universul Juridic Publishing House, Bucharest, 2010, p. 473.

- Volonciu N., Drept procesual penal (Criminal Trial-related Law), Ed. Didactică şi Pedagogică, Bucharest, 1972
- Dincu A., Criminologie (Criminology), Tipografia Universității Bucureşti, 1984
- Neagu I., Tratat de procedură penală, Partea specială (Treaty of Criminal Procedure. Special Part), Universul Juridic Publishing House, Bucharest, 2010
- Mateuț Gh., Procedură penală, Partea special (Criminal Procedure. Special Part), volume I, Lumina Lex Publishing House, Bucharest, 1997
- The New Code of Criminal Procedure, Ed. Hamangiu, Bucharest, 2014
- Dongoroz V., Kahane S., Antoniu G., Bulai C., Iliescu N., Stănoiu R., Explicații teoretice ale Codului de procedură penală român. Partea special (Theoretical Explanations of the Romanian Code of Criminal Procedure), volume II, Ed. Academiei, Bucharest, 1976
- Neagu I., Tratat de procedură penală, Partea specială (Treaty of Criminal Procedure. Special Part), Universul Juridic Publishing House, Bucharest, 2010
- Pop Tr., Drept procesual penal (Criminal Trial-related Law), volume IV, Tipografia Națională, Cluj, 1948.
- Kahane S., Drept procesual penal (Criminal Trial-related Law), Ed. Didactică şi Pedagogică, Bucharest, 1963
- Udroiu M., Procedură penală, Partea generală. Partea specială (Criminal Procedure. General Part. Special Part), C.H. Beck Publishing House, Bucharest, 2013
- Pop Tr., Drept procesual penal. Partea special (Criminal Trial-related Law. Special Part), volume IV, 1946
- Pop Tr., Drept procesual penal (Criminal Trial-related Law), volume IV, Tipografia Națională, Cluj, 1948

THE INSTITUTION OF COMPLAINTS WITH AN ADMINISTRATIVE-JUDICIAL CHARACTER MADE BY THE PERSONS DEPRIVED OF THEIR LIBERTY TO PROTECT THEIR RIGHTS AND INTERESTS

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Abstract

This study is an analysis of how direct judicial control is exercised over the problems arising during the execution of sentences and custodial measures through a new institution, that of the the judge of surveillance of deprivation of liberty , and an analysis of the limits of his powers.The study also analyzes the legal dimension of administrative-judicial complaints by the persons deprived of their liberty to defend their rights and interests.

Deprivation of liberty is an event with major implications for both persons subject to such a measure and for their families or relatives. Whether it is a pre-arrested person, a person serving a custodial sentence or a juvenile in custody, the restriction of constitutional rights and the imposition of specific prohibitions can cause psychological suffering to people in this situation. The purpose of the punishment, of the custodial measure is not to cause physical or moral suffering or to humiliate the persons deprived of their liberty, but they are instituted for the purpose of recovery and re-socialization of these persons, as well as for the granting of constitutional rights within the limits of the temporary restrictions established in the court decision.

In order to ensure the unitary application of these fundamental principles, the Romanian legislator, through Law no.254 / 2013, paid due attention to this category of persons, the new law being in line with the legislative changes that were made, as well as the European recommendations on the treatment of detainees, of Human Rights or the laws of other states regarding of the execution of sentences ordered by the court. These European regulations, among other things, have made substantial improvements to the regulations on ensuring the normal functioning of the Romanian penitentiary regime, especially as regards the right of persons deprived of their liberty to information, to fill complaints.

The study is based on the conclusions drawn from the author's work as a clerk at the judge's office of deprivation of liberty.

Keywords: *Law no.254 / 2013, judge for the deprivation of liberty, administrative-judicial complaint, person.*

Introduction

Modern execution of custodial sentences means ensuring a balance between rights, rewards and disciplinary sanctions imposed on persons deprived of their liberty[1] as well as giving the opportunity to complain against the incidents that occur during the execution of the punishment.

If in the legislation on the execution of custodial sentences prior the change of the political regime of 1989, constituted by Law no.23/1969, the persons deprived of liberty only had the possibility of appealing to the court for settling complaints against the incidents during the execution of sentences, the rapid evolution of the Romanian society in the post-1990 period, the application and consolidation of the democratic principles, the prefigured accession to the European Union, the many international and European regulations in the domain and, last but not least, the case law of the European Court of Human Rights[2] has shown the

Romanian legislative anachronism in matters of execution of of custodial sentences and its incompatibility with the degree of European development and civilization, so that the reformulation of the rules for their adaptation to the evolution of fundamental human rights become a continuous process[3].

The new pre-accession legislation adopted in the European Union in 2006[4] on the execution of sentences and custodial measures has introduced a direct judicial control over the problems arising during the execution, through a new institution, the institution of the delegated judge with the execution of the custodial sentences, as an independent, impartial authority and guarantor of respect the legality at the place of detention. In the light of the new provisions, the

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[1] According to art.2 letter d of the Government Decision No. 157 / March, 10th 2016 for the approval of the Regulation implementing Law no.254 / 2013 on the execution of sentences and deprivation of liberty ordered by the court during the criminal trial , published in the Official Gazette of Romania, Part I, no. 271 of April 11th, 2016, persons deprived of their liberty are, as the case may be, detained persons, arrested at home, preventive arrest, interned, convicted.

[2] Explanatory memorandum to the bill on the execution of sentences, p.5, available on http://old.just.ro/LinkClick.aspx?fileticket=1xkO3Xk6Bm4%3D&tabid=93, consulted on 11.24.2017

[3] I. Chiș, A.B. Chiș, *The execution of penal sentences* , Universul Juridic Publishing House , Bucharest, 2015, p.361.

[4] The Law no. 275/2006 concerning the execution of penalties and measures disposed by the judicial entities during the penal procedures, published in The Official Gazette no. 627 of 20th of July 2006;

delegated judge with the execution of custodial sentences was granted broad prerogatives for the fair resolution of the petitions and complaints made by the convicted persons, being able to make spot checks in places of detention, hear any person, to make checks in the penitentiary records, etc.

The extensive reform of the criminal law and the criminal proceedings have generated a change of optics in criminal law enforcement as a result of the constant practice of the European Court of Human Rights in relation to the lawfulness of the execution of custodial sentences while respecting human dignity and prohibiting discrimination in the execution of sentences[5].

Law no.254 of July 19, 2013, on the execution of sentences and detention measures ordered by the court during the criminal trial, which entered into force on February 1st, 2014, with the Law no.286/2009 on the Criminal Code, as subsequently amended and supplemented, and Law no. 135/2010 on the Criminal Procedure Code, expressed firmly the option of the Romanian legislator to continue exercising the same direct control of how people minor or major, are deprived, according to the law, of their freedom, regardless of the place of detention: prisons, centers of detention and pre- trial arrest, pre-trial detention centers, educational centers, detention centers for minors.

In the exercise of its judicial powers, the judge of surveillance of deprivation of liberty, as the institution of the delegate judge has been renamed[6], handles complaints of detained persons, persons under pre-trial arrest or interned people[7].

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[8]:

a) handles complaints of prisoners against any breach of the their rights provided by this law;
b) handles complaints regarding the establishment and changing of regimes for enforcement and educational measures involving deprivation of liberty;
c) resolve complaints from prisoners regarding disciplinary sanctions.

In order to strengthen the role and establish the legal nature of the activity of the judge of deprivation of liberty, the Superior Council of Magistracy has issued a regulation for the approval of the organization of the activity of the judge of surveillance of deprivation of liberty (Decision No. 89/2014) entered into force on February, 1st,2014, which includes the same duties provided by the Law No.254/2013, art.9 paragraph 2.

The judicial administrative duties are terminated by an administrative-jurisdictional act called *closing*. Against the conclusion, the convicted person and/or the prison administration can make an appeal to the court in whose jurisdiction is located the prison.

The law on the execution of sentences and custodial measures does not provide a meaning for the term of *"complaint"* but by analogy with the provisions art.289 paragraph 1 of Criminal Procedure Code, which defines the complaint as being *a notification made by the individual (...) relating to an injury caused to him, taking into account the wording and the content of the complaint*, we can conclude that the complaint made by the detainees *is an administrative-judicial legal instrument by means of which a detained person unhappy with the taking of measures by the administration of the place of detention against him regarding the establishment or modification of the regime for enforcement, the disciplinary sanctions and exercise of their rights provided by this law, reports these aspects or circumstances to the judge of surveillance of deprivation of liberty requesting, as appropriate, to cancel the Commission decision on the establishment and change of enforcement and educational measures involving deprivation of liberty and the Commission decision on the application of disciplinary sanctions through which such measures were ordered or restoring the exercise of violated or suspended rights*.

1. The legal nature.

The complaint of prisoners against incidents occurred during the execution of sentences and custodial measures is an specific institution of penal executional law, with administrative-jurisdictional nature, as it was conferred by Superior Council of Magistracy No.89/01/23/2014 for the approval of the organization of the activity of the judge of surveillance of deprivation of liberty (art.9 and 13 paragraph 3).

The complaint, the referral is in the same time a request addressed to the judge to analyze the factual situation that the petitioner puts forward in the complaint, requesting him to cancel all actions undertaken against him by the administration of of prison or to restore the violated right.

In agreeming with art.9, paragraph 3 of Law no.254/2013 on the execution of sentences and custodial measures ordered by the court during the

[5] Explanatory memorandum to the bill on the execution of sentences p.1, available on: http://old.just.ro/LinkClick.aspx?fileticket=1xkO3Xk6Bm4%3D&tabid=93

[6] Law 254/2013 chose to change the name of the institution of the delegated judge in the instituition of judge of surveillance of deprivation of liberty because he considered that as a better expression of the legal nature of the activity of the judge performing his activity in the penitentiary and at the same time removes the confusions generated by the name by "delegated judge", which would mean a delegation within the meaning of article 57 of Law no.303 / 2004, as amended, on the status of magistrates

[7] Explanatory memorandum to the bill on the execution of sentences, p.3, available on: http://old.just.ro/LinkClick.aspx?fileticket=1xkO3Xk6Bm4%3D&tabid=93

[8] The Government Decision No.157/2016

criminal trial, the main administrative-judicial duties of the judge of surveillance of deprivation of liberty (solving the complaints regarding the establishment and changing of regimes for enforcement and educational measures involving deprivation of liberty; solving the complaints from prisoners regarding disciplinary sanctions, solving the complaints of prisoners on exercise of the rights provided by this law) is exercised within the special procedures prescribed by law and are terminated by an administrative-jurisdictional act called *closing*. The closing, as an administrative act with jurisdictional nature[9], is a unilateral, binding and enforceable legal act issued by an administrative body under the state power through wich the provisions of the law or a normative act subordinated to the law are implemented.

As a referral, the complaint made by the prisoners against incidents occurred during the execution of sentences and the *prior complaint* shall not be confused, the last one being a specific institution of the criminal procedural law, meaning a condition of punishment and procedure[10]. Also, we shall not confused the complaint of prisoners with *the denunciation* which, accordind of Criminal Procedure Code, art.290, represent reporting a person or group of persons to public authorities about the commission of a criminal offence.

The denunciation, just like the complain, is a voluntary referral, which can be done by any aggrieved person without any legal obligation to do so[11].

2. The meaning of the complaint term.

From the analysis of the definition of *the complaint* we can distinguish several meanings but also characters:

1. The complaint is an ***act***, meaning:

a) **a document**, a material support, drawn up from unhappy person which informs the judge of surveillance about certain incidents or the actions undertaken against him by the administration of the detention place, requesting to reconsider the factual situation and to handing down a decision ordering the cancellation of those measures (eg. sanctions) or replacing the applied measure with a easier one, to order the change of the enforcement regime in a less severe one, or to order the restoration of the violated or suspended rights.

b) **a legal instrument**, a procedural means by which the person deprived of fredom unhappy of applied measure requires the judge of surveillance ofdeprivation of liberty to exercise judicial control of how the prison administration applies the measures and legal provisions.

c) **a notification act** to the judge of surveillance of deprivation of liberty on the issues complained about, leading to the initiation of an administrative-judicial procedure- registering the complaints in the records with an administrative-judicial character of the Bureau of the judge, forming the file, hearing of the petitioner, of the other convicted person or working in prison system, requesting information, documents or points of view from the administration of the detention, making the spot checks, requesting a rogatory hearing committee for detainees in other places of detention, as appropriate. If the issues shown at the hearing can be the subject of a complaint with administrativ- judicial nature, the request for a audience represent a notification act[12].

2. The characters of the complaint

From the analysis of the meanings of the term, as well as from the content of art.9 and art. 47 of the Decision No.89/2014 of the Superior Council of Magistracy for the approval of the organization of the activity of the judge of surveillance of deprivation of liberty, it follows that the complaint has a dual character, namely

a) ***administrative character,*** because it refers to a unilateral, binding and executory act issued by an administrative body under the state power is a unilateral, binding and enforceable legal act issued by an administrative body under the state power through wich the provisions of the law or a normative act subordinated to the law are implemented[13], in this case issues concerning the execution punishments phase, distinct of the criminal trial, the law regarding the execution of penalties being the framework law of this phase.

b) ***judicial character,*** because the referral is addressed to an authorized body, which carries out a judicial activity (judge of surveillance of deprivation of liberty) who has the obligation, in the exercise of the duties provided by law, to resolve the dispute, in this case the the petitioner's complaint.

After the managing of evidence[14], the judge of surveillance of deprivation of liberty shall prepare a reasoned conclusion that resolves the complaint. The closing represents the rendered outcome, the defense of the parties, according to the procedure provided by the law, with the aim of ensuring equal treatment of the parties before the body with administrative-judicial powers.

In the event of unlawfulness or groundlessness, the conclusion may be canceled or reformed only by the

[9] http://legeaz.net/dictionar-juridic/act-administrativ

[10] I. Neagu, M. Damaschin, *Criminal Procedure Treaty. The special part*, Universul Juridic Publishing House, Bucharest, 2015, p.55

[11] *idem*, p.57

[12] Decision No.89/2014 of the Superior Council of Magistracy for the approval of the organization of the activity of the judge of surveillance of the deprivation of liberty, art.47

[13] http://legeaz.net/dictionar-juridic/act-administrativ

[14] *ibidem*, art.26

competent court, otherwise it becomes executory by the mere fact of giving up to appeal[15]. The executory effect of closing oblige the parties, both detainees or the administration of the place of detention to obey the legal provision.

3. The conditions of the complaint.

3.1. Form condition.

3.1.1. Written form.

The persons deprived of their liberty must fill a written complaint to the judge of surveillance of deprivation of liberty to be able to be registered by the clerk and solved by the judge, even if they have been made orally before the judge, at the audience held at the place of detention or in the refusal of nourishment procedure. If the reported matters have not been recorded in writing, the judge of surveillance will record the statement in writing, the request for the audience or the statement given in the refusal of nourishment procedure constitute referrals, followed by the procedure for the subject of the referral[16]. The complaints are forwarded to the Bureau of the judge of surveillance by the prison authorities through the secretariat, or handed by detainees personally to the judge, on the detention section, during the audiences program.

3.1.2. Person identification data.

In order for the complaint to be considered a legal means of referral[17] it must include: the identification data of the petitioner (first and last name, parents' names, personal numeric code[18], eventually).

3.1.3. The subject of the case.

Represent the description of the factual situation which caused the person's discontent, as well as its request (eg.of establishing and changing of regimes for enforcement, of restoration the exercise of violated or suspended rights, of canceling disciplinary sanctions).

In the complaint, the complainant may indicate the evidence he or she is supporting in support of, for example, the name of the witnesses that he requests to be heard by the judge in support of innocence or attach supporting documents.

3.2. The substantive conditions of the complaint.

3.2.1.The complaint is made personally or by the legal representative.

According to art.51, regarding the right to petition, citizens have the right to to address public authorities through petitions formulated only on behalf of the signatories. The exercise of the right of petition is exempt from the tax. Public authorities have the obligation to respond to petitions within the terms and conditions established by law.

The right of a person deprived of freedom to lodge a complaint against incidents duringduring the execution of punishment is an absolute, personal, indivisible and non-transferable right, and may be exercised in his own name only by such persons or by a lawyer who has to prove its quality by empowering the lawyer and the document attesting the quality of lawyer[19].

Although Law no.254/ 2013 or the Regulations for the approval of the organization of the activity of the judge of surveillance of deprivation of liberty, as well as the implementation of Law no.254/2013 (The Government Decision No.157/2016, art.128, assurance of the right to legal assistance, art.129, the right to petition) does not expressly mention the above alternative, it should be regarded as a possibility in connection with the provisions of Article 62 paragraph 2 of Law no. 254/2013 regarding the assurance of the exercise of the right to legal assistance stipulating that convicted persons may consult with lawyers elected by them in any matter of law deduced from administrative or judicial proceedings, which means that even in the case of incidents during the execution of punishment, the lawyer may file such a complaint on behalf of the client he represents.

And the minors interned in detention centres enjoy the same legal treatment, since both the law on the execution of custodial sentences and the implementing regulation does not distinguish between the right of the major person and the underage individual to lodge a complaint against the incidents occurred during the execution of the sentence and custodial measures or the manner in which the judge of surveillance has been notified.

Similarly, even if the unhappy person quit the case, the express manifestation of the will of the person can be ascertained directly by the judge of surveillance before whom he gives the renunciation declaration or by a document drawn up by the legal representative adressed by postal services, to the judge of surveillance in the conditions shown.

Although the waiving of the complaint is an express manifestation of will and, although the hearing of the person by the judge of surveillance seems to be useless, we consider that it is necessary because we have to consider the hypothesis in which another person, without the petitioner's knowledge or with his knowledge taking advantage of the fact that the latter is non-schooling person, formulates this request for renunciation which he submits to the judge of surveillance through the postal services or through the

[15] http://legea.net/dictionar-juridic/act jurisdictional

[16] *ibidem*, art.47

[17] I.Neagu, M. Damaschin, *op.cit.*, p.55

[18] the simple indication of first name and name is not sufficient as it may cause confusion with another person with the same first name or name or with several first name

[19] The Government Decision nr.157/2016 for the approval of the Regulation implementing Law no.254 / 2013 on the execution of sentences and deprivation of liberty ordered by the court during the criminal trial, art.128 al.1, *Ensuring the exercise of the right to legal aid*

administration of the place of detention, the complaint becoming devoid of effects.

3.2.2. *The complaint must be signed by the petitioner or by the legal representative.* Another essential, substantive complaint is that of acquiring its content by the petitioner or by the legal representative by attributing the signature.

Lack of signature is a cause of nullity, but the latter may be covered by signing the complaint by the petitioner in front of judge of surveillanceas as result of the appropriation of its content, by the statement given for this purpose or taken through the rogatory commission.

Regarding the nullity of the complaint, the judge of surveillance will pronounce a closing which finds that the complaint is devoid effects.

3.2.3. The deadline until the complaint can be filed.

The term is the timeframe in which the person concerned has to do or produce something or, on the contrary, he is not allowed to do or to produce something. By its nature, the term until the complaint against the incidents occurred during the execution can be filed is a *legal* one, as established by the law no. 254/2013, but also a *preremptory*[20] one (imperiative, crucial, conclusive) in the course of which certain acts must be carried out. The non-fulfillment of the act before time expired leads to the cancellation of the exercise of the respective right resulting in the rejection of the complaint as delayed.

On this line, the deadline for filling by the inmates the complaint against of administrative decision, as the one of the committee for establishing or modifying the regime of enforcement (art.40 paragraph11 of Law no.254/2013) or enforcement of a disciplinary sanction (art.104 paragraph 1 of Law no.254/2013) is within three days of delivery thereof and ten days regarding the respecting of the rights of the convicted persons (art.56 paragraph 2 of Law no.254/2013).

The lack of a definite date in the complaint is not a cause of nullity. At the time to receiving of the complaint, the clerk shall assign a definite date, unless is no other definite date set by the judge of surveillance or if there is no mention made by theprison administration.

The clear date set out in this way will constitute the benchmark for the complaint being assessed as lawful or as late.

A situation often encountered in practice is the forwarding of these complaints to an incompetent body, than to the judge of surveillance who pronounced the conclusion, as the competent institution to deal with the complaints of persons deprived of their liberty (for example the court or to another oversight judge from a different penitenciary).

Thus, if an act that had to be done within a certain period was communicated, transmitted, by ignorance or by a manifest error of the sender, before the expiration of the term, to a judicial body that is not competent, it is considered to have been filed in term, even if the act reaches the competent judicial body after the expiry of the fixed term[21].

3.2.4. The complaint must be related to the incidents that occur during the execution of sentences and custodial measures.

The execution of sentences and custodial measures ordered by the court on modern principles places at the core of its principles and objectives the person deprived of liberty, as a holder of a separate legal status consisting of all subjective rights, legitimate interests and correlative obligations, as well as all legal means through to whom the position of these persons is defended in the execution of the punishment (the deprivation of liberty)[22], because the recognition and respect of human rights and freedoms is the very essence of a democratic society.

Ensuring the safe environment one at the place of detention, supervising and verifying the lawfulness in execution of punishment and the custodial measures are subject to the judicial control exercised by the institution of the judge of the surveillance of imprisonment. Although the latter does not exercise any powers other than those with which it has been legally and constitutionally invested, the judicial control is not an absolute one, the jurisdiction of the supervisor is limited to the certain situations provided by the law, such as rewards, selection, employment, educational programs, etc.

The main judicial administrative duties of the judge of surveillance of imprisonment provided by Law No.254/2013, as follows:

a) solve the inmates complaints regarding the establishment and changing of regimes for enforcement and educational measures involving deprivation of liberty,
b) solve the inmates complaints on exercise of the rights provided by this law;
c) solve the inmates complaints regarding disciplinary sanctions.

[20] I. Neagu, M. Damaschin, *op.citată*, p.709.
[21] M. Udroiu, Criminal procedure, The General part, The new criminal procedure code, p.646, Ed.CH Beck, București, 2014
[22] University of European Studies of Moldova, Vasile Ceban, Course Notes of Penal Executional Law (cycle I), p.12, Chișinău,2013,disponibil pe http://www.usem.md/uploads/files/Note_de_curs_drept_ciclul_1/060_-_Penal executional law.pdf

4. Exception of inadmissibility in the procedure for dealing with complaints and complaints made by persons deprived of their liberty against measures ordered by the administration of the place of detention. Situations of inadmissibility.

4.1. The powers of the judge of surveillance of deprivation of liberty .

Measures concerning the exercise of rights, the application of disciplinary sanctions as a result of disciplinary misconduct, with the consequence of changing the enforcement regime, are incidents arising during the execution of punishment, strictley defined by law, which fall within the functional competence of the judge for the supervision of the deprivation of freedom and which it can order by concluding. The judge of surveillance will be able to dispose one of the following solutions[23]:

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.

Consequently, in order to decide the solutions in points (a) and (b), the judge of surveillance will first examine the complaint as to the admissibility conditions because, if the issues raised goes beyond the framework of he's legal competence, the analyzing of the complaint's reasons becomes useless.

4.2. Situation of inadmissibility.

The imprisonment brings with it a restriction of the fundamental rights and freedoms of the individual. The penitentiary environment, institutionalized life does not mean prohibiting the exercise of all fundamental human rights but limits them, while imposing a series of rights and obligations specific to the place of detention. No one is allowed to restrict these rights. The restriction of rights can only be done by law or by the Constitution of Romania.

This leads the prisoners to amplify the instinct to protect the rights granted, using (even abusively) the legal means and institutionals provided by law. This is so, in the desire not to be directly controlled by rebellion over the rules and regulations considered to be excessively rigorous and which, in their opinion, violates their rights, most of the time by the desire to "overcome the system" and obtain substantive material compensation or at the instigation of other persons, the persons deprived of their liberty forward complaint to the judge of surveillance against any incidents considered by them as the cause of the injustice suffered or against the behavior of the prison staff who, many times, accuse them of "abusive behavior".According to functional competence, the judge of surveillance can't turn himself into a ”legal provision launcher” for any situation, such that some of the complaints will be rejected as inadmissible ones. Of the many situations that go beyond the jurisdiction of the judge of surveillance, most of the cases of inadmissibility encountered in practice concern:

a) **the deduction from punishment of a period executed under preventive arrest** - according to Law 254/2013, the competence of the judge of surveillance does not include the resolution of such a complaint, the deduction of a period executed in preventive custody constituting an incident in the execution of the punishment, the exclusive competence of the court in whose jurisdiction is located the prison.
b) the recognition of earned days during detention by inmates as a result of graduating from school courses, qualification courses, granting rewards, school credits - according to art. 56 para. 2 of the Law no. 254/2013 on the execution of sentences and custodial measures ordered by the court during the criminal trial, against any breach of rights, the convicted person may lodge a complaint to the judge of surveillance within 10 days of becoming aware of the breach.

The rights of persons deprived of their liberty are those provided by art. 58-80 of Law 254/2013, so the complaints concerning the granting of the rewards do not fall within the category of the rights provided by the law of execution for whose non observance the detainees can address the supervising judge. The way of granting the rewards of the persons deprived of their liberty is providing by the Decision no.443/ 24.05.2016 of the General Director of the National Administration of Penitentiaries approving the working procedure for granting the rewards[24].

c) the recognition of the earned days during detention by the inmates that demonstrated a good behaviour and from their work in penitentiaries of another states. In application of Article 17 of European Council Framework Decision 2008/909 / JHA of November, 27th, 2008 on the application of the principle of mutual recognition to judgments in criminal matters, imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union and art.144 par.(1) of the Law no. 302/2004, republished, as subsequently amended and supplemented, establishes that after the transfer of the person convicted by the foreign judicial authorities, in order to continue the punishment execution in Romania, the period of punishment deemed to be executed by the sentencing state on the basis of performed work and good conduct, granted as a benefit in favor of the convicted person, by the foreign judicial authority, must not be deducted from the punishment executed in

[23] Law No.254/2013, art.39 paragraph.6, art.40 paragraph 13, art.56 paragraph 6, art.104 paragraph.7
[24] Published in Official Gazzette of Romania, Part I, No.427/June, 27th, 2016

Romania[25].

d) the inappropriate behavior of surveillance staff. The conduct of a criminal investigation is not within the competence of the judge of surveillance of imprisonment, so he can not order the commencement of a criminal prosecution. The unhappy person may directly notify the criminal investigation bodies.

e) changing of regimes for enforcement and educational measures involving deprivation of liberty on petitioner demand. According to art.40 of the Law no.254 / 2013, the change of the execution regime is made only upon the fulfillment of the term of analysis of the legal situation established by the commission for individualization of the execution regimes. This legal provision amended the old provisions contained in the Law no. 275/2006 and the Law no. 83/2010 to amending Law no. 275/2006 which allowing the change, at the request of the detainee, of the regimes for enforcement and the educational measures involving deprivation of liberty, leaving the judge the assessment in the case of complaints regarding the establishment and change of those. The amendment was also necessary because the judge of surveillance of imprisonement were also assaulted by the requests made before the deadline set by the commission. On the other hand, it will not be possible to be accepted the requests to change the execution regime from a lower one to a higher one, regardless of the reason for this request, since the system of execution of custodial sentences in Romania is progressive and regressive, such a change of regime being possible only in the case of committing a disciplinary misconduct and the commission for the individualization of the regimes takes such a measure.

f) the transfer decisions in another penitentiary - the transfer of the persons deprived of their liberty to another penitentiary is made by the decision of the General Director of the National Administration of Penitentiaries, according to art.45 of Law no. 254/2013 and art.108 of the Government Decision no.157/March, 10th, 2016 to implementing the Law no. 254/2013, an institution with legal personality hierarchically located above all penitentiaries and whose measures can not be controlled by the prison judges in penitentiaries. The choice of the place of execution of the custodial sentences does not represent a right of the persons deprived of their liberty, as it is not foreseen among the rights granted by Law no. 254/2013. In this respect, in the reasoning of the *Serce vs. Romania* case (Application No. 35049/08), the European Court ofHuman Rights, at paragraph 51, states that the European Convention on Human Rights does not grant prisoners the right to choose the place of detention, that separation and the distance from their family are an inevitable consequence of their detention following the exercise by the Romanian state of its prerogatives in the field of criminal sanctions[26] .

g) the general provisions on work carried out in detention facilities or on educational and cultural activities, training courses or retraining. Although the marginal name of art.78 of the Law no.254 / 2013 is the Right to Work, it is clear from the wording of the law that the work carried out on detention places is only a vocation, not a right, since the work done by the persons deprived of liberty has a special legal nature, being not part of the category of rights provided by law in their favor at art.56-80 of Law 254. Selection criteria for work is regulated by Decision No. 500165 / September, 25th, 2017of the General Director of the National Administration of Penitentiaries[27]**.**

As regards the inclusion of persons deprived of their liberty in the activities recommended by the Personal Educational and Therapy Evaluation and Intervention Plan, this is done taking into account the identified needs, the regime of enforcement of the custodial sentence and the moment of the sentence serving route.

h) **deleting some information from the individual file of prisoners.** Law no.254/2013 does not provide for the person deprived of liberty to lodge a complaint against other acts issued as a result of pre-existing situations of addmission to prison (such as re-offending, belonging to organized crime groups, general or international pursuit, etc.). These statements are contained in the individual file accompanying the criminal record of the person deprived of their liberty at the Detainees Record Service[28].

i) **the distribution of detainees to detention rooms or the transfer to other detention rooms.** Art.48 of the Law no.254 / 2013 and art.111 of the Government Decision no.167 / 2016 regarding the minimum binding rules on conditions for accommodation of sentenced persons, as well as Article 2 of the Order of the Minister of Justice no.2772/C/October, 17th, 2017 entitled *The Minimum , binding rules regarding the conditions for accomodation persons deprived of their*

[25] See widely the Decision No.15/2015 of the High Court of Cassation and Justice on the examination of the appeal filed by the Timişoara Court of Appeal in file no.6.638 /101/2014, requesting a preliminary ruling on the principle dismissal of a matter of law in criminal matters,*published in Official Gazzette, First Part, no.455/June, 24th, 2015*.

[26] See widely The Judgment of the European Court of Human Rights of June, 30th, 2015, *Serce vs. Romania* case, https://www.csm1909.ro/csm/linkuri/22_04_2016__80250_ro.doc

[27] Published in Official Gazzette, Part I, No.904 bis/November, 17th, 2017

[28] the Order of the Minister of Justice no.432/C/on february 2nd, 2010, art.9 letter g, published in Official Gazzette of Romania, Part I, nr.157 bis on March, 11th, 2010

liberty[29], stipulate that the National Administration of Penitentiaries takes all necessary measures for the progressive increase of the number of individual accommodation rooms.

The persons deprived of liberty are accommodated individually or in common. The accommodation of the persons deprived of their liberty in the detention rooms or the transfer to other rooms is done according to the criteria established by the Internal Order of Penitentiaries.

According to art.81 letter g of the Law no. 254/2013, the convicted persons have the obligation to respect the assignment on the detention chambers, noncompliance to this obligation constitutes a very serious disciplinary offense.

j) **the remainder of the punishment to be executed as a result of the application of Law no. 169/2017.** According to art.55 paragraph 1 of the Law no.169/2017 of the compensatory appeal[30], the calculation of the punishment actually executed is considered, irrespective of the punishment execution regime, as a compensatory measure, and the execution of the punishment under inappropriate conditions, for each period of 30 days executed in improper conditions, even if they are not consecutive, 6 days of the punishment shall be additionally executed**.**

It follows that, the Detainees Record Service, to the calculation of the remainder of custodial sentence, applies an algorithm based on the duration of the sentence, the period of execution in improper conditions, so that some persons deprived of liberty acquired the benefit, the vocation to request release before the deadline, and others will benefit earlier from the conditional release. Since the conditional release is not a right of the persons deprived of their liberty, the complaints lodged to the judge of surveillance to recalculate the period executed under inappropriate conditions have been rejected as inadmissible. They can only be the subject of a challenge to execution before court.

k) the complaints against the inappropriate conditions of the detention rooms in the courts or of the vehicles for the transport of detainees. Although the right to the execution of the punishment under proper conditions is an absolute right, the transport to and from the courts, as well as temporary accommodation in the rooms specially arranged in these institutions, has been often a good opportunity to complain against conditions considered by the persons deprived of their liberty being as inadequate (inadequate ventilation, overcrowding, lack of privacy, transport in a special type vehicles with no seat belts, etc.). Although the time spent in transport vehicles to the courts and actually in court is relatively short, for several hours, these people have never proved thatthey have suffered any health damage from that cause. On the other hand, both specially designated detention rooms in court and special transport vehicles are built according to certain standards, technical specifications, these destinations, they can not be modified in order to provide increased comfort to the passengers during transport or during stay in court, which is why these complaints were rejected as inadmissible.

Conclusions

The execution of the of sentences and the measures ordered by judicial bodies on modern, humanistic principles allows people in this situation to defend their rights and interests against any form of abuse. The right to petition is a constitutional right that can not be restricted by any law, so that individuals deprived of their liberty can submit complaints to the judge of surveillance of deprivation of liberty as an independent and impartial authority legally and constitutionally invested.

The complaint is the legal means by which these persons manifest their dissatisfaction, by virtue of their right to petition, and in order to be register in the records, they must meet the substantive and formal conditions outlined in this study. It also has to fulfill another (unwritten) condition, namely the exercise of the right in good faith, according to its purpose, that of the defense of rights and interests, and not in bad faith, for feelings of revolt against regulations or to the administration of the place of detention. Unfortunately, such situations are a reality, and individuals deprived of liberty making such complaints openly declare that, as long as the administration of the place of detention will take measures deemed unjustified, they will also make various complaints to the judge of the surveillance of deprivation of liberty against the administration

In order to prevent and limit such situations, we hope for a change of the criminal law enforcement which will include among of disciplinary offence and the abuse of rights consisting in exercising the right to petition in bad faith.

References

- Ceban, Vasile, University of European Studies of Moldova, , Course Notes of Penal Executional Law (cycle I), p.12,Kishinev,2013, available on http://www.usem.md/uploads/files/Note_de_curs_drept _ ciclul_1 /060_-_Penal executional law.pdf

[29] the Order of the Minister of Justice no.2772/C/October, 17th, 2017, published in Official Gazzette of Romania, Part I, no.822/October, 18th, 2017.

[30] Published in Official Gazzette, Part I, no.571of July, 18th, 2017.

- Chiş, Ioan, Chiş, Alexandru Bogdan, The execution of penal sentences , Universul Juridic Publishing House , Bucharest, 2015
- Decision no.443/ 24.05.2016 of the General Director of the National Administration of Penitentiaries approving the working procedure for granting the rewards
- Decision No.15/2015 of the High Court of Cassation and Justice
- Decision No.89/2014 of the Superior Council of Magistracy for the approval of the organization of the activity of the judge of surveillance of the deprivation of liberty, published in Official Gazzette, Part I,. no.77/31.01.2014
- The Government Decision nr.157/2016 for the approval of the Regulation implementing Law no.254 / 2013 on the execution of sentences and deprivation of liberty ordered by the court during the criminal trial
- The Judgment of the European Court of Human Rights of June, 30th, 2015, Serce vs. Romania case, https://www.csm1909.ro/csm/linkuri/22_04_2016__80250_ro.doc
- http://legeaz.net/dictionar-juridic/act-administrativ
- https://legeaz.net/dictionar-juridic/act-jurisdicitonal
- Law no.169/14.07.2017
- The Law no. 275/2006 concerning the execution of penalties and measures disposed by the judicial entities during the penal procedures, published in The Official Gazette no. 627 of 20th of July 2006
- Legea nr.303/2004, on the Status of Judges and Prosecutors, republished, with subsequent amendments and completions, including those brought by OUG nr.83/12.12.2014,
- Neagu, Ion, Damaschin, Mircea, Criminal Procedure Treaty. The special part, Universul Juridic Publishing House, Bucharest, 2015
- Draft Law 254/2013 , available on http://old.just.ro/LinkClick.aspx?fileticket=1xkO3Xk6Bm4%3D&tabid=93
- The Order of Minister of Justice no.432/C/5.02.2010
- The Order of Minister of Justice no.2772/C/18.10.2017
- Udroiu, Mihail, Criminal Procedure, General Part, New Criminal Procedute Code, Universul Juridic, Publishing House, 2014

ASPECTS CONCERNING THE PRESUMPTION OF INNOCENCE IN THE LIGHT OF THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract

The presumption of innocence represents a constant principle of law, becoming in our modern era a basic principle of all law systems.

In Romania, the presumption of innocence is regulated by the Romanian Constitution, as revised, but at the same time by the Criminal Procedure Code that came into effect on 1st February 2014. The application of this principle is closely connected with other procedural guarantees of the suspect and/or defendant during the penal trial, this presumption being expressly given efficiency by judicial bodies under the scope of majority of court orders.

The European Convention for the Protection of Human Rights and Fundamental Freedoms addresses effectively the presumption of innocence in the dispositions of Art. 6 § 2, and the jurisprudence of the European Court has also established some specific criteria in its application.

Our study aims to make a brief analysis of the jurisprudence of the European Human Rights Court on the presumption of innocence, with respect to a number of causes, regarding Romania but also other member states of the Council of Europe and towards national standards involved by its regulation.

The applicability of the standards established by the European Court of Human Rights concerning this presumption confers to national courts from Romania the possibility to insure effectiveness to the national norm, by completing it, which ensures full compliance of all the guarantees a defendant may benefit from during criminal trials.

We consider that the national norm on presumption of innocence stipulated by art 4 of Criminal Procedure code may be modified as well in the light of the agreement given by the European Court in the application of the provisions of art 6 § 2 from the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Keywords: *presumption of innocence, European Court case law, enforcement criteria, meaning of words, national standard.*

Introduction

The concept of human rights has a broad scope in national Romanian case law relative to each specialisation matter and institutions thereof. Within the meaning of criminal procedure law, the concept of human rights becomes effective, both from the viewpoint of substantive law, and the viewpoint of procedure law. For the purpose of this study, the notion of the presumption of innocence shall be tackled as a criminal proceedings principle, on the whole, both during criminal investigations, and first instance and appeal proceedings, as well as from the point of view of human rights, as regulated by the provisions of Article 6 § 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The importance of a national and European two-dimensional approach of the presumption of innocence allows us to understand the common aspects of regulation and enforcement, along with the distinct aspects, as the two approaches do not overlap — the conventional regulation perspective is considerably broader than the national scope. In the matter of the presumption of innocence within our study, we intend to examine the regulatory framework, and its implications, in the scope of criminal procedure law, the factual criteria, and the manner in which the approach of this presumption under the Convention for the Protection of Human Rights and Fundamental Freedoms completes the scope of national rule interpretation, with the hard instruments of the arguments of the European Court of Human Rights concerning this presumption, in relation to the national rules that regulate the said presumption. We believe that this study, including solid practical aspects, shall help clarify certain matters regarding the enforcement of the provisions of Article 6 § 2 of the Convention in case investigation and proceedings, as well as provide the opportunity to postulate within the doctrine the manner in which the presumption of innocence is interpreted and enforced as a principle of a criminal trial.

Paper Content

Within the current Criminal Procedure Code, which entered into force on 1 February 2014, the presumption of innocence is regulated in Article 4[1]. As

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[1] Article 4 The presumption of innocence. (1) Everyone shall be presumed innocent until being found guilty by a final criminal judgement. (2) Following the submission of all the evidence, any doubt in the formulation of the opinion of judicial bodies shall be interpreted to the favour of the suspect, or the defendant.

can be observed from the perspective of the regulatory technique used, the legislator expressly stated the time point until an individual can enjoy presuming themselves and being presumed innocent, that is, their guilt is established by a final judgement. Whereas, in the Romanian law system, the appeal — the ordinary legal remedy — is the only court to sanction as final, in criminal matters, the resolution ordered in the court of first instance, i.e., concerning the existence or non-existence of the criminal facts that the persons allegedly committed, based on the evidence submitted during the criminal investigation, found as legal during the pre-trial chamber procedure, the evidence filed during the criminal investigation, in the court of first instance, as well as the evidence submitted during the appeal, upon a new judgement, pending a decision whether to hold the defendant on trial liable or not.

In the second paragraph of the aforementioned rule, as novelty, the principle of *in dubio pro reo* is stated, to the extent that any doubt in formulating the opinion of the judicial bodies shall be interpreted to the favour of the suspect or the defendant[2].

The presumption of innocence is a relative presumption that can be overturned by solid evidence by judicial bodies.

It has been stated in the doctrine[3] that the presumption of innocence is more than a tenet, rather regarded as a fundamental human right that, in one opinion, falls within the category of substantial rights, concerning anyone, as enforceable *erga omnes*, not only to judicial bodies[4], and, in another opinion, relates to a procedural right as, both under constitutional rule and criminal procedure rule, the notion of criminal judgement is utilised, leading to the conclusion that the presumption of innocence operates solely when a person is charged with committing a criminal offence[5].

The Convention for the Protection of Human Rights and Fundamental Freedoms enshrines within Article 6 § 2 that 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law'. Based on the manner of regulation, the presumption of innocence refers to a defendant in relation to the domestic regulation concerning everyone, the scope being broader in domestic criminal procedure law, which enabled an extension over witnesses to not self-incriminate, as provided for in Article 118 of the Code of Criminal Procedure[6].

Within the meaning of the European Court of Human Rights, 'accusation on criminal matters' has an autonomous character, and the 'accused' is any person against whom the competent bodies have ordered an action expressing the attribution of the offence to the said person, and which entails important consequences concerning their status, relative to search, arrest, bank account freezing and ordering mandatory domicile on an island[7].

The literature has mentioned that there is a scope for the presumption of innocence where it is enforceable according to the case law of the European Court of Human Rights, but it is not a safeguard of national law, respectively the matter 'assimilated' by the Court to the 'accusation on criminal matters', namely the field of contravention, fiscal crimes and liability to disciplinary action in certain situations[8].

We shall hereinafter present several significant cases in the case law of the European Court of Human Rights wherein infringement or non-infringement of Article 6 § 2 of the Convention was found.

Thus, in the case of Peltereau-Villeneuve v. Switzerland (case No. 60101/09 of 28 October 2014, found final on 28 January 2015) infringement of Article 6 § 2 of the Convention (ss. 30-39 of the decision) was found, highlighting that 'The Court notes that the presumption of innocence enshrined by paragraph 2 of Article 6 is among the elements of a fair criminal trial expressly provided for under paragraph 1 (see Deweer v. Belgium, 27 February 1980, § 56, series A No. 35 and Minelli v. Switzerland, 25 March 1983, § 27, series A No. 62). It is found as not assessed for its fair value when an official statement concerning a suspect reflects the feeling that they are guilty while their guilt has not been previously legally established (see, in particular, Allenet de Ribemont, 10 February 1995, § m 35-36; Daktaras v. Lithuania, No. 42095/98, §§ 41-42; ECHR 2000-X; Moullet v. France (Dec.), No. 27521/04, 13 September 2007). The reasons provided by the judge alone are sufficient, even in the absence of a formal finding, even the judge's sole opinion that the interested party is guilty (see Daktaras v. Lithuania, pre-cited § 41). On the other hand, prejudice to the presumption of innocence can emerge not only from a judge or a court, but also from public authorities, or even prosecutors (see Allenet de Ribemont v. France (interpretation), 7 August 1996 § 36, Judgement and

[2] Ion Neagu, Mircea Damaschin, Treaty by procedure criminal, The general part, In the light the new Procedure Criminal Code, Universul Juridic, Bucharest, 2014, p. 67.

[3] Nicolae Volonciu & Andreea Simona Uzlău team coordinators, The New Procedure Criminal Code, comments, The Second Edition, revised and completed, Hamangiu Publishing House, 2015, p. 15.

[4] *Ibidem*, p.15, citing S.M. Teodoroiu, I. Teodoroiu, The presumption of innocence and unconstitutionality procedural rules, in Dreptul nr. 5/1995, p. 4, apud. V. Puşcaşu, The presumption of innocence, Universul Juridic Publishing House, Bucharest, 2010, p. 35.

[5] *Ibidem*, p. 15.

[6] Article 118. The right of the witness to not self-incriminate. The witness statement provided by a person who, in the same case, prior to the statement, or thereafter, became a suspect or defendant, cannot be used against them. The judicial bodies are under the obligation to mention, upon recording the statement, the previous capacity.

[7] Nicolae Volonciu and Andreea Simona Uzlău team coordinators, The New Procedure Criminal Code, comments, The Second Edition, revised and completed,, Hamangia Publishing House, 2015, p.16, citing cases Tejedor Garcia v. Spain; Abas v. The Netherlands; Padin Gestoso v. Spain; Slezevicius v. Lithuania.

[8] *Ibidem*, p.17.

decision Vol. 1996-III, and Daktaras v. Lithuania, previously cited § 42). What is equally at stake once criminal proceedings are initiated, is the reputation of the interested party, as well as the manner in which it is perceived by the audience (see Allen v. the United Kingdom (GC) No. 25424/09, § 94, ECHR 2013). In addition, the Court holds that a distinction should be made between the judgements reflecting the feeling that the person in question is guilty, and the ones limited to presenting a state of suspicion. The former type infringes the presumption of innocence, while the latter category has been deemed as in accordance with the spirit of Article 6 of the Convention several times (see Marziano v. Italy, No. 45313/99, § 31, 28 November 2002). Last but not least, there is a fundamental difference between saying that someone is merely suspected of having committed a criminal offence, and an unequivocal judicial statement putting forward, in the absence of a final conviction, that the interested party has committed the offence in question (see Matijasevic v. Serbia, case No. 23037/04, § 48, ECHR 2006-X). As such, the Court should determine whether, in this specific case, the resolution of the criminal proceeding questions the innocence of the applicant while the latter has not been found guilty (see Virabyan v. Armenia, No. 40094/05, § 187, 2 October 2012). In this specific case, the investigation against the applicant was dismissed by the general prosecutor in relation to the prescription of the criminal action. It is true, as the Government emphasises, that, the classification of the offences in question needs to be conducted prior to establishing if they are punishable and prior to the intervention of prescription. The Court also notes that enforcement of Article 116 of 1 CPP/GE neither presumes, nor claims with certainty that the offence was committed (see, *a contrario*, Virabyan v. Armenia, previously cited, § 191). Thus, the examination of the terms in the Ordinance dated 25 September 2008, as it was drawn up, leaves no doubt concerning the general prosecutor in the matter of the applicant's culpability. In particular, having found that the offences had been established and having examined the conditions of finding the offence, the general prosecutor concluded that 'the criminal proceeding (...) could not have been carried out in relation to the prescription, even if the facts lead to finding that an offence has indeed been committed against the victims'. On the other hand, the use of superfluous phrases aided these findings. Such as using 'impossible manner' when the applicant committed the offence 'at least' against the two alleged victims. There is, therefore, no doubt that the Ordinance dated 25 September 2008, conveys the sense that the general prosecutor, as concerns the guilt of the applicant, failed to merely describe a state of suspicion. Whereas, if classification of the offences in question was required, nothing within the enforceable provisions compelled the general prosecutor to establish the facts. It was only up to the general prosecutor to choose the terms that did not exceed describing a state of suspicion rather than that of guilt of the applicant. The Prosecution and the Federal Court dismissed the applicant's appeals, without disapproving of the body of the Ordinance. Even while reconfirming the statements of the general prosecutor, the Federal Court found that the Ordinance included 'nothing that is not necessary to substantiate the reason for dismissal'. On the other hand, the content of the Ordinance dated 25 September 2008, was carried over by the media and it counted as an important landmark within the canon of the law procedure. If it can be taken into account that the public has an interest in being informed, such interest does not require concluding upon the applicant's guilt status. Whereas, it only led to largely affecting the applicant's reputation, as the order for dismissal was made public (see Allen v. the United Kingdom (GC), previously cited, § 94). These elements were enough for the Court to conclude upon the Reasons of the Order for dismissal dated 25 September 2008, and, primarily, confirm that, both the Prosecution and the Federal Court, breached the principle of the presumption of innocence. Thus, we have found infringement of Article 6 § 2 of the Convention'.

In another case, Neagoe v. Romania (case No. 23319/08 dated 21 July 2015, confirmed as final on 21 October 2015), the European Court of Human Rights found infringement of Article 6 § 2 of the Convention, the presumption of innocence respectively, and, mainly, held that, reporting the settled case law on the matter and that 'what matters is the real meaning of the statements in the case, and not their literal form. Finally, the fact that the statements in question were uttered as an interrogation or doubt is not enough to elude the provisions of Article 6 § 2 of the Convention; otherwise, the presumption of innocence would be void of all effectiveness (Lavents, previously cited, § 126). By applying these principles to the case, the Court holds that, mainly, on 29 February 2008, when the spokesperson of the Galati Court of Appeal made the litigious statement to the media, the guilt of the applicant had not yet been legally established. Finally, the Court of Appeal only issued the final judgement three days later, on 3 March 2008 (paragraphs 14 and 15 above). The Court then holds that judge G.I. intervened, in their official capacity of spokesperson of the Galati Court of Appeal in order to inform the media of the proceedings of the case... The Court also finds that the spokesperson did not resort to a simple communication of information concerning the procedure stages of the case, as they conveyed opinions regarding the guilt of the applicant, suggesting that a conviction would probably be delivered (paragraph 14 above). Finally, the Court holds that the litigious statement prompted the public to believe in the guilt of the applicant, while the Court of Appeal had not yet delivered the judgement in the case. The Court held that the spokesperson used certain terms expressing doubt, such as 'it is likely' and 'I suppose' (paragraph 14 above); on the other hand, the Court believed that this behaviour did not alter the real meaning of the

statement (Lavents, previously cited, § 126). The Court holds that, under their official duties, the spokesperson is under the obligation to observe the presumption of innocence, judicial independence, impartiality and objectivity of the justice administration (paragraphs 18 and 19 above). Moreover, the Court emphasises that the spokesperson publicly intervened for the purpose of informing the media as well, (see *a contrario*, A.L. V. Germany, case No. 72758/01, § 38, 28 April 2005), and that they did not hesitate to spontaneously express a personal opinion (see, *a contrario*, Gutsanovi, previously cited, §§ 195-196). The Court finds that, in accordance with the duties and particular circumstances of the case, the spokesperson should have shown more caution and reservation as regards the choice of words in order to avoid the overall confusion (Allenet de Ribemont, previously cited, § 41, Gutsanovi, previously cited, § 199, and Khoujine *and others* v Russia, case No. 13470/02, § 96, 23 October 2008). Finally, the Court emphasises that the offence for which the applicant was ultimately found guilty and sentenced to imprisonment could not erase their initial right to be presumed innocent until legally proven guilty. The Court holds, several times, that Article 6 § 2 of the Convention envisages the entire criminal proceedings 'independently of investigation initiation' (Minelli v. Switzerland, 25 March 1983, § 30, series A, No. 62, and Matijasevic v. Serbia, case No. 23037/04, § 49, ECHR 2006-X). These elements are sufficient for the Court to find that there was an infringement of Article 6 § 2 of the Convention'.

In another case, Bivolaru versus Romania (Application No. 28796/04, judgement of 28 February 2017, confirmed as final on 28 May 2017), the European Court did not find an infringement of Article 6 § 2 of the Convention, mainly noting that 'the Court holds that the applicant reported an interference with their right to be presumed innocent, in relation to the statements of the minister of Administration and Interior, I.R., who stated to the press that they 'found unusual the release of the applicant, on matters of procedure'. In the case, the Court notes that on 5 April 2004, when the minister of Administration and Interior made the litigious statement before the press, the guilt of the applicant was not yet legally established: a criminal investigation was still pending. The Court further holds that the statement in question was not a formal finding of guilt concerning the applicant, and that it referred to the initiation of the proceedings, rather expressing certain doubts concerning the procedure in terms of releasing the interested party from pre-trial arrest. The Court also notes that the applicant was acquitted in the court of first instance and appeal. It was only through the judgement of 14 June 2013, nine years after the statement of I.R., that the High Court of Cassation and Justice sentenced the applicant on matters of criminal law. Thus, it cannot be established that the litigious statement influenced the judge's ruling on the case (see *mutatis mutandi*, Pullicino v. Malta (dec.), case No. 45441/99, 15 June 2000). Finally, nothing on file leads to considering that the arguments professed by the applicant and the elements in question had influenced the judge's ruling on the first instance, following the statements of I.R. reprinted by the press (Mircea v. Romania, case No. 41250/02, § 75, 29 March 2007). In light of the foregoing, the Court finds that, in this specific case, there was no infringement of Article 6 § 2 of the Convention in relation to the statement made by the minister of Administration and Interior, I.R.'.

Conclusions

The presumption of innocence, as currently regulated by the Code of Criminal Procedure, enables its coherent enforcement within criminal procedures, which can also be complemented by the criteria highlighted in the case law of The European Court of Human Rights, making its effectiveness lead to holding judicial bodies accountable for its warranty throughout the proceedings.

Our study outlines the need to use cautious wording as concerns the content of the presumption of innocence, both in substantiating the orders, when a resolution of not going to trial is issued, within the evidence body, within the sentence delivered in the court of first instance, and upon making the public aware of the resolutions through conferences, statements, or press releases.

As noted, the use of words and phrases should be managed carefully as long as the judicial bodies are carrying out proceedings, not enabling the use of terms that would lead to the finding of an offence for which the defendant is being investigated, but merely a suspicion that can be estimated based on the criteria highlighted in European case law.

We believe that through our study both the main laws, the Code of Criminal Procedure and Article 4 in relation to the case law of The European Court of Human Rights, can be adjusted and improved, and secondary laws, namely, the Superior Council of Magistracy Guidelines on the relationship between the judicial system of Romania and the media, as well as the manner in which procedural actions are substantiated in criminal cases, ordinances, evidence reports, court resolutions delivered by Judges for Rights and Liberties concerning pre-trial measures, precautionary measures, court resolutions delivered by the Pre-Trial Chamber on the applications and exceptions lodged on the matter of the legality of the referral, of the evidence, of the criminal investigation actions and sentences delivered in the court of first instance.

References

- Ion Neagu, Mircea Damaschin, Treaty by procedure criminal, The general part, In the light the new Procedure Criminal Code , Universul Juridic, Bucharest, 2014
- Nicolae Volonciu & Andreea Simona Uzlău team coordinators, The New Procedure Criminal Code, comments, The Second Edition, revised and completed, Hamangiu Publishing House, 2015
- Case Peltereau-Villeneuve v. Switzerland on the HUDOC database of the European Court of Human Rights
- Case Neagoe v. Romania on the HUDOC database of the European Court of Human Rights
- Case Bivolaru v. Romania on the HUDOC database of the European Court of Human Rights

THE RIGHTS OF A PERSON DEPRIVED OF LIBERTY OF MAINTAINING FAMILY TIES IN 5 EUROPEAN COUNTRY

Iulia POPESCU[*]

Abstract

A prisoner's life can often be a scary way of life for many people, which is why many individuals don't want to be close to people who have been imprisoned, for obvious reasons.

But the reality is that those who execute prison sentences, sooner or later, are liberated from prison and re-enter en society. Resocialization is a hard and difficult process to be fulfilled, but obviously not impossible.

In trying to redress the behaviours of those who have chosen the wrong way of life, family involvement is essential, especially in terms of maintaining mental health, and in the hope that at the end of the punishment, at the exit of the penitentiary there will be someone waiting there for them.

The present paper aims to analyze the rights of inmates to keep in touch with their families, stipulated in the legislation of 5 European countries, the similarities and possible differences of their approach in the desire to identify the best regulations in this field, with best results in re-socialization.

However, it is known that permanent contact with the family increases the confidence in the person self-esteem so that he / she overcomes the bad moments of life, as well as in the case of the prisoners the existence of more rights to maintain contact with the family is a desire

Keywords: *rights, deprived of liberty, European country, family, re-socialization.*

1. Introduction

The incarceration is an unusual situation that deprives the person convicted of both freedom and his familiar and family environment.

Sentencing a person to the execution of a custodial sentence is an exceptional measure that is applied by the court in the case of those offenses punishable by life imprisonment or imprisonment.

In most cases, when the situation permits, the law provides rules that have the effect of avoiding the deprivation of liberty, precisely because of the obvious negative effects that the isolation of society can provide on individuals.

However, there are many cases where the enforcement of a custodial sentence is mandatory, and the data on the number of persons imprisoned in Romanian prisons confirms it.

According to World Prison Brief, on January 27/ 2018, 22,988 people were imprisoned in Romania[1].

Following the Regulation on the organization and functioning of penitentiaries, their purpose is to ensure the execution of custodial sentences and the measure of preventive arrest and to ensure the recuperative intervention, facilitating the empowerment and reintegration into society of persons deprived of their liberty.

A success of re-socialization involves first and foremost the awareness of the consequences of the committed offenses and the violation of social norms.

Changing the mentality is a route that staff in charge of educational and re-socialization activities in penitentiaries go without results if this titanic work is not based on factors outside the penitentiary, factors that are represented by family and friends.

The existence of families waiting for them to leave the penitentiary is a motivation for convicted people not to let themselves to be fooled into negative feelings and violent starts, sometimes suicidal.

Romanian legislation provides rights for arrested and convicted persons to keep in touch with their families or close persons, being in this respect in harmony with European Union provisions.

An analysis of the rights of persons legal provisions deprived of their liberty in countries in Europe can be a good thing in identifying a complete and effective picture of these rights.

In doing so, the laws of 5 European countries, namely Spain, the Netherlands, Belgium, the Republic of Moldova and Romania, were analyzed.

Their choice was based on geographic aspects (taking the extremes of the Western part of Europe, in this case the Netherlands, Belgium and Spain) constitutional (some being republics, other monarchs) and EU membership (Moldavian Republic, neighbour to our country but at the same time it is not part of the European Union).

At the same time, the fact that those peoples origins, their habits and their lifestyle are different, but also with common elements has influenced their choice even more, for the radiography of how each state perceives the connection that a person should have with his family.

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[1] http://www.prisonstudies.org/country/romania

2. Paper Content.

2.1. Spain.

The Spanish legislation provides for convicted person rights to keep in touch with his family, the elements common to the Romanian legislation, but also different aspects.

The normative framework governing the rights to stay in contact with the family, which have convicted persons in Spain, is the Organic Penitentiary Law no. 1 of 1979 and the Law on the Penitentiary Regime, Royal Decree no. 190/1996.

These rights are:

- the right to correspondence;
- the right to visit, which is divided into three categories, an intimate visit, a visit to relatives and friends as well as a family visit;
- the right to telephone conversations;
- the right to receive packets.

Art. 51 of the Organic Penitentiary Act explain that convicted persons have the right to communicate periodically, both verbally and in written form, in the language they understand, with their family or friends.

These communications are done in such a way as to respect as much as possible the privacy of individuals and the way these communications are conducted without violating the security rules. In some cases, written or verbal communications may be suspended or intercepted, reasoned, with the authorization of the director of the penitentiary unit.

Art. 52 of the Law no. 1/1979, provides that in the event of death, illness or serious injury of the convicted person, the director shall immediately inform his / her family or person designated by the sentenced person. Also, if a parent or a person close to the convicted person has died or is in serious condition, the convicted person will be immediately informed.

The detainee has the right to inform his or her family, about incarceration, as well as the transfer to another penitentiary.

In art. 53 of Law no. 1/1979, it is inserted that the penitentiary units will provide annexes, specially arranged for the family or intimate visits of those convicts who do not have a permit to leave the penitentiary.

Art. 41 of the Penitentiary Regime Act, Royal Decree no. 190/1996, provides that it is foreseen that visits and communications will be made in the manner necessary to meet the special needs of foreign detainees to which the rules applicable to Spanish citizens will apply in accordance with the present normative act.

According to art. 42 of the same Royal Decree no. 190/1996, the usual visits are carried out at least twice a week, for a period of at least 20 minutes, the detainee being allowed to be visited by up to 4 persons at the same time. If the location allows, the convicted person may accumulate the time for 2 visits in one.

In order to be able to visit the detainee, the family must provide evidence of family ties, and for those who are not family members, the penitentiary director's authorization is required.

Article 43 of the aforementioned normative act provides for the possibility of restricting this right in the case of violation of security rules, communicating this fact to the detainee.

Another right provided by Royal Decree no. 190/1996, in art. 45, is the possibility for inmates to have an intimate visit, a visit to relatives and friends, and a family visit.

These three types of visits are given by the categories of visitors that may come to the detainee.

Thus, the intimate visit is granted at the request of the detainee, at least once a month, which cannot be less than 1 hour but not more than 3 hours, unless the security rules prohibit it.

The visit of relatives and friends, as the name implies, is that category of visit that is granted for family, extended family and friends, on request, with a minimum of 1 hour and a maximum of 3 hours, at least once a month.

People presenting for an intimate visit or for relatives and friends do not have the right to bring packets or to be accompanied by minors (in case of intimate visits).

Family visits are made on demand and run between the detainee and his or her spouse or person with a relationship similar to that of spouses and children not older than 10 years of age. The duration of this type of visit is a maximum of 6 hours and is done at least 2 times a week.

According to art. 47 of the Penitentiary Regulations, detainees have the right to make phone calls if their families live in remote localities and cannot travel to visit it and if the detainee has to communicate some important issues to the family, the defender or another person.

In those situations permitted by the penitentiary rules the incarcerated person have the right to telephone communications that shall be made at a maximum of 5 calls per week in the presence of a supervisor and may not take more than 5 minutes.

The value of the conversations will be borne by the detainee, except those related to the communication of the penitentiary entry and the transfer to another penitentiary.

Telephone calls made between detainees from different penitentiaries can only be made on the basis of the director's authorization.

According to art. 50 of the Regulation for the organization of penitentiary units, the detainee can receive no more than two packages per month, except for the ones included in the closed regime which can receive only one package per month and the weight of each package cannot exceed 5 kg, containing books, publications, or clothes.

2.2. Netherlands.

As far as the legislation on the rights of persons deprived of their liberty is concerned, in Netherlands

those rights are close to those in Spanish law, but of course with specific features.

The classification of rights covered by this analysis is:

- the right to correspondence;
- the right to visit;
- the right to telephone conversations;

The rights of convicted persons are laid down in the Penitentiary Principles Act, within the framework of Art. 38, which provides that the detainee is entitled to receive visits in accordance with the rules laid down in the Regulations for at least one hour per week.

It is foreseen that the Minister of Justice may lay down additional rules on the admission and refusal of a visit, and that the rules are set out in the Organizing Regulations on the request for a visit.

Also, it is stipulated that the director of the penitentiary unit may at the same time limit the number of persons admitted to the detainee, if necessary in order to maintain order or safety in the unit.

The director may refuse to allow the detainee to visit a particular person or persons if this is necessary for the maintenance of order and safety in the institution for the purpose of preventing or investigating offenses or for the protection of victims or other persons involved in committing the deed. This refusal may be maintained for a maximum period of 12 months.

Also for the safety reasons outlined above, the executive director of the penitentiary unit may establish that the prisoner's visit by persons outside the penitentiary is carried out under supervision. This surveillance may involve listening or recording the conversation between the visitor and the detainee, the detainee being informed of the nature and reason of the surveillance.

The Director may discontinue the visit within the specified time limit, with the intention of removing visitors from the institution if necessary to maintain order and safety in the institution for the purpose of preventing or investigating offenses or for the protection of victims or other persons, involved in the act.

At the same time, among the rights granted to the convicted persons are also those related to making phone calls with persons outside the penitentiary unit.

Art. 39 of the Penitentiary Principles Act indicate that convicted persons have the right to make one or more telephone calls, at least once a week, at the times and places established by the organizational regulations, from the telephone stations in the prisons.

The costs of calls made by persons deprived of their liberty will be borne by them, unless the director of the prison unit decides otherwise.

The telephone conversations made by or with the detainee may be supervised and recorded, with the consent of the director, if necessary to establish the identity of the person with whom the prisoner carries a conversation, if this is necessary to maintain order or safety in unity, protection of public order or national security, the prevention or detection of criminal offenses and the protection of victims or other persons involved in committing offenses.

The person concerned will be informed of the nature and the reason for the oversight, this supervision assuming either listening to a phone conversation, live or listening to a recorded telephone conversation.

By the Council's provision on recording telephone conversations and storing and providing recorded telephone conversations, other rules on telephone call surveillance may be established.

As with the right to visit, the Director may limit the right of the prisoner to hold a particular telephone conversation or certain telephone conversations or to conclude a telephone conversation while allowed if this is necessary for the same reasons as mentioned above up. The period for which this right may be limited is no more than 12 months.

Another right that is related to keeping in touch with the family is the right to send and receive letters and documents by post, provided in art. 36 of the Law on Penitentiary Principles.

As with the other rights mentioned above, the law provides, in addition to the right itself, the limitations of its exercise. Thus, the text of the law indicates that the director is authorized to inspect envelopes or other postcards from or intended for detainees to detect forbidden goods.

Where envelopes or postcards originate from or intended for the persons or bodies involving human rights protection, examination of the documents can only be carried out in the presence of the prisoner concerned.

Also under the control that the Director can make on documents sent or received by mail, the law stipulates that these correspondences can be supervised, which may include copying letters or other postcards or letters. The detainee is advised in advance of the surveillance.

The Director has the possibility to refuse to dispatch or deliver certain letters or books or postal orders, as well as the enclosed items, if necessary to:

- keeping order or safety in the unit,
- the protection of public order or national security,
- preventing or detecting crimes,
- the protection of victims or other persons involved in committing offenses.

2.3. Belgium.

The rights of detainees to keep in contact with the family in Belgium have the same rights as in the other mentioned states, namely:

- The right to visit;
- The right to correspondence;
- The right to telephone conversations.

The content of the detainees' rights is laid down in the Law on Principles on the Administration of Prison Facilities and the Legal Status of Detainees of 05.02.2005.

Thus, the right to visit in Belgian penitentiaries is a table visit, a visit with a separator, an intimacy visit and a children's visit.

The visit to the table is done in the special room assigned to this activity and represents the normal visit.

The visit with the separator is done in a space provided with a screen or window, the detainee cannot be reached.

The cases that lead to the application of this visit system, with separator, are:

- If there are reasonable suspicions that incidents that could endanger order and security may occur during the visit;
- At the request of the prisoner or visitor;
- If the former detainee or his / her visitors have violated the regulations governing the visit and there are reasons to believe that these deviations will be repeated;
- If the detainee was previously disciplined, where only a visit with a separator is allowed;
- If the detainee is included in an individual security regime, where only a visit with a separator is allowed.

From the presentation of this type of visit, it follows that visiting with a separator is the exception in the exercise of the right to visit.

The intimate visit consists of an unattended visit, which takes place in an intimate space, without being subjected to supervision by the penitentiary staff. This type of visit can be organized at least once a month for a minimum of 2 hours. An inmate may request this type of visit after at least one month of detention.

People who can benefit from this type of visit are husband, wife, legal partner or concubine, children, parents, grandparents, brothers and sisters, uncles and aunts.

The law is limited in terms of the persons who may be included in this visit.

In order to be able to benefit from this type of visit, the visitor, who have not family ties with the detained, must prove a sincere relationship with the person incarcerated by showing an interest in the detainee over the past 6 months.

As regards the children's visit, an activity for the children and their detained parents is organized at least once a month.

As mentioned above, another right that helps maintain the ties with the family and social environment of the detainee is that of correspondence.

Belgian law allows any detainee to send and receive an unlimited number of letters, according to art. 54 of the Law on Principles concerning the Administration of Penitentiary Establishments and the Legal Status of Detainees of 05.02.2005.

Correspondence that the detainee receives from his or her family and other people is controlled to contain no prohibited articles or substances. Only if there is a danger to the order and security in the penitentiary the correspondence will be read, the director of the penitentiary unit will decide in the immediate form that the objects or letters are not handed over to the detainee but kept in a depot, informing the detainee about these matters. The detainee will received those goods at the time of release.

Correspondence that detainees send, as a rule, is not verified, however, in case there are suspicions of a threat to order and security, correspondence will be verified and, if necessary, it will be retained.

The third right to keep in touch with the family is the right to telephone calls and other means.

Unlike the countries above, Spain and the Netherlands, the legislation in Belgium is more permissive in terms of making phone calls. Thus, phone calls can be made every day, at the expense of the prisoner, from fixed or GSM stations. Phone posts are located on the cell corridor, each prisoner receiving a personal code that he inserts into his phone, and the payment of calls will be made from his personal account.

The text of the law does not specify any time limit for the conversations made.

However, if there are indications that phone calls endanger the order and security of the penitentiary, the director of the unit will forbid totally or partially a detainee to exercise the right to make telephone calls.

Within the first 24 hours after entering the penitentiary, the detainee is entitled to a free national or international free phone call of 3 minutes.

The specificity of this right, with respect to the other legislation under consideration, is that these talks cannot be recorded nor heard. Penitentiary management can only check the person with whom the prisoner held the call and how long this conversation lasted.

2.4. Moldovian Republic.

The law governing the rights of convicted persons in the Republic of Moldova is the Decision no. 583 from 26.05.2006 regarding the approval of the Penalty Execution Statute of the convicted persons and Code no. 443 / 24.12.2004 on the Execution Code of the Republic of Moldova.

Detainees from Moldovan penitentiaries have the following rights closely related to maintaining family ties, according to art. 87 of the Decision no. 583/2006:

- have the right to communicate the name of the penitentiary to the family and close relatives;
- receive packets of supplies, parcels, bands and keep food, except those requiring heat treatment before being consumed and alcoholic beverages;
- to acquire and receive in the packages of necessities in the assortment provided in Annex no. 6, for storage and / or consumption;
- at meetings with relatives and other persons of a duration and number determined by the legislation;
- To phone calls from the public telephone, on its own, in the manner and under the conditions established by the Execution Code;
- Receive and dispatch, on their own, letters,

telegrams and petitions, without limiting their number, in the manner and under the conditions established by the Execution Code;

- For own account, send to relatives or other persons parcels, packages and bands, under the conditions stipulated by art. 211 of the Code of Enforcement;
- In case of death or serious illness of one of the close relatives or in other exceptional personal circumstances, as well as in other cases, under the conditions provided by art. 217 of the Enforcement Code, detainees are given the right to move without escort outside the penitentiary for a short period of time.

The normative act stipulates that the detainee has the right to receive during the year at least one short-term visit of up to 5 days outside the penitentiary for visiting the family, relatives, guardian or curator, as the case may be, and convicts enrolled in higher education institutions or specialist backgrounds - for the duration specified in the Labour Code for examinations.

In order to benefit from this right, the sentenced person has to execute the joint punishment or re-socialization, and be included in the release preparation program if it is positively characterized.

Sentenced persons are entitled to short and long-term meetings. Long-term meetings can take place outside the penitentiary, with the right of the convict to reside with family members, according to art. 213 of the Code no. 443 / 24.12.2004 on the Execution Code of the Republic of Moldova, for a period of 12 hours to 3 days, the convict paying the expenses incurred by the long-term meeting.

Short-term meetings with the spouse, relatives up to the fourth degree inclusive, or with another person indicated by the convict, are given for duration of 1-4 hours. These meetings are held in specially arranged areas, under visual supervision or through video systems by the representatives of the penitentiary institution administration.

The detainee is allowed to meet up to two mature persons with whom his / her minor children may come, as well as close relatives who have not reached the age of the majority (brother, sister, nephew, niece).

The detainee is entitled to a short term meeting per month and a long-term meeting per quarter.

There is no right to long-term interviews with convicts who:

a) the right to long-term meetings has been suspended;
b) who were initially transferred as a disciplinary sanction;
c) sentenced to life imprisonment in the initial regime.

The number of meetings mentioned above may be exceeded in order to stimulate convicts.

Thus, more than 4 short-term meetings and 2 long-term meetings per year are provided as incentives, according to Decision no. 583 of 26.05.2006, art. 280.

When determining the visit period allowed, the behaviour of the detainee, the periodicity of visits, the total number of visits of the prisoner concerned, as well as the number of visits to the prison, etc., are analyzed.

Incentive appointments are only granted to the spouse and relatives and cannot be given to others.

Meetings between detainees placed in different penitentiary institutions are forbidden.

The director of the penitentiary unit approves meetings between the detainees, if the detainees are in the same penitentiary institution and if there is a marriage relationship between them, based on documents.

It is not allowed to divide the time for a visit in more short ones, but replacing the long-term meeting with the short term is only allowed at the written request of the sentenced person.

Sentenced prisoners of the Republic of Moldova have the right to make phone calls of up to 15 minutes, including the possibility of changing long and short-term meetings with telephone conversations.

For marriage, the long-term and short-term meetings on this occasion are not included in the set number of meetings.

The meeting takes place after a meeting permit issued by the prison director following the request of the detainee or the visitor.

The administration of the penitentiary may order a ban or discontinuation of a meeting if there is a suspicion that the order and safety in the penitentiary unit may be jeopardized.

In accordance to art. 305 of the Decision no. 583 of 26.05.2006 regarding the approval of the Penalty Execution Statute by condemned persons, the discussion at the short-term meetings is held in the language chosen by the persons arriving on the visit. If the representatives of the penitentiary administration do not know the spoken language, an interpreter or other person (except for the detainees who know the language) may be invited to oversee the discussion.

According to art. 313, from the Decision No. 583 of 2006, detainees can receive packets, bands or parcels from family or other persons.

In art. 314 it is stipulated that the opening and control of the contents of parcels, parcels with supplies and banderols shall be carried out by the representative of the administration of the penitentiary, in the presence of the person who brought them, and the ones sent by mail are subject to specific control in the presence of the detainee and transmitted to the last counter signature.

Persons convicted have the right to receive and dispatch letters, telegrams and petitions on their own, without limiting their number, in the manner and under the law.

Sending postal mandates to the family is done freely and to other non-family members only with the authorization of the penitentiary administration.

Correspondence between detainees of different penitentiaries who do not have family ties is allowed

only with the authorization of the penitentiary administration, according to art. 330 of Decision No. 582/2006.

Correspondence of detainees can be subject to control if there is a suspicion of a danger to safety and order in the penitentiary.

In order to keep in touch with the family, the detainees also benefit from the right to telephone calls, the penitentiary administration assuring the installation of public telephones in the penitentiary in special places.

The detainee is entitled to telephone conversations with his spouse, a relative, or another person of his choice. The payment for telephone calls is made with prepaid cards, and in the case of a telephone connected to the public fixed telephone network, according to the established tariffs, on the detainee's account of the detainee.

Provision of phone calls to detainees is only allowed at the initiative and upon request. Conversations at the request of relatives or other persons are not admitted, they can only discuss with the representatives of the administration, communicating their exceptional information to be transmitted to the detainee.

The convict is entitled to a 20-minute weekly telephone conversation with the husband, relative or other person of his choice.

As with meetings, it is not allowed to divide the time allowed for one phone call in shorter ones. Also, phone calls between inmates of different prisons are forbidden.

2.5. Romania.

In Romania, Law 254/2013 regulates the execution of sentences and measures of deprivation of liberty ordered by the judicial bodies during the criminal proceedings.

By Government Decision no. 157 of 2016 approved the Implementing Regulation of Law 254/2013, which sets out in detail the composition of the rights of the convicts to preserve the contact with the external environment and especially with the family.

A first right is the right to correspondence, which is regulated in art. 63 of Law 254/2013, together with the petition right. The text of the law mentions in par. (1) only that the right to correspondence and petition is guaranteed.

In the other four paragraphs of the above mentioned article are stipulated only the restrictions on these rights.

These restrictions consist in the fact that correspondence can be held and handed over to those entitled to conduct investigations if there are good indications of a crime. The convicted person being notified in writing of these measures.

However, according to the law, correspondence and responses to petitions are confidential and can only be retained within the limits and under the conditions laid down by law.

The frequency of the use of this right was not limited by the legislator, the detainee having the possibility to make petitions and to have correspondence without limitations. In other words, the detainee has the possibility to keep in touch with his family by mail whenever he wishes.

Another right provided by national law is the right to telephone calls, provided in art. 65 of Law 254/2013[2]. Among the possibilities of the persons deprived of their liberty to communicate with the outside, the right to make phone calls helps constantly and regardless of the distance where the punishment or educational measure is executed, maintaining the connection with the family or with other persons with whom he wants to relate.

Phone calls are made without being heard, are confidential and run during the hours of the program, both with people in the country and abroad. Under the right to telephone calls, the detainee can contact his lawyer and diplomatic representative (if the detainee is a foreign national)[3].

In art. 2 lit. m) of the Implementing Regulation of Law 254/2013, are explained that the family members, are spouse, wife, relatives up to the fourth degree, persons who have established similar relations with those spouses or between parents and children, legal representatives when appointed, as well as, in exceptional cases, persons to whom strong affective relations have been established and which maintain contact with the detainee through visits, telephone, correspondence and on-line communications.

Regarding the right to correspondence, which is not limited, as far as the right to telephone communications is concerned, it has limitations given by the regime in which the detainee is included.

The limitations imposed by the detention regime are aimed at preventing the commission of new criminal offenses by means of telephone conversations. The fact that those who are imprisoned in penitentiaries with maximum security have committed acts of certain gravity, or their situation (crime contest, recidivism) has led to a certain danger, they are considered to be more prone to use the right to hold telephone conversations to continue their criminal activity interrupted by the conviction.

Although the existence of this right may favour the continuation of criminal activity, it is advisable to

[2] Law no. 254/2013, art. 65: "(1) Persons convicted have the right to make phone calls from public phones installed in penitentiaries. Phone calls are confidential and conducted under visual supervision. (2) In order to ensure the exercise of the right to telephone calls, the director of the penitentiary has the obligation to take the necessary measures for the installation of public telephones within the penitentiary. (3) Expenses incurred for the making of telephone conversations shall be borne by the convicted persons. (4) The number and duration of telephone conversations shall be established by the regulation for the application of this law. "

[3] Chiș Ioan, Chiș Alexandru Bogdan, Execution of criminal sanctions, Universul Juridic Publishing House, Bucharest, 2015, pag. 385

maintain the link with the family, outside the penitentiary environment, helping to preserve the humanity of every person deprived of liberty and his hope to reintegrate into the world of which was temporarily excluded.

The right to receive visits and the right to be informed about the special family situations provided in art. 68, is perhaps the most important right in the lives of detainees and which, as stated above, motivates the detainee to wish to overcome the period of imprisonment.

The right to visit allows direct contact with the family, keeping in touch with the family environment, maintaining feelings of affection among family members.

This right is all the more important by providing parents with the opportunity to see their children, to be part of their lives, enabling communication and fulfilment of the role of parent through the necessary guidance for children.

Contact with family, though reduced in terms of the consequences of punishment, is so necessary for parties, family and detainees.

Visit to the place of detention is a family event, sometimes educative or full of positive influences, by comparing what can be done between the status of those who meet thru separation devices between those who come and those who are visited[4].

Visiting moments represent for true moments of celebration that have the gift of interrupting the monotony of the daily existence.

The organization of the granting of the right to visit and the manner of granting these visits are stipulated in art. 138-144 of the Regulation implementing Law 254/2013.

Thus, detainees can be visited by the family or the caregivers and with the consent of the detainees and the approval of the director of the place of detention by other persons as well. Children up to 14 years of age can only visit detainees accompanied by a major person.

A detainee may receive a single visit during one day, the administration of the place of detention being obliged to provide a daily 12-hour program for the exercise of the right to visit by detainees.

The duration of the visit is from 30 minutes to two hours, depending on the number of requests for visits and existing spaces.

Visitors can not simultaneously visit two or more detainees, with an exception being provided when two or more inmates, husband or wife or relatives up to the second degree can be simultaneously visited by their husband or wife or relatives up to at the second degree, with the approval of the penitentiary director.

The number of persons visiting a prisoner at the same time can be limited by the motivated decision of the penitentiary director.

In order to benefit from the right to visit, it is necessary to make a prior appointment, which is made before the presentation date for the visit.

The request for the appointment is made by telephone, by e-mail or directly to the penitentiary's office, during the working hours of the package granting and visiting section.

The way of the visit is granted differently depending on the regime of execution of the custodial sentence and the conduct adopted during the detention, as follows:

a) With cabin type separation devices;
b) Without separation devices.

The visit with separating devices is granted to detainees to whom maximum security or closed regime applies and convicted detainees to whom the execution regime has not been established.

The visit without separation devices is granted to detainees to whom the semi-open and open regime applies.

The Regulation also provides for the possibility of granting the right to visit between detainees, with the approval of the prison director, under the law.

The number and frequency of visits varies depending on the regime in which the person in question is included.

Inmates to whom the open regime applies benefit monthly from 6 visits, the incarcerated in the semi-open regime, close regime and those for whom the penalty regime has not yet been established receive 5 visits per month and those to whom the maximum safety regime applies benefit monthly 3 visits.

Pregnant women who have given birth during the period of taking care of the child in their place of detention receive 8 visits per month.

The law provides for the possibility of granting a further visit, in addition to those stipulated, for the birth of the child of the detainee or the death of a family member, with the approval of the penitentiary director, which may be carried out without a separation device.

Detainees also have the right to be informed about the special family circumstances, the serious illness or the death of a family member, person or other person, as soon as they are aware of the event, being psychologically counselled, when required.

An important right that helps maintain affective and matrimonial relationships is the right to the intimate visit that is provided in art. 69 of the Law no. 254/2013[5].

The exercise of this right is done by the convicted person or preventively arrested, married, only with his

[4] Chiș Ioan, Chiș Alexandru Bogdan, Execution of criminal sanctions, Universul Juridic Publishing House, Bucharest, 2015, pag.390.

[5] Article 69 of Law 254/2013

a) They are finally convicted and assigned to a regime for the execution of custodial sentences;

b) the legal effects ceased;

c) There is a marriage relationship, proven by a legalized copy of the marriage certificate or, as the case may be, a partnership relationship similar to the relationships established between the spouses;

spouse, being granted by the director of the penitentiary at the written request of the sentenced person.

Persons convicted or preventively arrested, who are not married, may benefit from the intimate visit only with partners with whom they have established a similar relationship to relationships established between spouses prior to the date of receipt in the penitentiary.

The partnership relationship between the convicted person and his / her partner is carried out by a declaration on his / her own responsibility given to the notary.

The director of the penitentiary may approve intimate visits and between convicted persons upon their request, subject to the above mentioned conditions.

The person convicted or preventively arrested, the spouse or his wife or partner, as the case may be, have the obligation, under the sanction of the provisions of art. 353 and 354 of the Penal Code to inform each other, through a declaration on their own responsibility, of the existence of a sexually transmitted disease or acquired immunodeficiency syndrome - AIDS. Statements are filed in the individual file.

According to art. 146 of the Implementing Regulation of Law 254/2013, the persons finally convicted, respectively preventively arrested during the trial, are entitled to a once a 3-month intimate visit, with a duration of three hours, in compliance with the legal conditions.

For marriage, the right to intimate visit, which lasts 48 hours, may be interrupted for a maximum period of 24 hours for reasons related to the administration of the place of detention, without that the 24h being reduced from the 48h, according to par. 2 and 3 of Art. 146 of the Regulation implementing Law 254/2013.

The Romanian legislation also provides for the right to receive packages and to buy goods, according to art. 70 of Law 254/2013.

According to art. 148 of the Implementing Regulation of Law 254/2013, detainees have the right to receive a packet of foodstuffs weighing no more than 10 kg per month, to which a maximum of 6 kg of fruit and vegetables can be added.

Detainees are forbidden:

a) the receipt of foodstuffs which, for consumption, require heating, baking, boiling or other thermal treatments;
b) the purchase of easily altered foodstuffs or which, for consumption, requires heating, baking, boiling or other heat treatment, except coffee, tea, milk and instant smoked sausages;
c) the receipt and purchase of lemons and their derivatives.

3. Conclusions.

Following the analysis of the five penitentiary systems it can be concluded that the systems presented have many common points but also differentiation elements.

The result is a normal one given the fact that for maintaining strong connections between the convict and his family or friends group, both physical contact and the possibility of communicating by telephone or on-line, aspects that are also made between people at large, are necessary.

All penitentiary systems have regulated the right to visit, perhaps the most important right of all, which helps most to maintain the interest of the detainee for the family and the family for the detainee, the right to telephone calls and the right to receive packets.

The differences between those systems are the way these rights are achieved, reflecting the importance that the state attaches to the role of the family in the prisoner's life.

The Romanian penitentiary system is approaching most of the Spanish penitentiary system, in regulating the rights of convicts, but it also has common elements with the other penitentiary systems.

It is noteworthy that the legislation in our country and in Spain is the most permissive in granting the right to the usual visit, in relation to its frequency. Spanish legislation being even more permissive and by stipulating different types of visits, depending on the people who visit with different periodicities.

Analyzing the importance of each individual right, one could conclude that the existence of the right to intimate visit represents a gain, if one can say so, for both the detainee and the family, but also for society, by re-socializing the former condemned, many times he manages to overcome the negative effects of executing a prison sentence due to his family.

What is worth to note after presenting these five laws is that there are notable differences between detailing the exercise of these rights.

Thus, the Netherlands, Belgium and Spain, precisely in that order, are concise in the content of the listed rights without too much exemplifying the way in which the rights are exercised.

However, this is not the case in Romanian law, and even less so in the Republic of Moldova.

d) have not benefited from the permission to leave the penitentiary in the last 3 months prior to requesting an intimate visit;
e) have not been disciplined for a period of 6 months prior to the request for an intimate visit, or the sanction has been lifted;
f) Participates actively in educational programs, psychological assistance and social assistance or work;
(2) A married convicted person may only receive an intimate visit with his or her spouse.
(3) In order to grant the intimate visit, the partners must have had a similar relationship to relationships established between spouses prior to the date of receipt in the penitentiary.
4) Proof of the existence of the partnership relationship is made by the declaration on own responsibility, authenticated by the notary.
(5) The director of the penitentiary may approve intimate visits between convicted persons under the terms of this article.
(6) The number, periodicity and procedure of the intimate visits shall be established by the regulation for the application of this law. "

Why is it necessary to provide, in the smallest detail, the means of exercising only in Romanian and Moldovan legislation, in order to be understood by convicts, and in other legal systems is it sufficient only their succinct presentation?

Maybe there are questions whose answer comes out of the legal sphere, rather related to psychology or human consciousness.

However, what should be emphasized and praised is that the states under consideration have understood that the attempt to socialize some convicted persons cannot be achieved without the intervention of the family and the circle of friends of those condemned.

Nevertheless, there is no clear evidence that any of the systems analyzed is the best, with outstanding results in re-socialization.

It could be a solution a long-term research, during the execution of the sentence, of a representative group of convicted persons under different detention regimes, who keep in touch with the family as well as those who are not visited by family members.

But a solution of this study may be that Romanian legislation takes over those elements of the legislation of the other analyzed states, which allow a greater proximity of the family prisoner.

In the same time, the existence of more rights for the convicted person to keep in touch with the family is not an obligation on the family to honor them.

Although supplementation rights for prisoners would seem too lax compared to the punitive nature of the punishment, this must not lose sight of the fact that the punishment by imprisonment aims to punish the individual by taking away his freedom and not to break the family ties.

References

- Spanish Organic Penitentiary Law no. 1 of 1979
- The Spanish Law on the Penitentiary Regime, Royal Decree no. 190/1996
- The Netherlands Penitentiary Principles Act
- The Belgian Law on Principles on the Administration of Prison Facilities and the Legal Status of Detainees of 05.02.2005
- The Moldavian Republic Decision no. 583 from 26.05.2006 regarding the approval of the Penalty Execution Statute of the convicted persons and Code no. 443 / 24.12.2004 on the Execution Code of the Republic of Moldova
- The Romanian Law 254/2013 regulates the execution of sentences and measures of deprivation of liberty ordered by the judicial bodies during the criminal proceedings
- The Romanian Government Decision no. 157 of 2016 approved the Implementing Regulation of Law 254/2013
- Chiş Ioan, Chiş Alexandru Bogdan, Execution of criminal sanctions, Universul Juridic Publishing House, Bucharest, 2015
- http://www.prisonstudies.org/country/romania

CONTROVERSIAL ASPECTS REGARDING TAX EVASION

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Abstract

Throughout the paper, we have highlighted some controversial aspects regarding the crime of tax evasion, referring to some important decisions of the High Court of Cassation and Justice and also of the Bucharest Court of Appeal. Debating upon the impunity provision stated by art. 10 of Law no. 241/2005, the study also sheds light upon the issue of the perspective of the judicial organs regarding the juridical regime of the tax due for dividends. The main focus of the paper leads to the situations when there is legal ground for the tax due for dividends to be considered part of the damage caused by tax evasion crime. The study includes a short analysis of some relevant provisions of the Romanian Fiscal Code and also some aspects deriving from decisions issued by the Administrative and Tax Litigation Chamber of The High Court of Cassation and Justice concerning the legal regime of dividends. Consequently, the authors are presenting both perspectives of the interpretation of the issue regarding the tax due for dividends to be considered part of the damage caused by tax evasion crime, resulting from two decisions of the two Criminal Sections of The Bucharest Court of Appeal, also arguing in favour of the most solid interpretation among them.

Keywords: *evasion, dividend, tax, damage, court decisions, impunity.*

1. Introduction

The crime of tax evasion, provided for in Article 9 of Law no. 241/2005 on the prevention and combating of tax evasion, gave rise, both in doctrine and in judicial practice, to a multitude of opinions regarding the cause of impunity stipulated by art. 10 of the Law no. 241/2005 on the prevention and combating of tax evasion, as well as on the existence / non-existence of the crime unity regarding alternative variants for committing the offense, but also on the inclusion or the exclusion of the dividend tax as a component part of the damage brought to the consolidated state budget.

Starting from the analysis of the respective incrimination in the special law, the analysis continues with the most relevant decisions of the High Court of Cassation and Justice – the Panels for settlement of legal issues, as well as with the presentation of the relevant provisions of the Fiscal Code, as well as elements of judicial practice related to the Supreme Court Administrative and Fiscal Division. Last but not least, the study makes a comparative presentation of two solutions from the very recent judicial practice of the Bucharest Court of Appeal, belonging to both criminal departments, diametrically opposed solutions from the perspective of the judgment of the tax regime on dividends by relation to the damage caused to the state budget through the crime of tax evasion.

Given the existence of an obvious non-harmonized practice of the criminal justice authorities in this field, the authors propose to offer arguments, embraced by a part of the magistrates, in the sense of exclusion of the tax on dividends from the damage resulting from the crime of tax evasion, with direct consequences in terms of the individualization of criminal liability, in criminal cases having this object.

2. Paper Content

According to art. 9 of the Law no. 241/2005 on the prevention and combating of tax evasion, the following acts committed in order to avoid the fulfilment of fiscal obligations are considered tax evasion crimes which are punished by imprisonment from 2 years to 8 years and the prohibition of some rights:

a) the concealment of the taxable property or source;
b) the omission, in whole or in part, of recording, in the accounting documents or in other legal documents, of the commercial transactions or of the achieved revenues;
c) disclosure in the accounting or other legal documents of the expenses not based on actual operations or evidencing other fictitious operations;
d) alteration, destruction or concealment of accounting documents, memories of cash register tills or of other data storing devices;
e) the execution of double accounting records, using documents or other means of data storage;
f) avoidance from performing financial, tax or customs checks, by failure to declare, fictitious declaration or inaccurate declaration of the main or secondary premises of the persons checked;
g) substitution, degradation or alienation by the debtor or by third parties of the property seized in accordance with the provisions of the Code of Fiscal Procedure and the Code of Criminal

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Procedure.

If by the facts provided in paragraph (1) there was more than 100,000 Euro damage, in the equivalent of the national currency, the minimum limit of the punishment stipulated by the law and its maximum limit is increased by 5 years.

If by the facts provided in paragraph (1) there was more than 500,000 Euro damage, in the equivalent of the national currency, the minimum limit of the punishment stipulated by the law and its maximum limit is increased by 7 years.

From the perspective of the legal content of the crime, it should be noted that the High Court of Cassation and Justice, by decision no. 25/2017, ruled in the matter of the settlement of certain legal matters, established that the actions and inactions stated in art. 9 paragraph 1 letters b and c of Law no. 241/2005 on the prevention and combating of tax evasion, which refers to the same trading company, are alternatives to the committing of the act, constituting a single crime of tax evasion provided by art. 9 letters b and c of Law no. 241/2005 for the prevention and combating of tax evasion[1].

The aforementioned conclusion stems from the fact that, given the theoretical distinctions set out above, to the question of law subject to settlement, it follows that we are in the presence of a single crime of tax evasion, and not in the presence of multiple crimes, as one cannot retain a crime with alternative contents, but a crime with alternative content, the alternatives to commit the crime being equivalent in terms of their criminal significance.

The same conclusion is reached by means of the literal interpretation of the text, which unequivocally reflects the intention of the legislator to establish several alternative ways of the material element of the single crime of tax evasion and not distinct crimes of tax evasion.

The omission, or the disclosure in accounting or other legal documents of unrealistic, fictitious transactions under the same circumstances in respect of one or more commercial companies, the existence of short intervals and a single criminal intent or the committing of deeds at large intervals of time and on the basis of distinct criminal intents, either confers continuing character to deeds, or determines the existence of real multiple crimes, this attribute being exclusive the responsibility of the judicial authority called upon to enforce the law.

Concluding, it is noted that the actions and inactions stated in art. 9 paragraph (1) letters b) and c) of the Law no. 241/2005 on the prevention and combating of tax evasion, as subsequently amended, referring to the same trading company, are alternative variants for committing the offense, constituting a single crime of tax evasion provided by art. 9 paragraph (1) letters b) and c) of the abovementioned law.

It also presents importance in the economics of the topic under analysis, the provisions of art. 10 of the Law no. 241/2005 on the prevention and combating of tax evasion, meaning that the limits of punishment are directly related to the alleged damage caused to the consolidated state budget.

On the date of the entry into force of Law no. 241/2005 on the prevention and combating of tax evasion the text of art. 10 paragraph 1 of this provision stipulated that "*in the case of a crime of tax evasion provided by the present law, if during the criminal prosecution or the trial, until the first hearing of the trial, the defendant or the respondent fully covers the damage caused, the limits of the punishment stipulated by the law for the deed are halved. If the damage caused and recovered under the same conditions is up to 100,000 Euro in the equivalent of the national currency, the fine sanction may be imposed. If the damage caused and recovered under the same conditions is up to 50,000 Euro, in the equivalent of the national currency shall be subject to an administrative penalty, which shall be recorded in the criminal record.*"

Subsequently, art.10 paragraph 1 was amended by Law no. 255/2013 implementing Law no. 135/2010 on the Code of Criminal Procedure from February 1, 2014, the applicable text stating that "*in the case of committing a crime of tax evasion provided in art. 8 and 9, if during the criminal prosecution or trial the defendant fully covers the claims of the civil party until the first hearing of the trial, the limits provided by the law for the crime committed are reduced by half.*"

Regarding the nature of the cause of non-punishment / reduction of punishment limits, by Decision no. 9/2017, HCCJ - the Panels for settlement of legal issues accepted the petition filed by the High Court of Cassation and Justice, Criminal Department, file no. 9.131 / 2/2011, on the issuing of a preliminary ruling and, accordingly, determined that the provisions of art. 10 paragraph (1) of the Law no. 241/2005, as in force until February 1, 2014, regulate a cause of non-punishment / reduction of personal punishment limits[2].

In the sense of the aforementioned opinion there are also the decisions of the High Court of Cassation and Justice, the Criminal Department, as a court of second appeal, appeal or appeal in cassation, with reference to the Criminal Decision no. 1.386 of April 30, 2012, ruled in File no. 15.820 / 62/2010, by which the interpretation given by the Brașov County Court in the recitals of Criminal Sentence no. 120 of March 24, 2011, maintained by the Court of Appeal was appreciated as correct.

Brașov through Criminal Decision no. 95 / A of September 15, 2011, in the sense that only the

[1] Decision of the HCCJ (Panel DCD / P) no. 25/2017 (OG no. 936 / 28.11.2017): Article 9 (1) letters b) and c) of the Law no. 241/2005 for the prevention and combating of tax evasion – single crime

[2] Decision of the HCCJ (Panel DCD / P) no. 9/2017 (OG no. 346 / 11.05.2017): Article 10 (1) of the Law no. 241/2005 for the prevention and combating of tax evasion

defendants who have paid the entire damages, within the term stipulated by the legislator benefit from the provisions of art. 10 paragraph (1) the final sentence of Law no. 241/2005, the court stating in the reasoning of the solution the nature of personal circumstance of the conduct of the defendants to fully cover the damage caused by the crime of tax evasion; Criminal decision no. 1.425 / R of April 23, 2014, ruled in File no. 2.214 / 101/2013 by which it was correctly stated that through Criminal Sentence no. 142 of September 23, 2013, ruled by the Mehedinţi County Court (maintained in this respect by Criminal Decision No. 344 of November 7, 2013 of the Craiova Court of Appeal), the criminal proceedings against the defendant A were ordered to be terminated, since he fully paid the damage caused by committing the crime of tax evasion, provided by art. 9 paragraph (1) letter c) of Law no. 241/2005 with application of art. 41 paragraph 2 of the Criminal Code (1969), the value of which does not exceed 50,000 Euro in the equivalent of the national currency, considering that this circumstance cannot have consequences in the area of criminal liability and for the defendant legal entity B; Criminal decision no. 201 / A of June 27, 2014, ruled in File no. 263/35/2013, which stated that in order to be able to operate the provisions of art. 10 of the Law no. 241/2005, the damage must be recovered by the defendant and the civilly liable party; Criminal decision no. 368 / RC of December 11, 2014, ruled in File no. 3.447 / 1/2014, in which it was considered that, in order for the cause of non-punishment regulated by the provisions of art. 10 paragraph (1) the final sentence of Law no. 241/2005 to be incidental, it is necessary to ascertain the contribution of the defendant to cover all the criminal damage and not the attitude and the contribution of the civil party to recover their debts. In other words, not every way of recovering the damage leads to the incidence of the non-punishment cause, but only the active, strictly personal attitude of the defendant, to eliminate the consequences of the crime committed.

The relevance of the above resides in that the inclusion or exclusion of dividend tax as a component of the damage to the consolidated state budget may result in different punishment limits and implicitly the possibility of imposing a suspended sentence under supervision (the penalty imposed should not exceed 3 years).

In the judicial practice, there were conflicting views on the withholding of the tax on dividends alongside the corporate tax and VAT as part of the damage caused to the consolidated state budget, from the perspective of committing a crime of tax evasion.

In analyzing the topic under consideration, we must start from the legal regime of the dividend tax. According to art. 7 of the Fiscal Code a dividend is a distribution in cash or in kind, made by a legal person to a participant in the legal entity, as a consequence of the holding of shares in that legal person. It is also considered a dividend from a tax point of view and is subject to the same tax regime as dividend income:

- the amount paid by a legal person for the goods or services purchased from a participant to the legal person over the market price for such goods and / or services, if that amount has not been subject to taxation on income or profit;
- the amount paid by a legal person for the goods or services provided in favour of a participant to the legal person if the payment is made by the legal person for his personal benefit.

According to art.17 of the Fiscal Code, the net profit is obtained after the tax rate of 16% of the taxable profit is applied, which in turn is calculated according to art. 19 of the Fiscal Code as a difference between the revenues and expenditures registered according to the applicable accounting regulations, deducting the non-taxable incomes and tax deductions, plus non-deductible expenses.

It is apparent from the examination of these legal provisions that the situation in which a legal person pays money for goods or services which are not intended for the activity of the paying company but are carried out in the interest of the associate of this legal entity is assimilated to the factual hypothesis giving rise to the obligation to pay dividend tax.

In application of the legal rule mentioned, the High Court of Cassation and Justice (by Decision no. 3253 dated June 27, 2012) stated that: "*Expenses which have not benefited the contributing company, but its sole shareholder, are non-deductible, which is why it is justified to treat them as dividends for which the related tax is due"*.

Moreover, it is clear that the chargeability of the dividend tax requires the finding that the taxpayer's expense was made for the benefit of the company's shareholder, an aspect which must be examined in each case by reference to the evidence of the case.

In this respect, in a case, the Prosecutor's Office systematically took note in the indictment that the defendant committed the crime of tax evasion in order to reduce the tax liabilities of the company, but the fictitious invoices thus recorded benefit to this purpose and are not expenses incurred for the benefit of the defendant.

According to that reasoning, it does not follow that fictitious purchases from companies with inappropriate fiscal behaviour would have been made for the benefit of the shareholder, much less that the payments associated with those purchases would have been made in his favour.

Judicial practice (Bucharest Court of Appeal, 1st Criminal Department) [3] has argued, in a way worthy of admiration, what contains the damage caused to the state's consolidated budget in the case of the tax evasion, as will be shown below.

[3] Bucharest Court of Appeal, 1st Criminal Department, Decision no. 1656/A of November 28, 2017

By recording fictitious expenses in the accounting of companies, it is obvious that the decrease in taxable profit is pursued.

Correspondingly, by lowering taxable profits, the net profit, as well as the value of gross dividends, decreases. Thus, by recording in the accounts of commercial companies of fictitious expenses, the persons investigated in criminal proceedings duly diminish the value of the gross dividends to which a tax of 5%, 10% or 16% was to be applied (the amount of the tax according to the tax legislation applicable at the calculation time) in order to obtain net dividends.

However, there is no logical consistency that, by committing a crime, both the non-payment of the profit tax and the non-payment of the dividend tax are pursued, while the decrease in the net profit determines the decrease of the dividends due to the defendants.

In addition, if these fictitious expenses were intended to remove amounts of money as dividends, then the damage can only be 5%, 10% or 16% of the value of the fictitious expenses (the amount of tax according to the tax legislation applicable at the time of calculation) without taking the profit and VAT tax into account as damage.

In other words, the withholding of the profit tax and VAT as damage and the withholding of the dividend tax as prejudice are two incompatible situations because they cannot be both held for the purpose of committing the crime. Instead, what can be withheld as a double purpose in the case of registration of fictitious expenses is the unlawful removal of money from the company, which may embody the typical crime of misappropriation or the use of the assets of the company without right and the circumvention of the profit tax and VAT payment.

It should also be added that these dividends are not required to be distributed to shareholders. It can be decided that only a part of the net profit is distributed or that all the net profit is reinvested and not distributed as dividends so that withdrawing money from the company before the distribution of dividends may embrace the typical nature of the crime of embezzlement.

Therefore, in such cases, the prosecution must prove the purpose of recording fictitious expenses in accounting, embezzlement and / or evasion of the payment of profit tax plus VAT, which is very important in the analysis of whether the amounts of money for fictitious expenses were paid or not. If the amounts of money relating to fictitious expenses were not paid to the so-called service or goods provider, then it was certainly the case that these expenses were entered into the accounts solely for the purpose of evading VAT and profit tax payment.

As regards the hypothesis that, for the purpose of withholding the dividend tax as damage, the provisions of art. 21 of the Fiscal Code are applicable, as interpreted by HCCJ in Decision no. 3253 / 27.06.2012, according to which the goods and services acquired by a company, which by their specific nature are not related to the activity of the company and do not participate in the realization of its revenues but have been used by the sole shareholder of that company, are not deductible, their qualification as dividends for which tax is due being justified, it is appropriate to make the following clarifications.

Furthermore, Decision no. 3253 dated 27.06.2012 of the High Court of Cassation and Justice of Romania - The administrative and fiscal department, besides being a decision in the administrative field, considers a case that is not applicable to the present criminal case. Thus, the HJCCJ's decision, cited above, deals with a case in which the authenticity of the expenses is not claimed, but the nature of the expenses, which have been determined by the court to be made in the interests of the shareholders and not of the company, which imposed the provisions of Art. 67, paragraph 1, point 1 ^ 1 of Law 571/2003 amended and republished to be applied, which is not the case here. Moreover, the indicated case is one resulting from a tax inspection and not a result of a criminal case.

First of all, the above-mentioned case refers to goods and services that were actually purchased on the basis of commercial transactions actually in place, but these expenses either were not related to the object of activity of the company or did not bring profit to it.

Secondly, in order to meet the elements of civil tort liability, there must be, inter alia, a causal link between the unlawful act and the damage caused, but also the guilt. However, the illicit act is not the evasion of goods from a commercial company, that is the embezzlement or use of property belonging to the company without having the right, but the recording of fictitious expenses for the purpose of evading the payment of tax and duties (VAT and profit tax), and the purpose cannot be to circumvent the payment of the tax on dividends.

The contrary opinion, which we do not share, was also exposed by the Bucharest Court of Appeal, but the Second Criminal Department, stating that the full recognition of the accusations brought to the defendant following the trial of the case in the simplified procedure, also presupposes an acknowledgment of the damage, the more so since he has paid the alleged damage[4].

It has been shown that, in relation to the fact that the defendant on his own initiative has appropriated the amount of the damage, in the realization of the principle of availability that governs the settlement of the civil side, his statement is first of all determining the amount of civil damages, against any other element of the cause that diminishes the obligation.

By analyzing the arguments of the court, we observe that they relate rather to procedural aspects regarding the possibility of invoking the non-withholding of dividend tax as a component of the

[4] Bucharest Court of Appeal, 2nd Criminal Department, Decision no. 168/2018 of February 8, 2018

damage in the procedure for the recognition of guilt and not aspects related to the legality and merits of including dividend tax as part of the damage.

However, although it exceeds the scope of this article, we consider that the full recognition of the deeds the defendant is held responsible for and the payment by the defendant of the damage does not equate with an assumption of the amount which represents the damage to the state budget.

Thus, the defendant acknowledges the deeds, namely the omission, in whole or in part, of the disclosure in the accounting or in other legal documents of the commercial transactions performed or of the achieved revenues and / or the disclosure, in the accounting documents or other legal documents, of expenses that are not based on actual transactions or the disclosure of other fictitious transactions, and not the amount of the damage, and the payment of the alleged damage is a guarantee to the judicial bodies that if the defendant is convicted, the judicial bodies can satisfy their claim and not an implicit assumption of the amount of the damage.

Conclusions

In view of the above, it is noted first of all that we are in the presence of a single crime of tax evasion in the event that the actions and inactions provided by art. 9 paragraph (1), letters b) and c) of Law 241/2005 on the prevention and combating of tax evasion, as amended, refer to the same trading company.

At the same time, for the incidence of art. 10 paragraph (1) of the abovementioned law, the attitude of the defendant in the process of removing the consequences of the crime is taken into account.

Although in court practice there are non-conforming views on the withholding of dividend tax along with profit tax and VAT as part of the damage caused to the consolidated state budget, starting from the idea that the dividend category can also include expenses incurred by the taxpayer for the benefit of the shareholder of the trading company, we underline once again the need for a thorough analysis in each case in the light of the evidence in question.

Moreover, the incidence of legal provisions as well as their applicability (Article 7 of the Fiscal Code) must be *a priori* analyzed by the judicial bodies and, after this stage, to proceed to the analysis of the other aspects related to the merits of the accusation.

Concluding, we fully agree with the arguments of the Bucharest Court of Appeal, the 1st Criminal Department, and we consider that the dividend tax, in the context described above, cannot be a component part of the damage caused to the consolidated state budget because it cannot be simultaneously dealt with as a goal of the crime together with the damage represented by the profit tax and VAT.

References

- Economic Felonies - Iulia Ciolcă - Hamangiu publishing house 2008
- Tax evasion – Av. Rudolf Schmutzer, Av. Hobjilă Spătaru Isabela – Moroşan - Nicora publishing house 2010
- Tax evasion – Ştefania Tudor - Hamangiu publishing house 2014
- Barratry, Embezzlement, Tax Evasion – Iulia Nistorică - Hamangiu publishing house 2011

WATER INFESTATION AS A CRIME UNDER ROMANIAN LAW

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Abstract

The purpose of this paper is to highlight the main theoretical issues concerning the enforcement of art.356 of the Romanian Criminal Code, in regard to the protection granted by several special regulations that protect water resources.

In order to establish a frame for the content of this article, its structure shall be divided into four parts.

The first part will consist of an introduction, in order to establish the importance of this subject and its actual status in Criminal Law literature.

The second part will represent the first half of the paper content and will consist of a special criminal law approach to the provisions of art.356 of the Romanian Criminal Code, most importantly pointing out its constitutive content.

The third part, namely the second half of the paper content, will refer to specific provisions found in art.92 of Law no.107/25.09.1996, namely The Water Law or in art.98, paragraph 4, let.b of Government Emergency Ordinance no.195/22.12.2005, regarding the protection of the environment and finally in art.49 of Law no.17/07.08.1990, regarding the Regime of interior maritime waters, of the territorial sea, of the contiguous zone and of the exclusive economic zone of Romania, and their relations with the provisions of art.356 of the Romanian Criminal Code.

The fourth and final part will consist of brief conclusions as resulting from the content of this article, respectively the actual configuration of water protection, by Romanian Criminal Law provisions today, with a de lege ferenda proposal.

Keywords: *water infestation, environmental protection, criminal liability, crimes against the environment, water protection.*

1. Introduction

The importance of water sources is obvious today for everybody. Life itself and society as we know it depend on access to quality water, and therefore, it is expected for water purity to be protected even on a criminal scale.

Water is a renewable, vulnerable and limited natural source, indispensable for life and society, raw materials and productive activities, energy sources and transport and a key factor in maintaining ecological balance[1].

By law, the importance of water is recognized and the subsequent paragraph of the same article qualifies it as national patrimony, that needs to be protected as such, fact continuously supported by environmental literature[2].

Water protection against infestation by any means is incriminated in the Romanian Criminal Code[3], art.356. Alongside that provision, specific forms of water infection, prior to the enforcement of the Criminal Code, are found in art.92 of Law no.107/25.09.1996, The Water Law, or in art.98, paragraph 4, let.b of Government Emergency Ordinance no.195/22.12.2005, regarding the protection of the environment[4], and finally, in art.49 of Law no.17/07.08.1990, regarding the Legal regime of interior maritime waters, of the territorial sea, of the contiguous zone and of the exclusive economic zone of Romania[5].

This paper will establish the limits of the incrimination found in the Criminal Code, by reference to the provisions earlier mentioned, in order to specify the legal qualification of some actions that may represent the material element for both general and specific provisions subjected to analysis.

The expected outcome of this research is to highlight the effectiveness of the general regulations found in art.356 of the Criminal Code, nowadays, especially considering the fact that it is not a new type of incrimination, being almost identical to the provisions of the old art.311 of the 1969 Romanian Criminal Code, the only difference consisting in the penalty limits, and it is also similar to art.372 of the 1936 Romanian Criminal Code.

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[1] Article 1, paragraph 1 of Romanian Law no.107/25.09.1996, namely The Water Law, published in the Romanian Official Gazette, no.244/08.10.1996.

[2] D.Marinescu, M.C.Petre – *Treaty of environmental law* (original title: Tratat de Dreptul Mediului), Univesitara Publishing House, Bucharest, 2014, pag 165.

[3] Law no. 286/2009, published in the Official Gazette no.510/24.07.2009 regarding the Criminal Code of Romania, enforced since the 1st of February 2014, actual on the 1st of March 2018.

[4] Published in the Romanian Official Gazette, no.1196/30.12.2005.

[5] Republished, in the Romanian Official Gazette, no.252/08.04.2014

2. Water infestation, according to art.356 Romanian Criminal Code

Title VII, Chapter V of the Special Part of the Romanian Criminal Code incriminates water infestation, as a crime against public health, in art.356. According to paragraph 1 of the text earlier mentioned, *the infestation by any means of water sources or water networks, if the water becomes harmful to the health of humans, animals and plants, is punishable by prison between 6 months and 3 years or a fine.* Paragraph 2 of the same article stipulates: *The attempt is punishable.*

In order for an analysis, some terminological specifications must be made.

A *water source* is a natural accumulation or manmade installation which contains water, regardless whether if it is drinkable or not.

Water networks consist of channels, pipes, aqueducts, gutters, that hold water[6], or in which water circulates from a source to a consumer. I subscribe to the opinion[7] that water networks include water purifying machines or other technological equipment used to transport water between the source and the end-user. Equally, networks can be of natural origin, like a network of rivers or underground waters.

The special legal object consists in social relations regarding public health, by special reference to the security of water sources and networks[8].

The material object of the crime is represented by the quantity of water found in sources or networks subjected to infection. On a water circuit between the source, the purification facilities and the end user, the material object will be represented only by the water upon which the infection is initiated. I appreciate that the infected water is only the product of the crime, not its material object.

The active subject of the offense can be represented by any person, either an individual or a moral person[9].

The primary passive subject is society itself, as beneficiary of the social relations regarding public health, namely the security of water sources and networks. The secondary passive subject is the owner of the water source or network, which is not adequate for normal use anymore. If an individual is affected by the consumption of infected water, or the animals or plants of an individual or legal person are affected, I consider that person to be a tertiary passive subject.

The premise for the constitutive content is the preexistence of a source of water or a water network, destined for the use of humans, plants and animals. I do not appreciate that the water should be destined for consumption, firstly because the provisions of art.356 Criminal Code do not stipulate the need of consumption, and secondly because water can become harmful for humans even if it is used only for hygiene purposes. Equally, I cannot subscribe to the opinion that the premise is not met if the water source or network is only of individual use[10], mainly because a private fountain, found in the private garden of a family, is subjected to multiple use, by all members of a family, or by animals and plants living in that household. More than that, as mentioned in recent literature[11], water originating from a particular source can end up being incorporated in different products destined for public use.

Contrary to specific literature[12], I do not consider that the preexistence of technical provisions that qualify water as drinkable or for industrial use represent a premise for the crime analyzed. In this regard, art.356 of the Criminal Code, does not refer to technical measures to establish is the water infected is harmful for the health of humans, animals and plants and the effect of the crime should be evaluated *in concreto*, after the *verbum regens* has been executed.

The material element, from my point of view, can be fulfilled either by an action of infestation or by omission, for example, in the case in which an operator of a water purification plant doesn't take all the measures necessary to limit the quantity of chlorine to be inserted in the purification process, before sending the water on the distribution networks to the end-user.

Equally, it is important to see that the legislator stipulated the infection of water, *by any means*, fact that will include any action or omission that will change the quality of water in order to make it harmful for human, animal or plant use, regardless of the substances or procedures used: poison, chemical substances, bacteria, radiations, microbes, waste, etc.

The immediate consequence is a result, and consists of an alteration of the quality of water, in such a manner that it becomes harmful to humans, animals or plants. Establishing the fulfilment of the immediate consequence is a matter of fact, and has to be done in a particular manner, mainly because plants and animals have different standards of harmfulness by water than humans. Secondly, there is no need for a person, animal or plant to be effectively harmed by the use of infested water. If such a result occurs, the perpetrator will also be held responsible for another crime against life, health or patrimony.

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[6] I.Tănăsescu in G.Antoniu, T.Toader (coordinators) - *Explanations of the New Criminal Code* (original title: *Explicaţiile Noului Cod Penal*), vol.IV, Universul Juridic Publishing House, Bucharest, 2015, pag.816.

[7] I.Tănăsescu, *op.cit.*, pg.817

[8] I.Oancea in V.Dongoroz (coordinator) – *Theoretical Explanations of the Romanian Criminal Code* (original title: Explicaţii teoretice ale Codului Penal Român), vol.IV, ed.a II-a, CH Beck and Romanian Academy Publishing Houses, Bucharest, 2003, pag.542.

[9] 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.

[10] I.Oancea, *op.cit.*, pag.541

[11] V.Cioclei, L.V.Lefterache in G.Bodoroncea, V.Cioclei, I.Kuglay, L.V.Lefterache, T.Manea, I.Nedelcu, F.M.Vasile – *The Criminal Code. Comment by articles* (original title: Codul penal. Comentariu pe articole), CH Beck Publishing House, Bucharest, 2014, pag.774.

[12] I.Tănăsescu, *op.cit.*, pg.816

The causal relation must exist, and also must be proven for the incrimination to be effective.

In what concerns the subjective element, I consider that the crime can be committed both with direct and indirect intention, according to art.16, paragraph 6 of the Criminal Code. The mobile and purpose are of no interest to the legal qualification.

According to art.356, paragraph 2 of the Criminal Code, the attempt is punishable. It is important to notice that this is a difference from the old regulation of art.311 of the Criminal Code of 1969. Personally I consider this a progress, given the high importance of the incrimination and the great need of protection, both for public health and for the environment.

The punishment provisioned for the typical form is prison between 6 months and 3 years, or a fine. The limits are inferior to those stipulated by the ancient regulation, where the maximum was of 4 years.

Briefly I do not appreciate the new incrimination as being fundamentally different from the old regulation, with the reserves above mentioned.

3. Specific forms of water infestation, as provided by special regulations

In this part, I will point out the main differences between the general provision for water infestation and the particular incriminations found in special legislation.

Art.92 paragraph 1 of Law no.107/25.09.1996, The Water Law, stipulates: Discharging, dumping or injection into surface water and groundwater, in inland waterways or in territorial sea waters of waste water, waste, residues or products of any kind containing substances, bacteria or microbes, in an amount or concentration that may change the water characteristics, endangering the life, health, and physical integrity of persons, animal life, the environment, agricultural or industrial production, or the fishery fund, constitutes a crime and is punished by imprisonment from one to five years.

Firstly, this provision specifies the exact manner in which the infestation is incriminated[13]: Discharging, dumping or injection into surface water and groundwater, in inland waterways or in territorial sea waters.

I appreciate that surface water and ground water are generic terms that include water sources or water networks, as long as they are of natural origin. Man made installations, even if they contain water, cannot be included in this category.

Departing from the text, for the crime to be typical, it may seem that an essential request implies that the infestation must be done with *waste water, waste, residues or products of any kind containing substances, bacteria or microbes.* I appreciate that this is not limitative, given the fact that it can be done with *products of any kind*, containing *substances.* By using the generic term „substances", without any specific differences, the legislator virtually incriminated water infestation by discharging, dumping or injection, regardless of the products used for the infestation.

The immediate consequence is a result, namely a change of water characteristics which would endanger the life, health, and physical integrity of persons, animal life, the environment, agricultural or industrial production, or the fishery fund. Personally, I see this outcome as more comprehensive than that of art.356 of the Criminal Code. Equally, the causal relation must clearly be proven.

Paragraph 2, letter a) of the same article stipulates: With the punishment provided in paragraph 1 the following acts shall also be sanctioned: pollution in any way of water resources if it is systematic and produces damage to downstream water users.

I see this version as an assimilated form of the crime provisioned in art.92, paragraph 1 mainly because the distinction of the material element in alternative forms disappears. More than that, for the crime to be effective two essential requests are stipulated: 1) the pollution of water resources needs to be systematic, meaning that the acts would imply a repeated form based on the same general resolution, in an organized manner, most suitable for industrial activities that generate water pollution, and 2) effective damage must be produced to downstream water users. It is not important if the damage results from harming the health or life of humans, animals or plants. It can also derive from delay of an economic activity, resulting in material, namely financial, damage for the person who provides that activity.

Another important delimitation must be made from the provisions of art.98, paragraph 4, let.b of Government Emergency Ordinance no.195/22.12.2005, regarding the protection of the environment. According to the text, *It is a crime, and it is punished with prison from 1 to 5 years, if it is likely to endanger human, animal or plant life or health: discharging waste water and waste from ships or floating platforms directly into natural waters or knowingly causing pollution by discharging or submerging dangerous substances or wastes into natural waters directly or from ships or floating platforms.*

The main difference from the provisions of art.356 of the Criminal Code is that *verbum regens* is only possible by *discharging* waste water and waste, or *discharging or submerging* dangerous substances or waste. The most striking problem is the similitude with the provisions of art.92, paragraph 1 of Law no.107/25.09.1996, earlier analyzed. It is clear that both the objective and subjective elements of art.98, paragraph 4, let.b of G.E.O. no.195/22.12.2005 are included in the constitutive content of art.92, paragraph 1 of Law no.107/25.09.1996. More than that, the penalty limits are exactly the same.

[13] M.Gorunescu – *Crimes against the environment* (original title: Infracţiuni contra mediului înconjurător), CH Beck Publishing House, Bucharest, 2011, pag.249

My appreciation is that we are facing a double incrimination of the same conduct, punishable in the same manner found in two different acts. This situation must be regulated as soon as possible, by abolishing the provision found in art.98, paragraph 4, let.b of G.E.O. no.195/22.12.2005. Equally, I consider that repealing the latter is a salutary step in simplifying the criminal legislation in regard to water protection, but also I find it normal to remove specific water regulations from the same paragraph as crimes regarding nuclear materials as they are both found in art.98, paragraph 4 of the act earlier mentioned.

The third essential delimitation that must be made in this study is between the provisions of art.356 of the Criminal Code and art.49 of Law no.17/07.08.1990, regarding the Legal regime of interior maritime waters, of the territorial sea, of the contiguous zone and of the exclusive economic zone of Romania. According to paragraph 1 of the latter, *It constitutes a crime and it is punishable by prison from 3 months to 2 years, or by a fine, the discharge of polluting substances from a ship into: a) inland waterways or harbors to which Marpol 73/78 applies; b) territorial sea; c) the exclusive economic zone or an equivalent area established in accordance with international law; d) the high seas.*

Judging by penalty limits and its constitutive content, respectively the immediate consequence does not imply a minimal damage done to the environment or to water quality, I appreciate this provision as an attenuated form of art.356 of the Criminal Code.

It is relevant to analyze an aggravated form of this crime, provided by paragraph 3 of art.49 of Law no.17/07.08.1990: The act provided for in paragraph 1, which has caused significant damage to marine life is punishable by prison from one to five years.

The immediate consequence is a *significant damage to marine life*, which has to be appreciated *in concreto*. This outcome is far wider than the provisions of art.356 of the Criminal Code[14], but I believe it cannot coexist with the provisions of art.92 paragraph 1 of Law no.107/25.09.1996, namely because the area of protection is the same, and if the conditions of the latter incrimination are not fulfilled, then the legal qualification according to paragraph 3 of art.49 of Law no.17/07.08.1990 is possible.

4. Conclusions

The expected result of this study is to establish the limits of water infestation, as a crime, regulated by art.356 of the Romanian Criminal Code, taking into account its relationship with special provisions discussed in the third part of this paper.

I consider that art.92 paragraph 1 of Law no.107/25.09.1996 represents an aggravated form by reference to art.356 of the Criminal Code.

If the action or omission that represents the material element of the crime is done against a water network or water source of anthropic origin, then, the only incrimination viable is the general provision of art.356, paragraph 1 Crim.Code. If the material object of the crime is water situated in natural water networks or sources, and the action is done by *discharging, dumping or injection into surface water and groundwater*, I appreciate that the legal qualification should be done according to art.92 paragraph 1 of Law no.107/25.09.1996, because, as shown above, the immediate consequence of the two crimes is covered by the latters provisions.

If the material element is done otherwise than by the three actions above mentioned, the only valid incrimination is that of art.356, paragraph 1 Crim.Code.

Considering the crime regulated by art.92 paragraph 2, letter a) of Law no.107/25.09.1996, I appreciate that if the action is done in a systematic manner, this regulation shall prevail, but if the systematic way of action has not been proven, the act can be legally qualified as the crime provisioned in art.356, paragraph 1 Crim.Code.

Regarding art.98, paragraph 4, let.b of G.E.O. no.195/22.12.2005, although it is a clear form of an aggravated crime by reference to art.356 Crim.Code, it is also a double incrimination of art.92 paragraph 1 of Law no.107/25.09.1996. It is obvious that the penalty limits are the same, the normative content is included in the latter provisions, and its place in G.E.O. no.195/22.12.2005 does not respect the natural organizing of criminal provisions by the object of protection, therefore, I consider, *de lege ferenda*, that art.98, paragraph 4, let.b of G.E.O. no.195/22.12.2005 must be abolished.

Last, I have observed that art.49 paragraph 3 of Law no.17/07.08.1990 is a special aggravated form of art.356 Crim.Code, which shall apply accordingly if the conditions of the incrimination are fulfilled.

References

- G.Antoniu, T.Toader (coord.) – Explanations of the New Criminal Code (original title: Explicațiile Noului Cod Penal), vol.IV, Universul Juridic Publishing House, Bucharest, 2015
- V.Dongoroz (coordinator) – Theoretical Explanations of the Romanian Criminal Code (original title: Explicații teoretice ale Codului Penal Român), vol.IV, ed.a II-a, CH Beck and Romanian Academy Publishing Houses, Bucharest, 2003
- M.Gorunescu – Crimes against the environment (original title: Infracţiuni contra mediului înconjurător), CH Beck Publishing House, Bucharest, 2011
- D.Marinescu, M.C.Petre – Treaty of environmental law (original title: Tratat de Dreptul Mediului), Univesitara Publishing House, Bucharest, 2014

[14] And I consider the crime regulated by paragraph 3 of art.49 of Law no.17/07.08.1990 to be a specific aggravated incrimination for art.356, paragraph 1 of the Criminal Code, considering that the outcome is an effective damage to marine life.

COMPUTER SEARCH VERSUS TECHNICAL-SCIENTIFIC FINDING

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Abstract

The study intends to establish delimitation between computer search and technical-scientific finding, having as a starting point certain cases encountered in the judicial practice when the law enforcement authorities confused the scopes of these two evidentiary procedures. The author emphasises that such an error can injure the fundamental rights of the parties of the criminal case, including the right of defence that the suspect or the defendant has, and can lead to the exclusion of the gathered evidence.

Keywords: *search, technical-scientific finding, computer system, the role of the specialists, the exclusionary rule.*

1. Introduction

It is a more and more frequent practice that law enforcement bodies, especially during the criminal investigation stage, confuse the two technical evidentiary procedures: computer search and technical-scientific finding of the storage media.

The situation seems to be generated by the fact that both investigative methods involve the support of specialists in fields that exceed criminal procedure, which tends to generate the perception that it is one and the same procedure.

Such an evaluation is actually false, and the decision for a technical-scientific finding when the case asks for a computer search can lead to a breach in certain procedural rules that impact on the rights, which are guaranteed as a fundamental principle for the parties of the trial, including on the right of defence. The problem does not imply a simple displacement of evidentiary procedures and this is due to the fact that the Criminal Procedure Code stipulates considerably different norms in respect to the computer search compared with the technical-scientific finding. Therefore, the consequences can take severe forms, up to the point of a nullity of the procedure and to the exclusion of evidence.

This study intends to wise up the fundamental differences between the two evidentiary procedures and to identify the situations and circumstances in which the judicial authority can resort to one of them and to offer solutions in order to rectify an inconsistency in case of evidence collection during a criminal case. The analysis is structured based on a real case identified in the practice of the criminal investigation bodies, and the arguments shall capitalize the aspects that the doctrine has developed till now regarding the scientific evidentiary procedures.

Content

Jurisprudence recorded the following situation:

In the case no. 183/P/2013 run by a unit of the prosecutor's office, several documents were collected as evidence and, according to the prosecutor; they were obtained during a technical-scientific finding of a **memory-stick**. The technical-scientific finding is performed by specialists who work within an authority outside the General Prosecutor Office.

The examined memory-stick had been previously lifted from a person's house place in the course of a house search authorized by the judge for rights and liberties.

After the house search was completed, the prosecutor asked the judge for rights and liberties for the authorization of a computer search on the memory-stick, under the provisions of Article 168 Criminal Procedure Code, because the memory-stick is a computer data storage medium [art. 181 Criminal Code]. The judge for rights and liberties **authorized the computer search,** explicitly pointing out the legal provisions to be complied with during the evidentiary procedure.

After the computer search was authorized, the prosecutor actually ordered **a technical-scientific finding** over that computer data storage medium. In the order that authorized the search, the prosecutor referred to the resolution and the authorization of a computer search.

The designated specialists started to search the memory-stick and identified several scanned documents and printed them in a written form. A **technical-scientific report** was written, containing the technical methods used to access the computer data storage medium, and the written documents were attached to the file case as evidence.

From the above mentioned summarized presentation, we notice that the prosecutor used the authorization of a computer search to order a technical-

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scientific finding over a computer data storage medium. At least apparently, this latter procedure was the one to be performed.

The juridical problem is actually generated by the considerable differences in regards to the procedural circumstances of each of the two evidentiary procedures.

Thus, according to Article 172 paragraph (9) Criminal Procedure Code, the technical-scientific finding may be ordered by the criminal investigation body when there is a peril for the evidence to be lost or for the facts to change or an urgent clarification of the facts and circumstances of the case is needed.

According to Article 181[1] paragraph (1) Criminal Procedure Code, the criminal investigation body identifies the object of the technical-scientific finding, the questions that the specialist has to answer to and the time limit for this action. The criminal law doctrine noticed that, unlike search, in the case of a technical-scientific finding, the law does not stipulate the obligation of the judicial authorities to present the objects to the parties and likewise nor the possibility for the parties to have a party-specialist[1].

On the other hand, the computer search is ordered when an investigation of a computer system or of a storage media is required. Due to the fact that such a procedure is a blatant intrusion into a persons' private life, the previous authorization from a judge for rights and liberties is compulsory. Moreover, according to Article 168 paragraph (11) Criminal Procedure Code, the computer or a computer data storage medium search is performed in the presence of the suspect or of the defendant, and he is allowed to be attended by a trustful person and by his attorney.

Likewise, we can notice a difference of content between the procedural documents written at the end of each procedure. Thus, the technical-scientific finding is followed by a report including the description of the operations performed by the specialist, the methods, the programs and equipments used, and of the technical-scientific finding conclusions [art. 181[1] paragraph (2) Criminal Procedure Code], while the computer system search ends with a written record that contains other type of data [for example, according to Article 168 paragraph (13) letter c) Criminal Procedure Code, the name of the persons who assist the search].

Due to these differences, the confusion between the two evidentiary procedures generates severe effects for the criminal trial, and leads even to the avoidance of certain norms, which have the purpose to guarantee the parties' defence right during a criminal trial.

Thus, the substitution of a computer search with a technical-scientific finding triggers the consequence that the person from whom the storage media was taken is not going to be present during the technical operation procedure because the law does not enforces the obligation that the criminal investigation body or the specialist invites or asks the person to be present during the procedure. Such an obligation is stipulated for the computer search, and not for the technical-scientific finding.

Subsequently, as the party is not present and has no knowledge of the performance of the evidentiary procedure (because, we recall it, there is no obligation of telling the parties about the performance of the technical-scientific finding), the party will not know what evidence was extracted from that specific storage media and therefore he will not be able to certify in any way (for example, with a signature) the fact that the evidence was obtained during that evidentiary procedure.

Under these circumstances, due to the fact that it is a violation in the criminal procedure norms, the problem of nullity of the evidentiary procedure raises, the natural consequence being the exclusion of the gathered evidence.

We add the fact that, under these circumstances, there is the risk that the evidence is irremediably lost for the case. Theoretically, we do not exclude a new performance of an evidentiary procedure under the law, but this option is rarely encountered in practice because the prosecutor usually orders that the computer data storage medium is given back to the suspect/defendant immediately after the specialist searched the content of the device; the case file shall only keep the copies ("clones") on which the procedures were performed. Under these circumstances, there is an obvious risk that the original is later destroyed by the suspect/defendant, as he has no interest to keep it especially if he knows that the data on the device are unfavourable to him during the trial. Consequently, the evidence that remains in the file ("the clones") automatically looses its function to support the circumstances of the case that it apparently shows.

Under these circumstances, a correct delimitation of the two evidentiary procedures is necessary.

We note that **computer system search** designates the procedure for the **investigation**, **discovery**, **identification and collection** of evidence stored in a computer system or in a computer data storage medium [Article 168 paragraph (1) Criminal Procedure Code]. Due to its technical characteristics the computer system search is performed either by specialized police personnel, or by specialists that work within the judicial authorities or somewhere else [Article 168 paragraph (12) Criminal Procedure Code].

Instead, the technical-scientific finding designates the procedure of using the knowledge possessed by a specialist to **analyse and explain certain evidence** in possession of the judicial body. This procedure asks for a specialist because the judicial authority cannot understand and assess, exclusively on its judicial background, the information contained in the evidence because this information belongs to another technical area and not to law area.

[1] M. Udroiu, A.M. Şinc în M. Udroiu (coord.), *Codul de procedură penală. Comentariu pe articole*, ediția a 2-a, Ed. C.H. Beck, Bucureşti, 2017, p. 899-900; B. Micu, R. Slăvoiu, A.G. Păun, *Procedură penală. Curs pentru admiterea în magistratură și avocatură*, ediția a 3-a, Ed. Hamangiu, 2017, p. 172

This difference is eloquently described by the criminal law doctrine, which notes that: "The criminal investigation bodies **collect** the traces and the material evidence during various tactical forensic activities: search on the scene, collection of objects and documents, **search,** establishment of the flagrant crime, etc. The traces and the material evidence **are of no value to the case as long as they have not been analyzed, interpreted or capitalized** in order to collect the maximum of data needed to contribute to the elucidation of various circumstances regarding the commission of the crime, the offenders, etc. for the purpose of finding the truth. For **the capitalization of the traces and material evidence,** for the above mentioned purpose**, adequate specialized knowledge and technical means are needed, which the criminal investigation bodies, regardless of their equipment**, **do not possess.**" It is stressed out that ordering of technical-scientific findings is necessary "in order to ensure **the scientific capitalization** of the traces and of the material evidence" [2].

Consequently, although the two evidentiary procedures – computer system search and technical-scientific finding – are similar because, due to their technical characteristics, they ask for the presence of specialists, the essential difference consists on **the completely different purpose** that the specialists have.

Thus, for the computer system search, the specialist **limits to discover, identify and collect the evidence** found in the computer system, but he is not assigned to analyse them.

On the other hand, for the technical-scientific finding, the specialist's role is precisely to support the judicial authorities to analyse and understand the technical information that the evidence reveals.

We can say that the relation between the two evidentiary procedures represents an exchange, for the situation of computer data, of the classical relation between a house search and a technical-scientific finding. If, for example, "a work of art" is found in a suspect's house and the criminal investigation body suspects it was stolen, it is absolutely necessary to establish if that "work of art" is the original or a copy. In this case, the specialist's support does not consist in finding the evidence, because it is collected during the house search. In fact, thanks to his specific knowledge in the art field, the specialist analyzes the inherent characteristics of the evidence, which, obviously, the criminal investigation body cannot perform.

If the specialist limits to identify the existence of certain documents (for example, bills, agreements, notes, photos, etc.) in the computer data storage medium, and he later on prints them, we consider that he does nothing more than to identify a computer data storage medium and to extract various information that can turn into evidence. In this case, we cannot talk about the specialist's contribution to the interpretation of the data, as it is obvious that the data have no technical nature that recalls for the person who identified and printed them to be an IT specialist. Therefore, the support of the specialist is not necessary for the scientific capitalization of the evidence, because such evidence has no scientific nature, and his support is necessary only to identify the evidence, as it is stored on a computer system.

The evidentiary procedure for this case is actually a genuine computer system search.

Technical-scientific finding is yet performed when, for example, the IT specialist's role is to analyze the software characteristics (functions, capacity, the possibilities to encrypt, etc.) after that software was discovered during a computer system search on a hard drive. In this case, the specialist contributes, based on his skills, to the analysis of the criminal method or result, which the criminal investigation body could not make without his support.

Conclusions

A fair delimitation between the various technical evidentiary procedures stipulated by the criminal procedure legislation is essential for the proper conduct of the criminal investigation activities.

The right identification of the procedure that has to be performed in a certain criminal case, taking into consideration its characteristics, can ensure the premises for the compliance with the fundamental rights of the parties during the criminal trial and, at the same time, reduces also the risk to apply the exclusionary rule.

Taking into consideration the fact that collecting evidence in a criminal case is a difficult task, the consequences of errors when an evidentiary procedure is ordered and performed can hardly be repaired and, most of the times, they will affect the solution of the case.

References

- C. Aioniţoaie, I.E. Sandu (coord.), *Tratat de tactică criminalistică*, Ed. Carpaţi, 1992
- B. Micu, R. Slăvoiu, A.G. Păun, *Procedură penală. Curs pentru admiterea în magistratură și avocatură*, ediția a 3-a, Ed. Hamangiu, 2017
- I. Neagu, M. Damaschin, *Tratat de procedură penală*, ediția a 2-a, Ed. Universul Juridic, 2015
- M. Udroiu (coord.), *Codul de procedură penală. Comentariu pe articole*, ediția a 2-a, Ed. C.H. Beck, Bucureşti, 2017
- N. Volonciu, A.S. Uzlău (coord.), *Codul de procedură penală comentat*, ediția 3-a revizuită și adăugită, Ed. Hamangiu, 2017

[2] C. Aioniţoaie, I.E. Sandu (coord.), *Tratat de tactică criminalistică*, Ed. Carpaţi, 1992, p. 238-239

EMPLOYEE PARTICIPATION RIGHTS NEGOTIATION IN COMPANIES RESULTING FROM A CROSS-BORDER MERGER

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Abstract

The cross-border merger may have major consequences on the employee rights of the companies undergoing this process. The employees find themselves before two great uncertainties. The first one regards the continuity of the labor contract under the rights acquired before the merger, with respect to which the European legislator adopted Directive 2001/23/CE on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. The second one refers to maintaining the employee participation right to the administration and supervision of companies, where they exist, in the company resulting from the cross-border fusion process, right protected at European level through article no. 16 of the Directive 2005/56/EC on cross-border mergers of limited liability companies, completed with Regulation(EC) 2157/2001 in the Statute for a European company and with Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employee. The employee participation rights in resulting companies from a cross-border merger and the way they are negotiated are aspects of great importance in influencing the make-decision process regarding to operate or not such reorganization. The paper aims to achieve to an analyses of the legal framework provided by the European norms on the negotiation of participation rights of employees in the event of a cross-border merger, emphasizes the aspects with regard to which the regulation in the domain requires to be modified and proposes the lege ferenda amendments.

Keywords: *employee participation rights, negotiations, special negotiating body, agreements on employees, involvement, standard rules.*

1. Introducere.

The cross-border merger of companies, as a way to exercise the freedom of establishment, is inseparably linked to employee protection within the participating companies. The continuity of the employment relationship and the preservation of the employee rights acquired prior to the merger, as well as the preservation of participation rights to administration and management of the company resulting from the cross-border merger within the supervisory and management bodies represent the two aspects regarding to which the European legislation regulated protection mechanisms. Unlike the issue of the continuity of the employment contract within the work conditions grandfathered prior to the cross-border merger, which became the subject of numerous research in juridical literature[1], the right of participation in the administration of the company resulting from the merger and negotiating these rights have been less addressed[2].

The difference is understandable, if we take into account the fact that all Member States of the European Union have regulations regarding the preservation of rights acquired through the labor contracts , but not all of them have a legal framework which allows the employees to participate in the governance of the companies which employed them.

Therefore, on one hand there are Germany and the Netherlands, States in which employee participation rights are considered as being very important, while on the other hand there are States such as Italy or Romania that do not have such a system. In between these two extremes, there are States such as Austria or France, which have a system of employee participation, but are more reserved regarding the degree of participation of the employee in comparison to Germany. Even in those States that do not have a national participation system, there exists the obligation of respecting the employee participation rights by applying the "before and after" principle.

With the purpose of protecting the participation rights of the employees belonging to the companies partaking the process of cross-border merger in case in which the resulting company establishes its social headquarters in a State in which exists the risk of violation of these rights, the European legislator

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[1] Regarding the employee protection in the case of company transfer through merger, see R. Routier, *Les fusions de sociétés commerciales. Prolégomènes pour un nouveau droit des rapprochements,* Librairie Générale de Droit et de Jurisprudence, Paris , 2004, pp.342 and s.o.; I.T. Stefanescu, *Theoretical and practical treaty,* Bucharest, Universul Juridic Publishing House, 2012, p 466-474; A.Uluitu, *The employee rights in case of transfers of undertakings, businesses or parts of undertakings,* Romanian Journal for Labor Law number 1/2006, pp 28-35 F.Bejan, *Legal aspects of the transposition of the Directive 2001/23/EC regarding the safeguarding of employees rights in the event of transfer in the Romanian Law,* Lex Scientia Lesij, Number XX, volume 1/2013, pp 16-23.

[2] Regarding the employee participation rights, see U. Veersma, S. Swinkels - Transfer: *In European Reviiew of Labour and Research* Participation in European Companies: views from social partners in three Member States Volume11, 2005 pp. 189-205; F.Bejan, *"European Union Rules on employee participation right within the framework of cross-bordee merger ."*, Advances in fiscal, poiitical and law sciences, Proceedings of the 2nd International Conference on Economics, Political and Law Science (EPLS '13), pp 43-49.

adopted a adequate legal frame, contained in article no. 16 Directive 2005/56/EC on cross-border mergers of limited liability companies[3], completed with Regulation(EC) 2157/2001 in the Statute for a European company[4] and with Directive 2001/86/EC supplementing the Statute for a European company with regard to the involvement of employee[5].

Our research is focused on the legal aspects of negotiation of participation rights in resulting companies as they are regulated by the European legislation. Due to the fact that, in practice, negotiations take place at a slow pace and represent an impediment towards finalizing cross-border mergers, we aim to identify the aspects regarding which the present regulation needs to be improved, so that its provisions would be a consistent support for the employees and for companies.

2. Negotiation of participation rights.

The procedure for determining the participation rights in the company resulting from the cross-border merger is based on the model of the European Company. At Community level, Article 16 paragraph (3) extends the legal regime established by Council Regulation no. 2157/2001 and by Directive 2001/86/EC with regard to the involvement. Employees in case of establishing European Companies (EC), which become applicable to cross-border operations. At national level, Member States which established participation mechanisms, have adopted participation rules in relation to the peculiarities of their own social policies, harmonized in accordance with Community rules in the field.

Basically, if the parties do not decide otherwise, participation rights are established following negotiations between employees and employers, carefully and thoroughly regulated. Under certain circumstances, each party may choose to apply standard rules, as alternative to conducting negotiations and concluding an agreement.

According to the relevant provisions of Directive 2001/86/EC, the negotiation of participation rights by the employees and employers is subject to a legally regulated procedure, procedure which begins with the creation by the employees of a special negotiating body (SNB), continues with the ongoing negotiations between the SNB and the management bodies of the merging companies and can be finalized by an agreement between the parties with regard to the employee participation rights.

2.1. Establishing a special negotiating body (SNB)

The interests of the employees during the procedure for establishing participation rights are represented by a special negotiating body - SNB, the members of which are elected or appointed in proportion to the number of employees of the merging companies.

According to the Community rules, SNB are created after the publishing of the draft terms of the cross-border merger. As soon as possible after publishing, the management bodies of the participating companies must provide information about the identity of the companies, subsidiaries, establishments, and the number of their employees, to have all data available to create the special negotiating body and to open negotiations.

Thus, the creation of SNB is conditional upon the execution by the merging companies of a prior obligation to inform, which must be fulfilled as soon as possible after publishing the draft terms of cross-border merger.

In our opinion, the term to set up a special negotiating body is not enough regulated. *De lege ferenda* it requires a period expressed in time units to replace the current vague wording of the legislation, so as to limit any delays caused by a possible lack of the parties' intention to engage in serious negotiations.

The members of the SNB are established in proportion to the number of employees employed in each Member State by the participating companies and concerned subsidiaries and establishments. The number of members is determined by allocating in respect of a Member State one seat in the SNB corresponding to each 10% or a fraction thereof of the total number of employees employed by the participating companies and concerned subsidiaries or establishments in all the Member States.

The practical ways for appointing or electing representatives are established by the national law of each Member State. The measures taken by the Member States in this regard must ensure, to the extent possible, that each SNB includes at least one representative for each participating company which has employees in the respective Member State.

If there is a large number of companies involved in the merger and the mechanism to appoint SNB members may result in employees of a company that are not represented, the number of members for each Member State can be supplemented. The additional members from each Member State must be established so as to ensure the including in the SNB of at least one representative for each participating company which is registered and has employees in that Member State, and which will cease to exist as a separate legal entity following the merger. The increase of the number of seats in the SNB must be made so that the number of the additional members to not exceed the number of members previously designated and to not result in a double representation of the employees concerned, and if the number of such companies is higher than the

[3] Published in the Official Journal, nº L 310/2005.
[4] Published in the Official Journal, nº L 294/2001.
[5] Published in the Official Journal, nº L 294/2001.

number of the available additional seats, these seats shall be allocated to companies in different Member States by decreasing order of the number of employees.

Both in the legal literature[6] and practice in the field, critics were brought to the SNB structure, particularly with regard to the calculation of the number of employees based on which the SNB structure is established. *De lege ferenda*, a simplified algorithm is required to determine the SNB structure, so as to remove current uncertainties.

With regard to the main role of the SNB, it has the responsibility to negotiate with the representatives of their employers the substance of the employee participation rights in the company resulting from the cross-border merger. Meantime, SNB may decide not to open negotiations or to terminate negotiations already opened.

As a rule, the SNB shall take decisions by double majority, respectively by an absolute majority of the votes of the SNB members provided that such a majority also represents an absolute majority of the represented employees. Each member of the SNB shall have one vote.

Exception to the rule on decisions made by SNB are the situations where the result of negotiations leads to a reduction of participation rights, if participation covers at least 25% of the overall number of employees of the participating companies. In order to meet the requirements of the law in these particular situations, decisions must be taken with a majority of two thirds of the members of the SNB representing at least two thirds of the employees from at least two Member States. Also, given the consequences, the decision not to open negotiations or to terminate negotiations already opened shall be taken with the same special majority.

SNB and the competent bodies of the merging companies are required to conduct negotiations with a view to reaching an agreement on employee participation in the internal structure of the company resulting from the merger. The purpose of negotiation is that the employees preserve their influence on the participating companies, influence which could be affected by the fundamental structural changes in which their employer gets involved.

In order for the negotiations to be opened, the European legislator imposed on employers the obligation to inform employees with regard to the draft terms of the cross-border merger and its actual implementation. The reason to regulate the obligation to inform is to allow the employees' representatives to assess the size of the merger and its impact on their rights, so they can prepare on real and complete grounds the negotiation of the legal system of participation within the internal organization of the company resulting from the cross-border merger.

During negotiations, the SNB may be assisted by experts upon request. Given that the participating companies are financing the functioning of the SNB, it is up to the Member States to limit costs, so that the budget allocated to negotiations to cover the services of one expert.

Regarding the duration of negotiations, the Directive establishes a maximum term of six months commencing as soon as the SNB is established to finalize negotiations. The parties may decide, by joint agreement, to extend negotiations for other maximum six months, so that the duration of negotiations does not exceed one year from the establishment of the Sunbathe participants in the negotiations, the representatives of the employees as well as the companies' representatives, shall, in the exercise of their functions, enjoy the same protection and guarantees provided for the nationals of the state of the beneficiary company's registered office in similar qualities and activities.

All participants in the negotiations, including experts, are obliged not to reveal any information available to them during negotiations and which has been given to them in confidence. The obligation of confidentiality shall apply to the participants in the negotiations even after the expiry of their terms of office.

Except as otherwise provided in Directive 2001/86/EC, the legislation applicable to the negotiation procedure shall be the legislation of the Member State in which the registered office of the company resulting from the cross-border merger has its registered office.

2.2. Negotiating an Agreement

Negotiations between the employees' representatives and the SNB of the merging companies may be terminated by concluding an agreement on arrangements for the involvement of employees.

In principle, the parties are free to determine the applicable rules on participation, according to their interests and as negotiated. The only legal demands of which they are bound are the written form of the agreement and a minimum content including the terms expressly provided by law.

Hence, according to Article 4 paragraph (2) of Directive 2001/86/EC, the agreement shall be concluded in written form and shall specify the following terms of understanding between the parties:

- the scope of the agreement;
- the substance of the arrangements established by the parties with regard to the arrangements for the involvement of employees;
- the date of entry into force of the agreement and its duration; and
- the cases where the agreement should be renegotiated and the procedure for its renegotiation.

Among the measures taken following the negotiations, the document confirming the will of the parties must contain the following aspects related to employee participation:

- the number of members in the supervisory or

[6] B. Keller, *The European Company statute-employee involvement-and beyond*, in Industrial Relations Journal, Vol. 33, no. 5, 2002, pp. 424–445

administrative bodies which the employees are entitled to elect, appoint, recommend or oppose;

- the procedures as to how these members may be elected, appointed, recommended or opposed by the employees; and
- the rights of the members elected, appointed, recommended or opposed by the employees.

3. Standard rules.

The conclusion of an agreement is only one of the solutions that can be given to the employee participation issue. It should be considered that the negotiation process does not necessarily end by concluding an agreement on arrangements for the involvement of employees, since there is a possibility that the parties cannot reach an agreement in this regard.

Also, the employees, through their representatives, may opt for the conclusion of a bargaining agreement or may find as inefficient the delay of the cross-border reorganization due to the performance of a negotiation process, against the fact that, without a bargaining agreement, their participation rights are, in subsidiary, protected by law.

In our opinion, from the perspective of the participating companies, the conducting of negotiations has some key disadvantages.

One of these concerns the fact that the negotiation procedure may last up to one year. By default, the efficiency of the cross-border merger is affected.

Direct and implied costs of such procedure are equally a disadvantage of the negotiation process. All expenses made during negotiation with regard to the functioning and protection of SNB, respectively of the competent bodies attending negotiations, is financed by the participating companies.

In addition, if we consider that during negotiations, changes can take place in the economic and legal status of the companies involved, the necessary updates are, in turn, time and resource consuming so that the losses encountered by the attendees in this context might question the cross-border decision itself.

Finally, there is a possibility that the parties do not conclude an agreement, either because they so decide or because negotiations were blocked.

Given these aspects, applying the standard rules may be the best solution for establishing the arrangements for the involvement of employees.

3.1. The scope of standard rules

In Article 16 paragraph (4) of the Directive on cross-border mergers, the European legislator gives alternative legal solutions to establishing participation rights based on a negotiation process. According to the cited provisions, under certain circumstances, the social aim may be achieved also by applying the standard rules regarding participation.

The settlement of the scope of standard rules reflects the concern to provide merging companies and employees a variety of options to cover different situations in which they might be. The initiative to apply standard rules can belong to both employees and the competent bodies of the participating companies. In some cases, the decision to implement such alternative solution may be a unilateral act of will and in others may be the results of the agreement between the parties.

Standard rules apply in the following cases:

a) SNB and the competent bodies of the merging companies so agree;
b) SNB has decided not to initiate negotiations or to close negotiations already opened and rely on the standard rules established by the national law of the Member State where the company resulting from the cross-border merger has its registered office;
c) the legal deadline for completing negotiations expired without the parties reaching an agreement on the involvement and the competent bodies of the participating companies decide to apply the standard rules and continue the merger process, while SNB does not decide to open negotiations or terminate negotiations already opened; and
d) The competent bodies of the merging companies decide to directly abide the standard rules of the Member State where the registered office of the company resulting from the merger is to be situated, without prior negotiation.

It has been argued that there is a risk that the implementation of standard rules to be decided by the employers exclusively for their benefit and not for a proper settlement of employee participation. In order to limit this eventual risk, the legal framework in the field was supplemented with several measures.

Thus, the standard rules can be applied only if:

a) before the registration of the cross-border . merger, one or more participating companies applied forms of participations covering at least 33% of the total number of employees in all participating companies or
b) before the registration of the cross-border merger, one or more participating companies applied forms of participations covering at least 33% of the total number of employees in all participating companies and if SNB so decides.(Article 16 paragraph (3) point (e) of Directive 2005/56/EC and Article 7 paragraph (2) point (b) of Directive 2001/86/EC).

Hence, the competent bodies of the merging companies may decide to make use of standard rules only if the participation covers at least one third of the total number of employees in all merging companies. It is estimated that the one third limit rule corroborated with the participation rules established by the standard rules are likely to provide sufficient protection of employee rights.

Exceptionally, where the one third thresholds are not reached, the standard rules may be applied only of

SNB so decides. Without the consent of SNB, the standard rules do not apply.

In this second scenario, practically the decision to apply or not standard rules to the participation system is made by the ones directly interested, the ones that can best appreciate the appropriateness and effects of their decisions, so even more the suspicion of violating employee rights is removed.

Besides the actual protective measures referred to above, the directive on cross-border mergers is supporting by provisions of Article 16 paragraph (6) the strengthening of the protection mechanisms of participation systems.

The provisions of the said rule specifically devotes the obligation of the company resulting from the cross-border merger to take a legal form for which the national law establishes a participation system, where at least one of the merging companies knows such a system. For example, if the applicable national law allows the exercise of participations rights only in joint stock companies, the absorbing company or the company newly created by the cross-border merger shall be set up in this form or change its legal form, as the case may be. Certainly, a change of the legal form triggers a series of other changes in the organization and functioning proper to the respective type of company, which, in turn, have to be made. Supported by these measures, the legal system of participation established by applying the standard rules ensures the observance of the "before and after" principle.

3.2. Standard rules and applicable law.

According to the standard rules, the number of members in the administrative and supervisory bodies of the company resulting from the cross-border merger shall be equal to the highest percentage that applies to participating companies.

The allocation of seats in the supervisory or administrative body among members representing employees from different Member States, namely how they can recommend or oppose the appointment of members in these bodies is made by the SNB or by the employees' representatives, as the case may be, depending on the number of employees from each Member State.

In setting the participation mechanisms, the competent body must ensure, where possible, that from each Member State at least one employee is appointed, giving priority, if necessary, to the Member State where the registered office of the company resulting from the cross-border merger is to be established.

Since the members elected, appointed, recommended in the administrative or supervisory body are full members of these structures, they have the same rights and obligations as the shareholders' representatives.

Where the standard rules are implemented, the applicable law is the law of the registered office of the company resulting from the cross-border merger. The applicable standard rules are set in the internal rules of Member States, as these transpose Directive 2001/86/EC with regard to the involvement of employees in its part referring to standard rules, including part three of the annex to the directive.

It should be noted however, that surprisingly, the Community rules give Members States the option to decide to preclude, by the national legislation transposing the directive, with no distinction, the applicability of standard rules. However, none of the Member State made use so far of the right to bring such a regulation.

Obviously, the passing of rules to preclude the alternative to apply standard rules significantly limits the options of the parties and may have serious consequences on the cross-border merger.

In this hypothesis, the only legal means by which the forms of employee participation may be established is negotiation, followed by the execution of an agreement. A failure of negotiations would result in a failure of the entire draft terms of the cross-border merger, given that the operation cannot be registered without establishing a participation mechanism.

From this perspective, the possibility given to Member States to preclude the application of standard rules by internal rules may be considered a breach of the free movement of companies, which *de lege ferenda* must be removed from the Community regulatory framework with regard to employee participation.

4. Conclusions and *de lege ferenda* proposals

The negotiation procedure is considered as being a complicated one. We find it useful to configure, in our findings, the essential aspects of employee participation negotiation in the company's management:

a) The establishment of participation rights is not mandatory for all cross-border mergers;
b) The company resulting from the cross-border is mainly subject to any rules relating to employee participation of the Member State where its registered office is to be established by the modifying or constitutive act, and in subsidiary to rules of exception;
c) Negotiations may start only if the management bodies do not decide to apply the standard provisions;
d) Where the negotiations are opened, employee participation often becomes a barrier to the completion of the cross-border merger. In practice, many mergers fail due to the difficulty to find a solution to the social issue;
e) The content of participation rights is established considering the „before and after" principle and is regulated so that the employee participation level in the company resulting from the cross-border merger to maintain, basically, the highest level of participation known before the operation in at least one of the participating companies;
f) The actual influence of the employees on the company's strategic decisions varies from one national law system to another. One of the

consequences is that the extent to which the employees influence the activity of the company may start from proposing a candidate in one of its internal structures to deciding equally with shareholders, as it happens in the German system.

In the meantime, after the analysis conducted, we consider that the European regulation of employee participation rights would be subject to *de lege ferenda* amendments under the following aspects:

a) It is necessary that the future regulation sets a doubtless minimum duration for informing employees, a limited period to form SNB and a shorter term for conducting negotiations, all these to increase the efficiency of the operation. The fact that negotiations may last one year does not meet the required celerity for a cross-border merger. In practice, the duration of negotiations exceeds this term. In practice, the average duration required to form a special negotiating body is of three months after initiating proceedings for this purpose. If we add that employees should be informed "immediately" on the merger, which means another period of time, it obviously results that the duration of negotiations does not help to reach the economic purpose for which the operation was started;
b) The calculation method of the total number of employees according to which the SNB structure is set raises several issues in practice, especially where the participating companies have a large number of subsidiaries and establishments. A different mechanism for forming a SNB, a clear and easy to do one, should be regulated;
c) Given that currently the forms of involvement in different Member States are too diverse, in the view of the Community legislator, a better harmonization of the forms of participation in different Member States;
d) Considering that not all Member States have established in the national law participation mechanisms and consequently, employee protection can be ensured only by applying standard rules, paragraph 3 of Article 7 of Directive 2001/56/EEC, according to which "Member States may provide that the reference provisions in part 3 of the Annex shall not apply in the case provided for in point (b) of paragraph 2 of Article 7" shall be repealed.

The conclusion is that the European legislator has to clarify and modify the legal framework in domain, in order for the participation right to be safeguarded, . Such an improvement of the juridical norms will encourage the cross-border mergers of companies and will guarantee their freedom of establishment.

References

- I.T., Stefanescu*Theoretical and practical treaty*, Bucharest: Universul Juridic Publishing House, 2012
- B. Keller, The European Company statute-employee involvement-and beyond, "Industrial Relations Journal", Vol. 33
- F.Bejan,*"European Union Rules on employee participation right within the framework of cross-border merger ."*, Advances in fiscal, political and law sciences, Proceedings of the 2nd International Conference on Economics, Political and Law Science (EPLS '13, 2013
- U. Veersma, S. Swinkels - Transfer: *In European Review of Labor and Research* Participation in European Companies: views from social partners in three Member States Volume11, 2005
- Lencou D. , Menjucq M., *Les fusions transfrontalieres de sociétés de capitaux: enfin une réalité mais des difficultés persistantes!*, Editura Dalloz , Paris, 2009
- Craig, P. and de Burca, G., *Dreptul Uniunii Europene*, Bucharest: Hamangiu, 2009
- Menjucq, M., *Droit international et européen des sociétés*, Domat droit privé, Montchrestien, 2008
- R. Routier, Les fusions de sociétés commerciales. Prolégomènes pour un nouveau droit des rapprochements, Librairie Générale de Droit et de Jurisprudence, Paris, 2004
- Council Regulation no. 2157/2001 on the Statute for a European Company published in the OJ 294/1 of November 10, 2001
- Directive 2001/86/EC supplementing the Statute for a European Company with regard to the involvement of employees published in the OJ L 294/22 of November 10, 2001
- Directive 2005/56/EC on cross-border mergers of limited liability companies published in the OJ L 310/1 of November 25, 2005
- Directive 78/855/EEC of 9 October 1978 concerning mergers of public limited liability companies published in the OJ L 295/36 of October 20, 1978

EQUAL TREATMENT OF YOUNG PEOPLE AND SENIORS: "PLEADING" FOR A SPECIAL LAW ON AGE DISCRIMINATION

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Abstract

Prohibition of age discrimination is one of the sine qua non conditions of dignified life of any and every citizen. Regardless if we relate to labour or to other domains of public life, namely education, health, culture, participation in decision making process or access to goods and services, people should be equal in rights throughout their lives. The human life cannot be divided into spans in which the violation of human right is permitted and spans in which it is not. Age is always a quality and never a weakness. However, in real life, exclusion, restrictions and limitations of rights based on age criteria are day-to-day occurrences. Age discrimination affects young and less young individuals, women and men, and seems to be accepted in many countries and is even more so accepted in Romania. It is ordinary for a young person or for a person having a certain age to be rejected by the employers or by some of us, in our day-by-day life. The present paper aims to underline the seriousness of age discrimination, to analyse the rights provided by the legal rules and ignored through different practices according to age criteria, to identify legal measures having as purpose to improve the legal regime of equal treatment regarding age criteria in all fields of public life and to overcome the consequences of discrimination based on age.

Keywords: *young people, seniors, age discrimination, equal treatment, de lege ferenda.*

1. Introduction

The issue of age discrimination of young and senior employees is relatively new in the Romanian legal system and Romanian juridical literature, aspect which is explainable taking into account that the first normative acts regarding this subject in Romania have been adopted in the year 2000. It should be pointed out that national-level legislative action has risen from our obligation as a candidate state for accession to the European area to embrace the Community acquis in domain.

The mere existence of a legislative framework did not modify the practices of employers. Paradoxically, in the recruitment process, young people are required to have working experience, whilst, for seniors, the same experience is no longer an employment criteria. Either this, or young employees have small salaries because "they are young", and seniors are no longer kept within the company because "they are no longer young". And these are just two of the many cases in which age makes the two previously mentioned categories to be vulnerable within the labour market, marginalized and even stigmatized[1].

Age discrimination is increased in Romania and the consequences are severe and have a great impact on Romanian society. The abilities, needs, and aspirations are regarded in an unlawful, immoral way through their age.

This article aims to achieve to an analyses of the legal regulations regarding age discrimination, which can offer research ideas towards practical and efficient legislative measures, so that compliance with the right to equality of treatment regardless of age and irrespective of the domain of public life in which this right is exercised to be protected, and that the principles of human dignity to find themselves within the life of each and every citizen.

2. The European legal framework on young and seniors discrimination.

The principle of equality of treatment and prohibition of discrimination have been established from the beginning of the European construction, through the Treaty establishing the European Economic Community signed in 1957 and entered into force in 1958. The treaty's norms relate to non-discrimination of producers and consumers within the common agricultural policy, non-discrimination of citizenship of nationality of communitarian employees in the context of free movement of people, non-discrimination between men and women regarding payment for equal work.

The next important legislative step in the field was the Treaty of Amsterdam signed at in 1997, and entered into force in 1999, which extend the power of the Community against other criteria-based discrimination, namely race, ethnic origin, religion, beliefs, disability, age and sexual orientation. Thus, according to provisions introduced in article 13 from TCE (former article 6 a EEC) "Within the limits of the

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[1] Manolescu A., Brînzea V.-M., *The age-Un important criteria of discrimination on the labour market* in Analele Universităţii "Constantin Brâncuşi" Târgu Jiu, Seria Economie, Nr. 3/2011, pp 16- 28; Stanciu M. C.,, *Ageism in Romania and Intergenerational Practices*, Procedia - Social and Behavioral Sciences ,4th Worlds Conference on Educational Sciences (WCES-2012) 02-05 February 2012 Barcelona, Spain Edited by Prof.Dr.Gülsün A. Baskan, Assist.Prof.Dr.Fezile Ozdamli, Sezer Kanbul; Deniz Özcan, Volume 46, 2012, pp 4736-4740

powers provided for, the Council, acting unanimously, on a proposal from the Commission, and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."[2].

In the year 2000, immediately after the entering into force of the Treaty of Amsterdam, the secondary European legislation has adopted the Directive 2000/43/EC of the Council from June 29th, 2000 of implementing the principle of equal treatment between people, without differentiation based on sex or ethnical origin[3]. Given that in the field of employment relationships cases of discrimination are more often than in other fields, the European legislator adopted in the same year Directive 2000/78/EC of the Council, from November 27th, 2000 to create a general framework that would favour equal treatment regarding employment[4].

There are two new aspects brought forth by Directive 2000/78/EC in comparison to Directive 2000/43/EC:

- on one hand, aims to provide a special regulation for the access to labour market and employment relationships, and;
- on the other hand, to extend the field of application of the principle of equal treatment to other protected reasons, expressly providing prohibition of age discrimination.

Thus, according to article 1, the Directive's objective is to "lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment."

In accordance with the provisions of article 3 in conjunction with those of article 1 from Directive 2000/78/EC, young people and seniors must have access to employment based on non-discriminatory selection and recruitment criteria, to benefit from vocational training, improvement, promotion, retraining and practical experiences regardless of age, to have equal treatment with regard to employment and work conditions, dismissal and payment conditions, affiliation to an employee organization or any other organization of which members exert a profession. Prohibition of age discrimination is applicable to all the aspects which are entailed by the exercise of the right to equal treatment by its beneficiaries.

Practice in the field has revealed that advertisements and interviews are steps in the employment process in which candidates are constantly discriminated based on their age and we can illustrate with the situations in which employment is conditioned by seniority or by an age which guarantees the existence of a reasonable period of employment before retirement. Employee promotion runs into the same obstacle of a too young or too old age, regarding those who may benefit from the levels of the career. In regard to termination of employment , it is notorious that the employees age is within the unofficial reasons behind the official reasons of dismissal.

Due to the fact that the employers request that an employee must have a minimum and maximum age to exercise within equal terms his or hers right to work is a flagrant infringement of the principle of equal treatment, social realities of such have been founded the provisions of article 6 (1) paragraph 2 f Directive 2000/78/EC, which expressly stipulated that differential treatment based on motives such as age may specifically refer to:

- the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
- the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
- the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

Employers can oppose the right of non-discrimination based on age criteria in case in which employees invoke those provisions on the Directive 2000/78/EC according to which objective reasons, justified by a legitimate objective and put into force through adequate and necessary methods may justify a different of treatment without this being considered discrimination.

On what can be criticised towards the Directive is the general nature of the norms which regulate the justification of differences of treatment on grounds of

[2] The Treaty of Lisbon gives mandatory legal force and grants juridical value equal to that of treaties to the Charter of Fundamental Rights of The European Union (Article 6 paragraph (1) from EUT), which completes the European legislative framework on discrimination. According to Article 21 (1) from Charter of Fundamental Rights of The European Union "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."

[3] Published in The Official Journal of European Communities (OJEC) L series, no. 180 from June 19th, 2000. It should be specified that the first directive is applicable in labour domain as well.

[4] Published in The Official Journal of European Communities (OJEC) L series, no. 300 from December 2nd, 2000. As a basis of comparison, we underline that in the United States of America, the first federal regulation regarding age discrimination *The Age Discrimination in Employment Act (ADEA)* was adopted in the year 1967. The Age Discrimination in Employment Act (ADEA) prohibits discrimination of those at the age of 40 or older. Regarding protection of young people, there is no federal law, but some States have regulations that protect young people against age discrimination in labour. The USA States have their very own legislation on employee and possible employee discrimination based on their age. It is notable that the Colorado State has such regulation since 1903.

age, which are often transposed with the same level of generality in the legislation of the Member States, so that in present leave the possibility of interpretations extremely generous with the practices of the employers that discriminate on base of age[5].

From our point of view, *de lege lata*, European law offers the Member States a articulated set of rules, which allow them, through national act of transposition, to create a state of normality in the field of labour, which benefits both those who want to be employed or those who are already employed, regardless of age, and the employers, which can increase their profit not just by decreasing costs related to work force, but also by valorisation this very work force

De lege ferenda, we acknowledge that the assessment of weather the way in which within national level legislation of the Member States, the intentions of the European legislator lead to an improvement in the juridical conditions of all employees, regardless of age, and is case in which this analysis shows that the objectives have not been reached, Directive 2000/78/EC should be amended towards a more detailed regulation of discrimination based on age criteria in terms of acts of discrimination and justifications of these acts which exclude the existence of discrimination.

3. The Romanian legal framework on young and seniors discrimination.

European directives have been transposed in Romanian law system, trough G.O. no. 137/2000 regarding the the prevention and sanctioning of of all forms of discrimination[6].

As provided for in the regulation field of G.O. no. 137/2000, age is one of the expressly regulated criteria regarding to which discrimination is prohibited[7].

The juridical regime of this type of discrimination is shared with those of the majority of other criteria. Thus, criteria such as race, nationality, ethnicity, language, religion, social category, beliefs, sexual orientation, age do not benefit of a special regulation. Meanwhile, in our legislation there exist other types of discrimination such as discrimination based on gender, which benefits of a special legal framework – Law no. 202/2002 regarding Equal Opportunities of Women and Men, republished[8].[8]

In our opinion, *de lege ferenda*, a specialized law regarding combating age discrimination presents itself as a solution to both ensuring the respect for the dignity of Romanian citizens and the guarantee of their rights and freedoms, and solving the economic and social problems, at individual and society level, which have their roots in this type of discrimination.

The reasons for which we support the adoption of a normative act are the following:

- a special law would rise awareness regarding age discrimination and promote equal opportunities regardless of age;
- a special law may be focused on discrimination in the field of labour, but may equally regulate age discrimination in other areas of public life;
- a special law would identify clearly, completely and in detail the purpose, the scope of the normative act, the sphere of social relations which are regulate, the rights and the obligations of the subjects to law, and particular behaviour in this respect. We believe that acts of age discrimination currently foreseen in national norms, even if pretty numerous, their phrasing is general, limiting their applicability in practice, either because those entitled do not succeed to the noticed differences of treatment as discrimination, or because those who should respect the right to equal treatment use the general nature of the law in a astute way in order to bypass the consequences of non-compliance with that rules;
- a specialized law may have a better defined preventive effect; stipulating sanctions rigorously defined depending on the particular act of age discrimination and the harm done by this may shape subjects to law behaviour and would prevent discriminatory and abusive practice;
- a special law may have an educational effect and may reconfigure both relationships between employers and employees, between co-workers and the way juniors and seniors are perceived and treated by society.

Such a normative act must first of all be based on a quantitative and qualitative research on acts of age discrimination faced by Romanian citizens within the employment relations and in other areas of public life.

A source of inspiration in preparing an age discrimination normative act proposal can be Law 202/20002 regarding gender equality, which, in our opinion, has an important contribution to the progress made towards equal opportunities and treatment

[5] Article 6 (1), entitled "Justification of differences of treatment on grounds of age" provides the following: "Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary."

[6] Republished in The Official Gazette, Part I, no. 166 from March 7th, 2014.

[7] The discrimination is defined in the article 2 of the Ordinance. According to the provisions stipulated under paragraph 1 discrimination is "any distinction, exclusion, restriction or preference based on race, nationality, ethnicity, language, religion, social status, belief, sex, sexual orientation, age, disability, non-contagious chronic disease, HIV infection, membership of a disadvantaged group and any other criteria which has the purpose or the effect of restriction, elimination of recognition, use or exercise of fundamental human rights and freedoms or of rights recognized by the law in the political, economic, social or cultural field or in any other field of public life."

[8] Republished in The Official Gazette, Part I, no. 326 from June 5th, 2013. Law 202/2002 taken over provision from European directives regarding the principle of equal treatment between men and women in the area of work relationships.

between men and women, proving the efficiency of a special regulation.

Research with a view to proposing a special law may also include study of the Age Discrimination in Employment Act (ADEA)[9], or the laws through which other Member States have transposed Framework Directive 2000/78/EC, laws which present many similarities and differences as well[10]. The latter regard aspects like the definition of discrimination[11], justification of difference of treatment[12], the term in which a request for restore of rights by the discriminated person[13], sanctions which the author of the discrimination act must bear[14].

4. Conclusions

The study of age discrimination regarding both young people and seniors constitutes, first of all, a contribution towards raise the visibility of the vulnerabilities of the previously specified two categories especially in the labour market, but also in other areas of public life[15].

An analysis of European and national level statistics may lead *in extremis* to the conclusion that the only time span a person can have high level of certainty that he or she will not be discriminated on the base of age is that between 25 years and 40 years.

In other words, the guaranteed active period may be reduced to 15 years, instead of 47 years, which should be the proper timespan for a person who is employed at the age of 18 and retires when he or she is 65. Moreover, for women who chose to become mothers or men who wish to benefit from a leave for child's growth, there are high risks of discrimination, including the period of the "protected" age span (between 25 years old and 40 years old).

The effects that such an abnormality on individual and social levels may become the subject of different research. Although normality would presume the existence of a predefined, secure career route, promotion based solely on competence and labour management in the active period, what happens in reality is quite alarming. Furthermore, normalcy would mean that generations ought to collaborate, to support each other and to bring adds value depending on the professional stage in which individuals find themselves, not to be in conflict, having antagonists relationships[16]. Basically, they have common interests, all generations desire to exercise their right to dignity, their right to equal treatment and they have to stick together in this respect.

In Romanian society, in general, treatment of young and seniors people is still in the sphere of inadequate, insulting language, which is perceived as a good joke, irony, not as a violation of human dignity. Particularly in labour, age discrimination is justified by companies through the objective nature of their employment policies and is permitted by the general character of juridical norms in this domain. In their turn, those discriminated often chose not to file a complaint regarding the discriminatory treatment, as they often appreciate that proving that such discriminatory acts have taken place is hard to prove.

We consider that our proposal towards the adoption of a special law having as purpose to eliminate all types of age discrimination, which should contain detailed provisions regarding regulated social relationships, specifying concrete acts of discrimination and stipulating sanctions for each and

[9] According to the Age Discrimination in Employment Act (ADEA), an applicant shall not be required to include in their CV information regarding their date of birth or their civil status. Furthermore, relevant professional experience is limited to the last 10 years of work. Any practice that interferes with these norms is considered discriminatory. We identify three situations in which noncompliance with the non-discrimination obligation on age and civil status criteria may be invoked in the American legal text. What draws attention and would be useful to implement in the Romanian law system is the fact that acts of discrimination are specifically stipulated, so that the application of norms does not leave room for misjudgement, thus the restoration of the discriminated rights' is guaranteed.

[10] The Netherlands have adopted in 2004 a special legislative act that prohibits discrimination on age criteria –Age Discrimination Act. Most of the Member States have transposed the Directive into the national laws in similar terms through normative acts including all grounds of discrimination.

[11] In the French law system, discrimination is represented by "every distinction between natural persons based on their origins, sex, family circumstances, pregnancy, physical appearance, vulnerability caused by their financial circumstances, known or unknown by the author of the act of discrimination, family name, residence, medical condition, disability, genetic features, habits or manners, sexual orientation or identity, age, political opinions, trade union activity, affiliation, real or suspected, to a certain ethnicity, nation, race or religion. Moreover, French law prohibits discrimination between legal persons based on the aforementioned criteria (leaving aside pregnancy), with the addition of employee affiliation of these legal persons." The French legislator had chosen an extensive transposition of discrimination concept comparing with our legislator.

[12] In Ireland, according to law, when employment requires training before retiring age, we find ourselves before a justification of difference of treatment, which is why setting a maximum employment age is permitted in this kind of situations.

[13] In Germany, the law provides that the victims of discrimination must file a complaint in a period of maximum two month from the moment the act of discrimination took place, not a year, such as is provided by the legislation of other Member States.

[14] In Austria, the common penalty is an administrative fine of maximum 360 euros; furthermore the victim can require compensation in some situations. In France, the amount to which the victim can request can rise to as much as 45.000 euros and even surpass this sum if the act of discrimination has been carried out under aggravating circumstances.

[15] According to National Statistical Institute, In Romania, in 2017, second semester, the employment rate of people between 20-64 years was 70,5%, of which 65,5% were seniors and 35, 5% were young people. An important part of active human resources, using the their right to free movement within European Union, have left our country in favor of those European countries where they have found jobs. The depopulation phenomenon of Romania is increasing and the prevention of work-force emigration has to be to be a priority for our society.

[16] In October 1999, in Netherlands, there was an international meeting of intergenerational specialists where it was launched The International Consortium for Intergenerational Programmes (ICIP), an international organization, registered under Dutch law, having as purpose to promote intergenerational projects, strategies and public policy from a global perspective, and to improve the relationships between generation, especially between younger and seniors people, through intergenerational practices and activities.

every one of these acts may answer to a social necessity. Such a normative act would support all citizens, regardless of age, helping them build a career, would be beneficial to family relationships due to the fact that the two discriminated categories would have financial stability, not having to consume the resources of active family members anymore. The transposition of this idea into practice would contribute to the improvement of relationships profile between young people and seniors, on one hand, and society, on the other hand.

References

- Stefanescu, I.T., *Theoretical and practical treaty of labour law,* Bucharest,Universul Juridic Publishing House, 2012
- Țiclea A., *Treaty of labour law,* Bucharest,Universul Juridic Publishing House, 2012
- Craig, P. and de Burca, G., *European Union Law*, Bucharest: Hamangiu, 2009
- Manolescu A., Brînzea V.-M. *The age-Un important criteria of discrimination on the labour market,* Analele Universităţii "Constantin Brâncuşi" Târgu Jiu, 2011
- Stanciu M. C,, *Ageism in Romania and Intergenerational Practices***,** Procedia - Social and Behavioral Sciences , 4th Worlds Conference on Educational Sciences (WCES-2012) 02-05 February 2012 Barcelona, Volume 46, 2012
- The Treaty of Lisbon
- Charter of Fundamental Rights of The European Union
- Treaty establishing the European Economic Community
- Treaty of Amsterdam
- Directive 2000/43/EC of the Council from June 29th, 2000 of implementing the principle of equal treatment between people, without differentiation based on sex or ethnical origin
- Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation
- G.O. no. 137/2000 regarding the combat and penalization of all forms of discrimination
- Law no. 202/2002 regarding Equal Opportunities of Women and Men
- Age Discrimination in Employment Act (ADEA), U.S.A.
- Law no. 2008-496 of 27 May 2008, diverse adaptations of community law in the field of the fight against discriminations, France
- The General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz,AGG), Germany
- The Equal Treatment Act (Gleichbehandlungsgesetz, GlBG), Austria
- The Employment Equality Acts 1998 to 2008 ("the Acts"), Ireland
- Age Discrimination Act, The Netherlands
- National Statistical Institute :http://www.insse.ro/cms/ro/content/statistica-oficiala-din-romania

COLLECTIVE REDRESS AND ALTERNATIVE DISPUTE RESOLUTION – REMEDIES IN THE „CONSUMER TOOLKIT"

Monica CALU*

Abstract

Collective redress for compensation, also known as a group action or a class action, reunites consumers who have suffered the same or very similar loss or harm caused by the same trader. They come in court as a group and seek redress, in one legal claim.

Alternative dispute resolution it's a collective term for the ways that parties can settle a dispute by means of extra-judicial mechanisms with (or without) the help of a third party.

Even if these two notions of „collective redress" and „ADR", at first sight, apparently have little in common, these two topics have become closely related in disputes regarding consumers who have had their rights violated by traders.

Even if judicial collective redress procedures cannot be replaced by Alternative Dispute Resolution (ADR) or amicable settlements, we must put aside the assumption that the courts offer the only technique that can deliver redress or that is not possible an amicable settlement procedure for mass claims. Parties in dispute should remain free to recourse to alternative means of dispute resolution before or in parallel to the formal introduction of the judicial claim, taking into account all available options.

This study examines the different mechanisms available to consumers to resolve disputes, from private complaints handling to ADR and class actions. This paper aims to analyses the advantages and disadvantages of different approaches to dispute resolution and redress mechanisms, the limits of the out of court settlements and the current situation in the EU Member States, and the cross-border cases and solutions. It also approaches the enhance and the interconnection of the existing national ADR systems in creation of a powerful unified pan-EU mechanism, provided by Directive 2013/11/EU of the European Parliament and of the council on alternative dispute resolution for consumer disputes.

Keywords: *consumer disputes, collective redress, alternative dispute resolution, cross-border cases, settlement.*

1. Introduction

According to international and European human rights law, the notion of access to justice obliges states to guarantee each individual's right to go to court - or, in some circumstances, an alternative dispute resolution body - to obtain a remedy if it is found that the individual's rights have been violated.

Non-judicial pathways to justice are also considered, including non-judicial bodies and alternative dispute resolution methods. Alternative dispute resolution (ADR) procedures, such as mediation and arbitration, provide alternatives to accessing justice via formal judicial routes. The EU has encouraged the use of ADR with legislation such as the EU Mediation Directive and a variety of consumer protection initiatives.

Dispute Resolution is one of the most talked-about topics nowadays. An area barely known or practiced a decade ago, it has now become the most reachable 'tool' for people who seek justice. Now we know that Court is not the only solution, and even more, we have begun to see it as a last resort solution.

The legal needs of ordinary people as consumers in their disputes with traders have changed over the last decade. After years of litigations and due to the large amounts of money and lengthy judicial procedures involved in the trial process, the consumers and the consumer's communities or consumer's associations have increasingly turned to legal alternatives that are more prompt, private and economical than the courtroom. Also, when the traders are faced with a dispute regarding the consumer's right, due to the changes in consumer protection legislation, the companies are learning that, whenever possible, it is more advantageous to them to solve their differences between themselves rather than relying on an expensive, time-consuming and sometimes inefficient judicial system. Now, the parties in dispute can reach practical and private agreements instead to fight for years and spend huge amounts of money in endless courtroom battles by using the ADR bodies and the Online Dispute Resolution (ODR) bodies have been created and linked together thorough the European Union. Almost all of the ADR systems use one or more of the same elementary dispute resolution techniques of negotiation, mediation, conciliation and arbitration.

Generally, the procedural rules regarding arbitration are more formal that the rules of mediation, but not as strict as procedural rules that govern litigation in court. Therefore, mediation is seen as a non-binding process and arbitration as a binding action, or, simplifying, in ADR, binding arbitration replaces the trial process with the arbitration procedure.

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2. A view of ADR in Romania

Alternative Dispute Resolution mechanism in Romania provides arbitration and mediation, according to Government Ordinance no. 38 of 26 August 2015 on Alternative Dispute Resolution between Consumers and Traders. While arbitration procedure is very similar to the common judicial procedure due to provisions regarding the arbitration from the Romanian Civil Procedural Code, that regulate notifications, summoning, compatibilities and binding effect (general legal framework on arbitration is governed by the Code of Civil Procedure, Law No. 134/2010 on the Civil Procedure Code, republished in articles 541-621), mediation is far more different due to the fact that the mediator's activity involves mostly counseling and the mediation agreement is essentially non-binding. Even that arbitration is less formal than court, though the claimant/ the consumer and the other party may present evidences, appear at hearings etc. Unlike mediation, an arbitrator or panel of arbitrators makes a decision and the decision may be legally binding. But, in case an alternative dispute resolution does not settle the problem, the consumer may choose to sue the trader.

Nowadays, after the explosion of the trials against the financial institutions, the insurers, cars producers telecom, internet or energy providers or even against governments illegal actions, we live in a changed reality where many judicial systems face increasing workloads and where access to courts can be expensive. And so, in many aspects of life when a conflict arise, due to the vast amounts of time and money involved in the trial process, the consumers and business communities start increasingly to choose the legal alternatives that are more prompt, private and economical than the courtroom. The principles of shared costs, and the power that multiple complainants can have, are well understood and appreciated by European consumers.

But, despite the advantages provided by these quasi-judicial procedures brought before the non-judicial bodies (these ADR methods are recognized as more expeditious, private, less formalistic and generally much cheaper than a trial), however, the large majority of non-judicial bodies do not have the power to issue binding decisions, and their powers of compensation are generally limited. Also, in case of consumers who have suffered the same or very similar damage from the same trader and gather in a group of claimants, the very large numbers of consumers complicates the evaluation of the case and of damages, and the total value of claim is so high that surpass the capacity of ADR bodies to provide proceedings for mass claims. There are a very few alternative dispute resolution bodies which developed the procedures for mass claims: Swedish and Finnish Consumer Complaint Boards, Spanish Arbitration System. Another limitation of the power of the ADR bodies is that it is impossible to take provisional measures during the negotiations, like to immobilize a company's assets. In these situations of multiple claims situations, ADR or the amicable settlements could be part of the „consumer toolkit", but judicial collective redress procedures cannot be replaced by alternative dispute resolution.

As example of the limits of the ADR use are eloquent in the Volkswagen case, where the company refused to negotiate for compensation with consumers from European Union. In September 2015, in Dieselgate scandal, Volkswagen admitted that 11 million of its vehicles were equipped with software that was used to cheat on emissions tests. In the United States, where the scandal was uncovered, Volkswagen reached a settlement agreement with American consumers. The VW group has agreed to pay $1,000 to 500,000 drivers. US owners of VW diesel cars with proposed to pay $500 on a prepaid visa card and $500 in dealership credits as compensation because it cannot yet remove the illegal software. Even if in Europe over 8 million cars have had this defeat device installed and VW may have broken two directives of EU legislation - the consumer sales and guarantees directive and the unfair commercial practices directive[1], the carmaker has said rules in Europe are different and an engine repair is sufficient compensation.

This is one reason for in many EU's Member States jurisdictions, litigation culture still remains dominant; change may be resisted by parties unwilling to submit their disputes to an unfamiliar process, courts still strain under growing pileup of cases, even that the new consumer rights legislation adopted aims to reduce the burden and the pressure, and inspiring prospective litigants deterred by the prospect of a lengthy court process to pursue alternative options.

3. Collective redress for compensation

What is collective redress for compensation: also known as a group action or a class action, it's the situation when consumers who have suffered the same or very similar harm or loss, caused by the same trader, gather and seek redress in court as a group, in one legal claim. Consumer regress for compensation enables a group of consumers who have had their rights violated, to be represented by a third body (for example, by a consumer organization or by a state authority) which seeks remedies for them especially by litigation against the trader.

The role of collective redress results from the reality that, in our mass consumption society fueled by mass production and the globalization of the markets,

[1] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive')

violation of legal norms can affect a great number of consumers and individual consumers would not go to court fearing high financial costs, expensive or lengthy procedures, time consuming, emotionally draining process, even intimidating tactics and not to forget the unpredictable result.

Also, there are several advantages for what class action lawsuits can be preferable to individual litigation for consumers. Aggregating multiple suits into one suit expedites the legal process and makes it easier for a case to move through the court system, as a class action lawsuit is decided by one judge in one court. A class action is a unique procedure which implies lower litigation costs (costs will be divided among group members), the opportunity for plaintiffs to seek relief when claiming for small amounts of money and opportunity for all plaintiffs to receive damages. When violated rights have low value for each plaintiff, a class action will allow plaintiffs to seek relief who would not have found it financially prudent to do so in an individual lawsuit. This is the case, for example, in consumer lawsuits pertaining to deception or overcharging, where the only damage produced is monetary damage of low value. Also, the use of collective redress mechanisms attract a large media coverage than individual litigation and/or individual ADR. In case a class action is won by consumers, the judicial precedent is so powerful that the corporation or the authority which would be tempted to abuse its power in the future will retain from such type of abuse.

As example, after the financial crisis caused the inflation of class actions against the financial institutions, the defendants are increasingly wary of their reputation, and media coverage increases the deterrent effects caused by such collective cases than the concomitant abundance of individual litigation.

The downside of the class action brought in front of court is that if the plaintiff's litigator does not plead effectively or the class applicants do not have strong claims, then the legitimate claims of other class members can be hurt.

Also, if the group action is unsuccessful in their lawsuit then individual class members likely do not have the right to bring individual lawsuits in another trial (non bis in idem rule). This is the reason for what the group should consider as first option alternative dispute resolution procedures as a safer way of obtaining redress in mass harm situations. Collective alternative dispute resolution procedure should always be available alongside, or as a voluntary element of judicial collective redress. Even that the principle of party disposition remains the ground principle for the allegations and evidences, applications during the trial and appealing to remedies between the parties and the court in civil proceedings, there is an undeniable tendency, across the Member States, towards a more active role being played by the court. In the content of the principle of the active role of the judge comes in the obligation (and the right of the judge, of course) to put all the diligence as the parties to choose another way of solving the conflict between them, namely the amiable way.

4. Class action in Romania

Under Romanian law, class action is not expressly regulated nor collective redress action. Although, there is not currently explicit regulation of procedure in group action in Romanian law, the Civil Procedural Code allows collective actions considering the regulation of such institutions, as joinder of actions, joint claimants, co-plaintiffs, co-defendants, co-participation in trial etc. Also, the Romanian law does not offer a special proceedings for complex class action.

The notion of collective/class actions is not provided within the Civil Procedure Code, but some elements are regulated in certain special laws related to consumer law, labor rights and in Competition Code (modified recently by Emergency Ordinance 39/2017 on damage claims related to cases of competition law infringements and amending the Competition law no. 21/1996).

However, several persons may file an unique claim, according to article 37 of Romanian Civil Procedure Code, in case of the object of the trial is a mutual right or obligation, or if their rights and obligations have the same cause or if there is a close connection between them e.g. their claims derive from similar contracts concluded with the same person.

Unfortunately, in some situations - like it happened in Romania in the class actions regarding misleading the borrowers to CHF loans (between 2013-2015) - this type of cases are discouraged by administrative reasons of courts. In many of these class actions regarding the freezing of the exchange rate of CHF at the level from the time of the concluding of the contracts, courts severed collective files in hundreds and even thousands of individual files, without scrutinized the identity of the legal issues raised collectively by hundreds of consumers and has disunited collective files in hundreds of individual actions.

Notwithstanding the above, a few type of class action developed in Romania and among them are the actions filed by consumer associations in the matter of infringement of consumers' legally established rights and interests. Social and economic sideslips led to infringements in consumers' rights by major economic actors such as commercial banks or non-banking financial institutions, by telecom, transport, touristic companies, by energy providers. The interest in collective claims has registered an increasing trend due to recent amendments in consume legislation. The Government Ordinance nr.21/1992 provides the possibility to establish consumer association, defined by law as non-profit legal persons founded in the purpose of representing the rights and interests of their members or as well as the general interest. On behalf on their members' rights and interests provided by the

Government Ordinance 21/1992, Consumer's Code (Law 296/2004), Law no. 193/2000 regarding the abusive clauses in contracts concluded between consumers and traders and other relevant legislation, these associations, among other legal attributes, have the capacity to file claims before courts of justice for the protection of their members' rights and interests, to initiate claims when providers infringe their legal obligations and put to risk their members' rights and interests. Also, associations that meet legal requirements have the possibility to seek for judicial relief in matters of covering consumer's losses deriving from dangerous goods or inconsistent services, to obtain annulment of abusive clauses in contracts or to injunct dishonest practices that put consumers' rights and interests to risk.

In case of adhesion 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 asking to be bound by an order of court injunctions to change the contracts under development, by removing the abusive clauses, as it is provided by art.12 and 13 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.

Especially after the amendment of Law no. 193/2000 by Law 76/2012, in the situation of an court action filed by the National Authority for Consumer Protection in front of a tribunal against a professional concerning abusive clauses in consumer contracts, if the court ruling confirms the abusive character of a contractual clause, the judicial decision will be mandatory for the professional with regard to all such on-going contracts and all pre-formulated standard agreements which are to be used. To receive compensation, if the injunction case was won by National Authority of Consumer Protection, a consumer must introduce a separate action in court, according to the Romanian Civil Procedural Code. The National Authority of Consumer Protection is not entitled to make these kind of request in court. Through a civil case, against a trader the professional need to fully repay the price (and interest) and to compensate damages to the consumer and also to pay the judicial charges.

Recently, in Romania, was adopted the Emergency Ordinance no. 39 of 31 May 2017 on the actions in damages in cases of breach of the provisions of the legislation in competition matters, as well as to change and completing Competition Law no. 21/1996. The Government Emergency Ordinance deals with the transposition into national law of Directive 2014/104 / EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for compensation under the of national law in the event of infringements of the provisions of competition law in the Member States and the European Union.

5. Collective redress and alternative dispute resolution in the European Union

An European Commission consultation[2] from 2011 it has been Furthermore, it has been revealed that majority of consumers (an EU average of 79%, rising to 90% in Ireland) would be more willing to defend their rights in court if they could join a collective action. The same consultation showed the consumers strongly prefer collective actions in mass claim situations, 96% said they would certainly or likely join a group action with other persons affected by the same business behavior.

Also, in 2011, in all EU Member States (with the exception of Hungary), a majority of respondents agreed that they would be more willing to defend their rights in court if they could join with other consumers who were complaining about the same thing, according to Flash Eurobarometer 299 "Consumer attitudes towards cross border trade and consumer protection", March 2011

In conclusion, consumers in Member States, which do not have collective redress mechanisms in place, are likely to suffer a detriment as a result of the unavailability of such mechanisms.

Therefore, existing individual redress mechanisms are unsuitable for mass consumer claims. For example, only the internal market of the European Union has 500 million potential consumers and the non-compliance of the producers or providers of services or of the sellers with the legal rules regarding the consumers' rights produce mass harm or hazardous situation for the consumers. Only in a few EU Member States as Spain, Portugal, Belgium and Italy it was possible for consumers to make collective redress claims against the company because very few national mechanisms can really be used with positive results, even if there are an amalgam of national collective redress mechanisms currently in place in the European Union.

These inefficient mechanisms cause lack of compensation for harm suffered by the mass of consumers and is an elapse of the legal system that allows for illegal profit to be retained by unfair traders. Moreover, there are numerous cross border mass detriment situations where consumers are not protected because lack of an appropriate mechanism.

But, do collective redress in court works? Does obtains cheaply, rapidly and effective mass solutions? Collective actions also take long time and are also expensive.

[2] http://ec.europa.eu/competition/consultations/2011_collective_redress/ocu_en.pdf

In the OECD's Recommendation on Consumer Dispute Resolution and Redress[3], OECD recommends that all states should adopt mechanisms that enable consumers to be able to resolve disputes effectively, whether individually, collectively or through public authorities, and accentuates the need for a combination of mechanisms, preferring direct negotiation as the first option. Early settlement of disputes should be encouraged whenever possible, and the litigation in court should be viewed as a last choice.

Collective out-of-court dispute resolution schemes should take into account the requirements of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters43 but should also be specifically tailored for collective actions.

In the past decade, and especially after adopting the Directive 2013/11/EU on alternative dispute resolution (ADR), alternative dispute resolution has been included within court procedures and separate structures of Consumer ADR have been constructed that are set to expand considerably (Hodges et al. 2012a). Alternative dispute resolution bodies have to meet strict EU quality criteria, which guarantee that they handle the disputes between traders and consumers dispute in an effective, fair, independent and transparent way. Also, under European Union law, consumers can use these bodies to handle all contractual disputes they have with a trader established in the European Union. Alternative dispute resolution can be used for any market sector (such as financial services, e-commerce, tourism, transport, telecoms and energy).

Some of them reached a pan-European coverage, as FIN-NET. FIN-NET is a network of national organizations responsible for settling consumers' complaints in the area of financial services out of court. The network covers the countries of the European Economic Area[4] (the European Union, Iceland, Liechtenstein and Norway). As good example of tool in consumer tool-kit, FIN-NET was set up by the European Commission in 2001 to promote cooperation among national ombudsmen in financial services provide consumers with easy access to alternative dispute resolution (ADR) procedures in cross-border disputes about provision of financial services.

On 11 June 2013, European Commission adopted a Recommendation [5] on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law. The purpose of this Recommendation is "to facilitate access to justice, stop illegal practices and enable injured parties to obtain compensation in mass harm situations caused by violations of rights granted under Union law, while ensuring appropriate procedural safeguards to avoid abusive litigation". The Recommendation is a proposed framework, is not mandatory and many aspects remained subject to internal national rules for each of Member States. Also, European Commission has published on 26th January 2018 a report[6] regarding the progress made by Member States on the implementation of collective redress measures following the Commission's 2013 Recommendation[7].

The Commission's 2013/396/EU Recommendation stresses that all Member States should have collective redress mechanisms at national level, both injunctive and compensatory, available in all cases where rights granted under Union law are, or have been, violated to the detriment of more than one person.

Regarding collective out-of-court dispute resolution, the 2013/396/EU Recommendation requests Member States to encourage parties to settle their disputes consensually or out-of-court, before or during the litigation and to make collective out-of-court dispute resolution mechanisms available alongside or as a voluntary element of judicial collective redress. Also, suggests that limitation periods applicable to the claims should be suspended during the alternative dispute resolution procedure. Regarding the binding outcome of a collective settlement, the Commission proposes it should be controlled by a court (paragraphs 25 to 28 of the Commission Recommendation, Collective alternative dispute resolution and settlements). Recommendation also provides that the use of collective out-of-court dispute resolution should depend on the express consent of the parties involved, whereas in relation to individual claims it may be mandatory.

The advantages of introducing such schemes of collective alternative dispute resolution and settlements in collective redress mechanisms are the potential positive effects on the length of the proceedings, lowering the costs for parties and for judicial systems, and I foresee them as being an efficient way of dealing with mass harm situations. Using ADR procedures does not prevent parties from exercising their right of

[3] OECD Recommendation on Consumer Dispute Resolution and Redress (Paris: OECD, 2007) at http://www.oecd.org/dataoecd/43/50/38960101.pdf

[4] In Romania, Center of Alternative Solution of litigations in Banking System (CSALB) was constituted according the Government Ordinance no. 38/2015 with the purpose of organizing and managing the alternative solution of litigation in banking sector, respectively between the consumers and credit institutions. *Since September 2017 the Ministry of Economy has the responsibility to analyze the requests of bodies wishing to be alternative solution entities litigation, to ensure that they comply with the legal provisions and to notify the list entities admitted to the European Commission.* This is the first step of including the Alternative Dispute Resolution Center for Banking (CSALB) in the European Alternative Dispute Resolution Platform, FIN-NET.

[5] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU) (OJ L 201 of 26.7.2013)

[6] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:40:FIN

[7] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOL_2013_201_R_NS0013

access to the judicial system in case does not settle the problem by out-of-court resolution. At the last resort, the only truly convincing incentive for traders to respond seriously and in good faith to collective redress ADR is the final threat of collective redress.

As we see, in fact these two solutions in the consumer toolkit – alternative dispute resolution and collective redress have become recently closely connected, promoted politically and put in practice.

The report shows that the availability of collective redress mechanisms as well as the implementation of safeguards against the potential abuse of such mechanisms is still not consistent across the EU. „Collective redress in the form of injunctive relief exists in all Member States with regard to consumer cases falling within the scope of the Injunctions Directive[8]" (…) Compensatory collective redress is available in 19 Member States (AT, BE, BG, DE, DK, FI, FR, EL, HU, IT, LT, MT, NL, PL, PT, RO, ES, SE, UK) but in over half of them it is limited to specific sectors, mainly to consumer claims." The scope of the Injunctions Directive covers infringements of EU consumer laws as enumerated in its Annex I.

But, also the report reveals that "among the 19 Member States that have compensatory relief schemes, 11 have introduced specific provisions on collective out-of-court dispute resolution mechanisms (BE, BG, DK, FR, DE, IT, LT, NL, PL, PT, UK). This list includes the three Member States that have adopted new legislation after the adoption of the Recommendation (BE, FR and LT) as well as the UK which introduced a specific provision on out-of-court dispute resolution in the competition mechanism. In its legislative proposal, SI is largely following the Recommendation. The remaining 8 Member States that have collective redress schemes apply general provisions on out-of-court dispute resolution to such situations, for instance as implemented in the national legislation pursuant to Directive 2008/52/EC.

Regarding *cross-border cases*, the Recommendation requires Member States to not prevent, through national rules on admissibility or standing, participation of foreign groups of claimants or foreign representative entities in a single collective action before their courts. In present, in cross border situations, consumers have to act individually to obtain compensation. But, European Court of Justice, in the recent judgment in Case C-498/16 Maximilian Schrems v Facebook Ireland Limited, stated that European consumers cannot group their claims and go to one single court in their home country collectively when faced with the same misconduct and resulting damages by a company.

As still are a large number of European consumers which are deprived from using a collective redress tool, as several Member States have not introduced collective redress mechanisms in their national system, the ruling issued by the European Court of Justice has limited consumer options for better access to justice in mass harm cases. A great divergence between the Member States persists in terms of the availability and the nature of collective redress mechanisms,

Just few EU countries have introduced or amended legislation in this area following the European Commission's recommendation, and 9 countries still do not provide any possibility for consumers to claim compensation collectively.

For example, the Romanian procedural law does not provide expressly for a mechanism for class action or for collective redress and Romanian law does not offer special proceedings for complex class action litigations. The Civil procedure code only provides the legal possibility for claims between different Parties to be united and the fact that the Romanian procedural law allows multiple claimants, it contains no actual legal provisions implementing the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU).

The consumers that suffered damages due to the inclusion of unfair terms in their respective agreements concluded with professionals may claim damages from the professional.

The Government Ordinance nr.21/1992 provides the possibility to establish Consumer Association defined by law as non-profit legal persons founded in the purpose of representing the rights and interests of their members or as well as the general interest.

On 31 May 2017, he Romanian government adopted Government Emergency Ordinance no. 39/2017 on damage claims related to cases of competition law infringements and amending the Competition law no. 21/1996, which transposes to Romanian law Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (the "Damages Directive"). The 39/2017 GEO establishes the right of any person that suffered harm caused following an infringement of competition law by an undertaking or association of undertakings to claim full compensation before the competent courts.

6. Conclusions

At this moment, there are powerful consumer protection rules in place in European Union, but regarding public enforcement by way of ceasing infringements and imposing fines, does not in itself enable consumers to be compensated for damage

[8] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests

suffered. Through injunctive actions, consumer organizations and/ or national authorities for consumer protection act in court to put an end to illegal practices. European consumers suffering from damage caused by the same trader should be able to coordinate their claims effectively and efficiently into one single action in all European Member States. The integration of European markets and the consequent increase in cross-border activities highlight the need for EU-wide, consistent, redress mechanisms, available in out-of-court, alternative dispute resolution system and also in judicial system. Because of the demand is for a binding instrument at Community level. A collective redress mechanism should be available to every European consumer, for both national and cross border cases, irrespective of the value of the claim. Without functioning collective redress procedures, consumers do not have chances to get remedies even in cases of evident infringements of their rights. The introduction both to judicial and out-of-court of more effective collective actions and collective redress mechanisms that should be common across the Union, while respecting the different legal traditions of the Member States, could yield benefits to consumers in countries where collective redress mechanisms have not been introduced yet, as well as to consumers in countries where collective redress mechanisms are already available.

It is possible that the existence of collective redress mechanisms at Community level to create a higher exposure to liability for a company, because other means of redress (such as individual court action) may be in practice unavailable to consumers due to the costs of litigation or other obstacles. Also, existing collective redress mechanisms, both out-of- court or by litigation, may decrease rather than increase the costs for traders, in case that a multitude of separate litigations, potentially in different courts, is replaced by one collective procedure. Therefore, a procedure is necessary to be available in all EU Member States, based on minimum requirements: an equilibrium between the rights of both parties and not making the system too complex and overburdened with procedural requirements and rules. to address certain identified shortcomings of the Consumer Rights Directives could be beneficial by introducing EU-level rights to remedies (such as right to terminate the contract or to receive a refund of the price paid) for victims of unfair commercial practices, improving the awareness, enforcement of the rules and redress opportunities to make the best of the existing legislation.

As the Report on the implementation of collective redress mechanisms by Member States shows that the availability of collective redress mechanisms as well as the implementation of safeguards against the potential abuse of such mechanisms is still not consistent across the EU. EU legislation protects well the rights of consumers, the Commission will propose a "New Deal for Consumers, to further strengthen ways of enforcement and redress for consumers.

References

- Christopher Hodges, *Collective Redress: A Breakthrough or a Damp Squibb?* in Journal of Consumer Policy 37(1), March 2013
- Christopher Hodges, Current discussions on consumer redress: collective redress and ADR, Published online: 11 January 2012, https://www.law.ox.ac.uk/sites/files/oxlaw/here_2_2.pdf
- http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOL_2013_201_R_NS0013
- http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:40:FIN
- http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=612847
- https://ec.europa.eu/info/business-economy-euro/banking-and-finance/consumer-finance-and-payments/consumer-financial-services/financial-dispute-resolution-network-fin-net_en
- http://www.civic-consulting.de/reports/collective%20redress_study.pdf

RULINGS OF THE NATIONAL COURTS FOLLOWING THE CURIA DECISION IN CASE C-186/16, ANDRICIUC AND OTHERS VS BANCA ROMANEASCA

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Abstract

The CJEU's judgment in Andriciuc and Others vs Banca Românească Case C-186/16 that came in September 2017 is an addition to a growing body of case law on procedural obstacles to consumer protection under Directive 93/13/EEC. According to the Court, a contractual term must be drafted in plain intelligible language, the information obligations should be performed by the bank in a manner to make the well-informed and reasonably observant and circumspect consumer aware of both possibility of a rise or fall in the value of the foreign currency and also enabling estimation of the significant economic consequences of repayment of the loan in the same currency as the currency in which the loan was taken out.

Following a succession of consumer-friendly preliminary rulings from European Court of Justice (Case C-26/13, Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt and Case C-186/16 Andriciuc and Others v Banca Românească, bank customers across the European Union are increasingly taking their banks to court. However, there are still a lot provisions in the national legislations which made the judicial review of unfair contract terms difficult and reveals the limits of consumer protection under Directive 93/13. Also, we focus on the powers of the national court when dealing with a term considered to be unfair (civil) courts and the availability of legal remedies in ensuring the effectiveness of the Directive.

Although the CJEU provides interpretation of EU law, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law. The ruling issued by the Court of Justice of the European Union (CJUE) in the Andriciuc versus Banca Românească case represents a great advantage for some of the European debtors.

In this paper, we intend to examine, starting from the theory of abusive clauses and referring to the jurisprudence of the European Court of Justice in the matter, to what extent it is possible that under Council Directive 93/13 / EEC of 5 April 1993 on unfair terms in consumer contracts and the national laws of the various Member States to order "freeze of the exchange rate" or conversion of the currency of the credit into domestic currency

Keywords: *„Unfair terms in consumer contracts"; "plain intelligible language" in „consumer contracts"; „Significant imbalance in the parties" rights and obligations arising under the contract"; „ Case C-186/16 Andriciuc and Others v Banca Românească"; „Case C-26/13, Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank".*

1. Introduction

The problem of foreign exchange loans in Romania, as well as in other European Countries, is well known. Banks have been miss selling this kind of loans, especially in Swiss Francs (CHF), to European families with a terrible impact in their economy.

The European Court of Justice ruled on 20th of September 2107 that lenders must be frank with borrowers about the economic consequences of foreign-currency loans. "When a financial institution grants a loan denominated in a foreign currency, it must provide the borrower with sufficient information to enable him to take a prudent and well-informed decision."

A preliminary ruling was requested in a proceedings between Mrs Ruxandra Paula Andriciuc and 68 other consumers with Swiss francs loans and Banca Românească SA ('the Bank'). Ruxandra Paula Andriciuc and 68 other borrowers brought the underlying challenge in the District Court of Bihor, Romania, with regard to loans they obtained in Swiss francs from Banca Românească about a decade ago.

In 2007 and 2008, Mrs Ruxandra Paula Andriciuc and other persons who received their income in Romanian lei (RON) took out loans denominated in Swiss francs (CHF) with the Romanian bank Banca Românească in order to purchase immoveable property, finance other loans, or meet their personal needs. According to the loan agreements concluded between the parties, the borrowers were obliged to make the monthly loan repayments in CHF and they accepted to bear the risk related to possible fluctuations in the exchange rate between the RON and the CHF. In the event that the borrowers failed to repay their loans, the contracts allowed Banca Romaneasca to debit their accounts and carry out any currency conversion where necessary, using that day's exchange rate.

Mrs Andriciuc and the other borrowers claim in their lawsuit that the contracts were unfair, saying the Swiss franc fluctuates significantly against the Romanian leu, and that the bank failed to fully explain the exchange risk despite its foresight about the exchange rate. The exchange rate changed considerably, at enormous cost to the borrowers.

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Between mid-2007 and mid-2011, the lei's value halved against the Swiss frank.

The main argument put forward by the borrowers was that, „at the time of conclusion of the contract the bank presented its product in a biased manner, only pointing out the benefits to the borrowers without highlighting the potential risks and the likelihood of those risks occurring. According to the borrowers, in the light of the bank's practice, the disputed term must be regarded as being unfair."

Judgment C-186/16 was issued on the request of the Appellate Court in Oradea (Romania) for a preliminary ruling, in which the Romanian court asked several questions regarding the scope of banks' obligation to inform clients about the exchange rate risk in foreign currency loans, from the perspective of the Directive 93/13/EEC on unfair terms in consumer contracts.

The Court of Justice ruled in case C-186/16 "that financial institutions must provide borrowers with adequate information to enable them to take well-informed and prudent decisions and should at least encompass the impact on installments of a severe depreciation of the legal tender of the member state in which a borrower is domiciled and of an increase of the foreign interest rate."

If the contract terms were clear is a question that the Romanian court must examine.

In addition, the CJEU took the view that, when determining the existence of an uneven position of contracting parties, the circumstance whether a bank, at the moment of entering into the contract, had certain knowledge on the facts that could affect the performance of contractual obligations has to be taken into account as well.

"First, the borrower must be clearly informed of that fact that, by concluding a loan agreement denominated in a foreign currency he is exposing himself to a certain foreign exchange risk which will, potentially, be difficult to bear in the event of a fall in the value of the currency in which he receives his income," the court said in a statement about the ruling. "Second, the financial institution must explain the possible variations in the exchange rate and the risks inherent in taking out a loan in a foreign currency, particularly where the consumer borrower does not receive his income in that currency."

If the bank has not fulfilled those obligations, the national court must determine whether the bank acted in bad faith and if the parties to the contract are imbalanced.

"That assessment must be made by reference to the time of conclusion of the contract concerned, taking account of the expertise and knowledge of the bank, in the present case the bank, as far as concerns the possible variations in the rate of exchange and the inherent risks in contracting a loan in a foreign currency," the court's statement says[1].

But for the consumers in this case the legal battle is far from over. Having ruled on this point of law, the ECJ handed the case back to the Romanian courts to determine whether the Romanian bank has met these criteria, because the Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

With this ruling the CJEU has created a very wide space for examining clauses which established the liability to repay the loans in foreign currencies. Namely, as a result of the subject judgment, if it is determined that a bank did not inform its client about possible risks, but emphasized only the advantages when entering into the contract, the subject term may be declared unfair, and consequently null, i.e. without legal effect.

The number of individuals in Romania with Swiss franc loans declined to 37,907 at the end of the first quarter of 2017, half as compared to 2014, before the franc grew strongly against the Romanian leu. At the end of 2014 there were 74,849 francs debtors. Credits in Swiss francs are mainly directed to the population - 98% and 5.3 billion lei respectively. In March 2017, banks had 12,252 mortgage loans and 12,458 mortgage-backed consumer loans denominated in Swiss francs. As a result of the negotiation between debtors in Swiss francs and banks, 37,586 consumers accepted the conversion of the loans from Swiss francs to leu. In front of the Romanian courts are a few thousand consumers asking the declarations that the term according to which the loan must be repaid in CHF, regardless of the potential losses that those borrowers might sustain on account of the exchange rate risk, is an unfair term which is not binding on them in accordance with the provisions of Directive 93/13/EEC[2] on unfair terms in consumer contracts.

2. Content

In C-186/16 case, examining the aspects of the knowledge of average consumers and banks' obligations towards them, the European Court of Justice establishes that contractual terms regarding the denomination of a consumer loan in a foreign currency and the requirement the loan to be paid back in the same currency are core terms of the loan agreement. They are seen as defining the 'main subject matter of the contract' (par. 38). This implies that this contractual clauses are not subject to the unfairness test, provided the terms were transparent.

Curia's decision distinguishes between consumer loan agreements denominated in foreign currency

[1] https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-09/cp170103en.pdf

[2] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31993L0013

which have to be paid back in the same currency (like in current case), and the loan contracts where the monthly installments only have been indexed to foreign currencies, which means that the repayment occurs in local currency and its rate is calculated on the basis of the exchange rate of foreign currency (para. 39-40):

"39 It is true that the Court held in paragraph 59 of the judgment of 30 April 2014, Kásler and Káslerné Rábai (C-26/13, EU:C:2014:282) that the 'main subject matter of the contract' covers a term incorporated in a loan agreement denominated in a foreign currency concluded between a seller or supplier and a consumer which was not individually negotiated, pursuant to which the selling rate of exchange of that currency applies for the calculation of the loan repayments, only if it is established, which is for the national court to ascertain, that that term lays down an essential obligation of that agreement which, as such, characterizes it.

40 However, as the referring court also pointed out, in the case which gave rise to the judgment of 30 April 2014, Kásler and Káslerné Rábai (C-26/13, EU:C:2014:282), the loans, although denominated in foreign currency, had to be repaid in the national currency according to the selling rate of exchange applied by the bank, whereas in the case in the main proceedings, the loans must be repaid in the same foreign currency as that in which they were issued. As the Advocate General observes, in point 51 of his Opinion, loan agreements indexed to foreign currencies cannot be treated in the same way as loan agreements in foreign currencies, such as those at issue in the main proceedings.). In the second case, the term describing the repayment mechanism could be classified as an ancillary contractual term, and, therefore, subject to the unfairness test. The same cannot be said of the term setting an obligation to repay the loan in the same (foreign) currency:

"...the fact that a loan must be repaid in a certain currency relates, in principle, not to an ancillary repayment arrangement, but to very nature of the debtor's obligation, thereby constituting an essential element of a loan agreement." (par. 38)

Consumers in Andriciuc case did not, therefore, enjoyed the protection of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, because, Oradea Court of appeal, in Decision 370/2017 28.11.2017 rendered in file no. 1713/111/2014 that the plaintiffs couldn't prove that the contractual term was non-transparent (not written in plain and intelligible language):

"Although the court finds that the defendant has not proved that it has informed the plaintiffs of the actual consequences of the reimbursement clause, the court of appeal considers that this lack of information is not such as to lead to the absolute nullity of the clause, because an informed average consumer knows that the currency in which it was borrowed is subject to a currency risk, unless it could retain bad faith of the defendant that the lender was aware that there will be a significant depreciation of the national currency, a currency shock, sufficient to break the contractual balance between the parties. In this regard, it should be noted that, as stated above, the clause providing for the repayment of a loan in a foreign currency is the contractual transposition of the principle of monetary nominalism regulated by Art. 1578 Civil code, which in a credit agreement is naturally implicit, even in the absence of a contractual clause in this respect. Foreign currency credit agreements are not characterized by the usual imbalance in consumer contracts caused by the consumer's lack of information or differences in negotiating power, but by an imbalance generated by the attribution of currency risk to the consumer because the bank always receives the currency in which the credit was granted, irrespective of the intrinsic value of the foreign currency in which the credit is denominated, but the consumer who earns the income in another currency, in case of devaluation of it against the currency of the credit, has to submit an additional financial effort to obtain the necessary resources for repayment. Although a certain level of informational asymmetry can be identified between the bank and the consumer even in the case of foreign currency loans, the information held by the bank does not allow it to anticipate the shock events and consumer ignorance no longer plays the same role in the equilibrium contractual imbalance. Forex fluctuations are not only abnormal but are quite typical and predictable, but if course variations can be anticipated, their meaning and magnitude can not be anticipated. The unpredictability of foreign exchange fluctuations must also be related to the different degrees of currency exoticism, but irrespective of the status of the foreign currency on the credit market, currency shocks are generally unpredictable events not only for the consumer but also for the bank."

The Oradea Court of Appeal continues: "Even if one could have anticipated a certain increase in the exchange rate, as existed in previous periods, when there were variations in the course, without these being excessive, from the evidence administered does not result that the defendant could have anticipated the extent of the increase exchange rate CHF/ Leu in the period following the granting of the loans. It was identified only after the economic crisis and after the outbreak of currency shocks into the true size, the problems caused by foreign currency lending, both the recommendation of the ESRB / 2011 and the 2014/17 / EU Directive following them. Even though, as is apparent from the recitals of Directive 2014/17 / EU[3], it was noted that there was an irresponsible behavior of market participants this aspect is not likely to leads to the conclusion that the bank, at the time of the granting of the loans, knew or could have known or anticipate the subsequent currency shock."

[3] Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property

This reasoning follows also from the European Court of Justice in judgement for a for a preliminary ruling in case C-186/16, Ruxandra Paula Andriciuc and Others v Banca Românească SA, and invoking the European Systematic Risk Board's Recommendation ESRB/2011/1 of 1 September 2011 which specified risks to consumers of lending in foreign currencies (par. 49): "49 In the present case, as regards loans in currencies like those at issue in the main proceedings, it must be noted, as the European Systematic Risk Board stated in its Recommendation ESRB/2011/1 of 21 September 2011 on lending in foreign currencies (OJ 2011 C 342, p. 1)4, that financial institutions must provide borrowers with adequate information to enable them to take well-informed and prudent decisions and should at least encompass the impact on instalments of a severe depreciation of the legal tender of the Member State in which a borrower is domiciled and of an increase of the foreign interest rate (Recommendation A — Risk awareness of borrowers, paragraph 1)."

The Oradea Court concludes: "The Court of Appeal does not dispute that, as a result of the explosive growth of the Swiss franc, the execution the credit agreements would not have become overly burdensome for the applicants, both from the point of view of the financial effort that they must make to pay the rates, as well with regard to the balance of credits, most of plaintiffs are likely to be in a situation where, while paying rates nearly 10 years, the remaining balance in lei equivalent is equal to or even higher than the credit equivalent in RON at the time it was granted, but, as it showed both the court of first instance and the Romanian Constitutional Court by decision no. 62/2017[5], these issues are not likely to lead to nullity of clauses, but could call into question contractually solidarism and adjusting the contract by applying the unpredictability, not covered by the object of case."

The German Federal Court in Karlsruhe (Bundesgerichtshof – BGH is the highest court of civil and criminal jurisdiction in Germany) in case XI ZR 152/17, decided on 19 December 2017 with a judgment in favor of the borrower. Notwithstanding the fact that in a concrete lawsuit it is not about a consumer, who has special protection, the German Federal Court has ruled that the explanatory duty of the bank in terms of foreign currency loans must include specific weaknesses and risks of such a product.

In Spain, the Supreme Court, Civil Chamber, in Ruling no. 608/2017 tof November 15, 2017, which considered that a multi-currency clause did not exceed transparency control. "43.- The lack of transparency of the clauses relating to the denomination in foreign currency of the loan and the equivalence in Euros of the repayment instalments and of the capital pending amortisation, is not innocuous for the consumer but causes a serious imbalance, going against the requirements of good faith, since, by not knowing the serious risks involved in contracting the loan, they could not compare the offer of the multicurrency mortgage loan with those of other loans, or with the option of maintaining the loans already granted and that were cancelled through the multicurrency loan, which generated new expenses for the borrowers, the payment of which came from the amount obtained with the new loan. The economic situation of the borrowers worsened severely when the risk of fluctuation materialised, such that not only the periodic instalment payments increased drastically, but the Euro equivalence of the capital pending amortisation increased instead of decreasing while they were paying regular instalments, which was detrimental to them when the bank exercised its power to terminate the loan early and demand the capital pending amortisation in a foreclosure process, which turned out to be superior to the amount they had received from the lender when arranging the loan."

51. - No matter how much Barclays alleges the difference between the loan object of this appeal and the one which is the subject of the main proceedings in respect of which the questions were referred giving rise to the judgments of the CJEU, and in particular the STJUE of the Andriciuc case, requires the denomination in a given monetary unit of the amounts stipulated in the pecuniary obligations, which is an inherent requirement of monetary obligations.

There is no problem of separability of the invalid content from the loan contract.

55. - This substitution of a contractual regime is possible when it comes to avoiding the total nullity of the contract in which the unfair clauses are contained, so as not to harm the consumer, since, otherwise, the purpose of the Directive on unfair clauses would be contravened.

This was stated by the CJEU in the judgment of 30 April 2014 (Kásler and Káslerné Rábai case, C-26/13), paragraphs 76 to 85.

References

- http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32014L0017
- http://www.fxloans.org/sentencias/supremo/STS_171115_BARCLAYS_REVOCA_150414_AP8_MADRID_REVOCA_140512_JPI84_MADRID_HMD_TRANSPARENCIA_ASUFIN_SIN_ENG.pdf
- http://curia.europa.eu/juris/document/document.jsf?text=&docid=151524&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1358661

[4] https://www.esrb.europa.eu/pub/pdf/recommendations/2011/ESRB_2011_1.en.pdf

[5] Decizia nr. 62/2017 referitoare la admiterea obiecției de neconstituționalitate a dispozițiilor Legii pentru completarea Ordonanței de urgență a Guvernului nr. 50/2010 privind contractele de credit pentru consumatori, text published in the Official Gazette of Romania no. 161 03 March 2017

CHALLENGES OF THE NOT-SO-FAR FUTURE: EU ROBOTICS AND AI LAW IN BUSINESS

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Abstract

The paper focuses on the emerging European legislation in the area of artificial intelligence and robotics, based on the currently fast developing technical procedures for the manufacture of products characterized by autonomy. The importance of having a clear and stable legislation for the production and spread of technical devices has been under discussion for some time now and member states have reached preliminary conclusions regarding the definition and criteria by which one can identify artificial intelligence. Also, continuous innovation lead to the necessity of integrating these AI products in common household economy and therefore, the need for a proper legal framework addressing both liability and limits for creating and operating machines for civil use arose. This article shall review the measures already taken by the European Parliament and the European Commission for the establishment of a standardized legal framework related to robotic and artificial intelligence products. The objectives of this study are to analyze the general guidelines available as created by the EU legislator which shall ultimately be transposed in national legislation, in order to supersede the current lack of regulations for companies developing and selling AI products nation-wide.

Keywords: *"civil law rules on robotics", "artificial intelligence and its liability", "Robotics Regulation in the European Union", "robotics liability".*

1. Introduction

Law should be the expression of a set of norms emerging from the current real situations mankind is confronted with. For example, once you have the first homicide, the state regulates that homicide is a criminal offence and any perpetrator is punished. But what is the solution when reality is faster than the legal framework and you find yourself in a situation where, for example, a Tesla car without a driver while circulating within the limits of legal obligations applied to any man-driven vehicle, endangers a citizen on a crossing? Or how will a situation when several autonomous cars collide, creating human victims, be dealt with? Who shall bear liability in such case - the car manufacturer, the IT software manager or the person sitting on the left side who did not intervene? And whom shall you prosecute in such a case: the human or the robot itself?

Currently, we are unable to fully reply to these queries, since the available framework applies limitedly and by analogy. We have only stipulated sanctions applicable for the citizens of a country without thinking that one day, damages may be occurred as a result of a non-man intervention. Well, while almost all participants to the legal system have been busy catering to more classical matters, that day has come.

Therefore, based on recent developments, there is the urgent need to establish a proper legal framework which allows citizens and professional to know their rights and obligations when contracting an artificial intelligence tool, a smart contract or when a product which may be identified as a robot creates certain changes in the contractual dynamic between parties.

2. The A-B-C of artificial intelligence

Although many may establish what artificial intelligence is based on the information available through social media or mainstream media, the truth is that there is no accurate definition generally accepted and adopted as a legal norm.

Defining a machine as intelligent was firstly done by Alan Turing, Deputy Director of the Computing Machine Laboratory at the University of Manchester, while developing the world's first stored program digital computer.

In 1950 Alan Turing created the so-called Turing Test[1] for establishing whether a machine is 'intelligent': a machine could be said to 'think for itself' if a human interlocutor could not tell it apart from another human being in conversation. However, the term "artificial intelligence" is known to have firstly been used by Professor John McCarthy at Dartmouth College, New Hampshire, USA in 1956.

In 2010, a definition of artificial intelligence which reflects the basic understanding of the term emerged:

"Artificial intelligence is that activity devoted to making machines intelligent, and intelligence is that quality that enables an entity to function appropriately and with foresight in its environment[2]".

By now, artificial intelligence has been deemed to be the fourth industrial revolution humanity is currently

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[1] *Computing Machinery and Intelligence*', Alan Turing, Mind, October 1950 .

[2] The Quest for Artificial Intelligence: A History of Ideas and Achievements', Prof Nils J Nilsson, Cambridge University Press, 2010.

undergoing, in the words of the executive chairman and founder of The World Economic Forum, Klaus Schwab[3], after steam, electricity and computing. Mr Schwab's thesis is that humanity is on the break of substantial IT-driven change where we may expect a 'deep shift' by 2025 which will materially impact our lives.

Already artificial intelligence is used in our households and encountered frequently in a high-pace society. As the Briefing issued in January 2018 by the EPRS | European Parliamentary Research Service[4], artificial intelligence has became the usual technology used in the following cases: automatic translation, provided for example by Google Translate, speech recognition and interpretation, such as the example between English and Chinese demonstrated in November 2012 by Rick Rashid of Microsoft, face recognition systems used in criminal investigations or to unlock a smartphone, Self-driving vehicles: equipped with sensors and analysing gigabytes of information each second, the new generation of automated vehicles combine different AI systems to drive themselves (Tesla or Waymo), medical diagnosis: AI can help physicians establish or confirm a diagnosis (Human Dx), or even Killer robots: lethal autonomous weapons systems are able to select and engage targets with little or no human intervention

2.1. How does artificial intelligence actually work?

Artificial intelligence requires highly skilled systems which are able to learn from humans or even individually, by applying several learning methods, how to reach a result by themselves through autonomous and cognitive thinking. In order to properly operate and gain a higher level of artificial intelligence, these systems learn based on the data usually stored in cloud, with the help of humans which are responsible for guiding the learning process.

− Even in the initial stage of exploring the vast realm of artificial intelligence, the consequences of an improper use of data stored in cloud has kept recent headlines active. The case refers to Facebook's leak of data to Cambridge Analytics, a company which employed several artificial intelligence programs in order to analyze the data pertaining to a large number of people so that certain benefits in political campaigns were envisaged to be gained. European legislators foresaw this type of situation and developed the General Data Protection Regulation (GDPR) (EU) 2016/679.

2.2. Practical analysis of cases in which artificial intelligence is used in relation to legal field

Although in Romania, the implementation of artificial intelligence is remote, most likely due to limited legal framework protecting the parties using such tools, the practical approach of other nations implementing these tools is remarkable.

2.2.1. Predictive coding

For example, artificial intelligence has been used by law firms for the analysis of high-volume data. In one case, the English High Court issued a decision approving the use of predictive coding technology for electronic disclosure, at the request of both parties, in Pyrrho Investments Ltd v MWB Property Ltd & Ors [2016] EWHC 256 (Ch)[5]. The most substantial point of dispute was over the most appropriate and proportionate approach to disclosure by the respondent who, it was accepted, held the significant majority of the potentially relevant documents. BLP, an English-based law firm representing the respondent, proposed that the documents were analyzed through predictive Coding, which is a machine learning technology driven by human tuition. Basically, a lawyer would initially review a small set of documents. Then, the result is analyzed by the technology and used to generate a further sample for review. If the review is considered accurate, the system is set to further review all the documents, thus being cost and time efficient. The English court ordered that predictive coding be used by the respondents' solicitors in this case, marking the first such order made without the consent of all parties.

2.2.2. Smart contracts

Another field where artificial intelligence has gained leverage is the contractual one, since by using blockchain technology, parties are able to efficiently record any data on a so-called smart contract. The blockchain is a comprehensive, always up to date accounting record or ledger of who holds what or who transferred what to whom[6]. The principle of blockchain, which became known once the Bitcoin arose in influence, is that the contracting parties may use it to record anything which they agree is the contract's object, such as movable or immovable assets, transactions, shares, financial instruments, databases etc. Blockchain technology is used for legal agreements in a similar way is was used for the creation of the Bitcoin. It is based on cryptography, meaning it allows the parties to authenticate their identities. Afterwards, it creates immutable hashes (digets) of each ledger record, the current page of records (block) and the binding that links (chains) each block to the earlier ones. Once it is created, the blockchain ledger is distributed and a complete and updated copy is held on the computers of each of the network participants - contractual parties (miners) who help keep it up to date.

[3] '*The Fourth Industrial Revolution*', Klaus Schwab, World Economic Forum, 2016.

[4] Briefing issued in January 2018 by EPRS | European Parliamentary Research Service addressed to, the Members and staff of the European Parliament as background material to assist them in their parliamentary work.

[5] http://www.blplaw.com/expert-legal-insights/articles/blp-wins-contested-application-predictive-coding.

[6] Richard Kemp, Legal Aspects of Artificial Intelligence, November 2016, available at www.kempitlaw.com, November 2016.

The software can also be used to make and execute chains or bundles of contracts linked to each other, all operating autonomously and automatically. Here, the immutability of the hash (digest) representing each ledger record can get in the way, when all the links in what may end up as a long contractual chain need to execute at the same time to keep the record straight. To get around this, the blockchain is starting to be made editable, with trusted administrators – called oracles – able to change the database.

The underlying difference is that for the use of smart contracts, one must adhere to a new contractual codified infrastructure in which the operator and the user of the contractual platform are linked together by the software developer.

3. Legal and Regulatory Aspects

3.1. Is a new legal framework necessary?

Given that the application of artificial intelligence is continuously growing, it is imperative to establish whether the current legal framework suffices to address the issues regarding the application and implementation of artificial intelligence in our homes and in our businesses.

The issue of a new regulatory background has been addressed for some time now. At the USA Committee of Technology, 12 October 2016, the Executive Office of the President and the National Science and Technology Council (NSTC)[7], stated that "*If a risk falls within the bounds of an existing regulatory regime, moreover, the policy discussion should start by considering whether the existing regulations already adequately address the risk, or whether they need to be adapted to the addition of AI. Also, where regulatory responses to the addition of AI threaten to increase the cost of compliance, or slow the development or adoption of beneficial innovations, policymakers should consider how those responses could be adjusted to lower costs and barriers to innovation without adversely impacting safety or market fairness*".

Legal aspects regarding the utilization of artificial intelligence determine consequences in the field of contractual law, intellectual property, data privacy and tort law.

3.2. Potential legal framework regulating artificial intelligence in EU

Steps have been carried out at the level of the European Union for the creation of a proper background for the development of clear and responsible guidelines for the creation of intelligent machines and products. Law and regulation of Artificial Intelligence and robots is emerging, fuelled by the introduction of industrial and commercial applications in society.

3.2.1. Report on Civil Law Rules on Robotics

In January 2017, the European Parliament adopted a report on Civil Law Rules on Robotics that includes recommendations to the Commission on Civil Law Rules on Robotics (2015/2103/(INL).

One of the ideas discussed by the Members of the European Parliament was the imperative necessity for the European Commission to adopt legislation to clarify liability issues. Also, a voluntary ethical code of conduct on robotics for researchers and designers was discussed, so that they operate in accordance with legal and ethical standards and that robot design and use respect human dignity. The report outlined the importance of creating a European agency for robotics and artificial intelligence.

Based on the issuance of this report, Parliament's Committee on Legal Affairs (JURI) decided to hold a public consultation specifically on the future of robotics and artificial intelligence, with an emphasis on civil law rules.

3.2.2. Resolution on robotics

Further to the Report on Civil Law Rules, on 16 February 2017 the European Parliament adopted a Resolution on robotics[8] with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)).

The most relevant aspect of the Resolution on robotics may be summarized as follows:

- the European Parliament called on the Commission to propose common Union definitions of cyber physical systems, autonomous systems, smart autonomous robots and their subcategories,
- a comprehensive Union system of registration of advanced robots should be introduced within the Union's internal market where relevant and necessary for specific categories of robots, and calls on the Commission to establish criteria for the classification of robots that would need to be registered,
- the existing Union legal framework should be updated and complemented, where appropriate, by guiding ethical principles in line with the complexity of robotics and its many social, medical and bioethical implications
- it should always be possible to supply the rationale behind any decision taken with the aid of artificial intelligence that can have a substantive impact on one or more persons' lives; considers that it must always be possible to reduce the artificial intelligence system´s computations to a form comprehensible by humans; considers that advanced robots should be equipped with a 'black box' which records data on every transaction carried out by the machine, including the logic that contributed to its decisions,

[7] Preparing for the Future of Artificial Intelligence', Executive Office of the President and the National Science and Technology Council (NSTC), Committee of Technology, 12 October 2016, page 11 https://www.whitehouse.gov/sites/default/files/whitehouse_files/microsites /ostp/NSTC/preparing_for_the_future_of_ai.pdf.

[8] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0051+0+DOC+XML+V0//EN

- asks the Commission to consider the designation of a European Agency for Robotics and Artificial Intelligence in order to provide the technical, ethical and regulatory expertise needed to support the relevant public actors, at both Union and Member State level, in their efforts to ensure a timely, ethical and well-informed response to the new opportunities and challenges, in particular those of a cross-border nature, arising from technological developments in robotics, such as in the transport sector,
- Calls on the Commission and the Member States to ensure that civil law regulations in the robotics sector are consistent with the General Data Protection Regulation and in line with the principles of necessity and proportionality.

Discussions in relation to the adoption of a full normative act and in relation to the harmonization of current framework regarding product liability, machinery standards and intellectual property are still carried out.

3. Conclusions

Although recent legal developments have opened discussions regading a new dimension of humanity's evolution, the outcome of these discussions is yet to be effectively imprimed in a mandatory regulation, at least at the level of the European Union.

Since artificial intelligence machines and programs shall use the data collected from individuals for their analysis, an important prevention step has already been taken by Europeans through the adoption of the The General Data Protection Regulation (GDPR) (EU) 2016/679.

However, the necessity of a normative act regulating aspects deriving from the liability of artificial intelligence products still remains unadressed and must be considered also from the perspective of its mandatory character. To this end, it is imperative that the act adopted by the European Union is a regulation and not a directive, which Member States may implement with their own methods. Also, given that the main economies of the United States of America, Japan and Russia are not part of a common union as connected as the European Union, similar rules should be adopted in these countries, as well, so that contractual partners around the world benefit from the same protection.

Other aspects which must receive a final legal regulation are the ones related to the common understanding of the notion of a "robot". Currently, the European Parliament agreed on the several characteristics of a "smart robot", out of which it is relevant to mention the possibility to aquire autonomy through sensors or by exchanging data with its environment (inter-connectivity) and the trading and analyzing of that data and the adaptation of its behavior and actions to the environment.

In addition, it is important that technical specialists fully collaborate with legislators in order to draft full and comprehensive legal standards for the utilization of robotic machines. The development of common technical standards should not be ignored either, since this feature is likely to prevent or to solve cases in which one party bases its claim on the other party's liability and responsibility for the autonomous machine.

Last but not least, a controversial issue was addressed by the European Parliament[9] regarding including a form of "electronic personhood" to ensure rights and responsibilities for the most capable Artificial Intelligence. An improper regulation of this aspect has the most serious consequences in connection to liability of damages produced by robotic machines, applicable currently to non-man driven vehicles, for example.

References

- Alan Turing, Computing Machinery and Intelligence, Mind, October 1950
- Prof Nils J Nilsson, The Quest for Artificial Intelligence: A History of Ideas and Achievements', Cambridge University Press, 2010
- Klaus Schwab, The Fourth Industrial Revolution, World Economic Forum, 2016
- Briefing issued in January 2018 by EPRS | European Parliamentary Research Service addressed to, the Members and staff of the European Parliament as background material to assist them in their parliamentary work
- Richard Kemp, Legal Aspects of Artificial Intelligence, November 2016, available at www.kempitlaw.com
- November 2016
- Preparing for the Future of Artificial Intelligence', Executive Office of the President and the National Science and Technology Council (NSTC), Committee of Technology, 12 October 2016, page 11 https://www.whitehouse.gov/sites/default/files/whitehouse_files/microsites/ostp/NSTC/preparing_for_the_future_of_ai.pdf
- http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0051+0+DOC+XML+V0//EN
- http://www.blplaw.com/expert-legal-insights/articles/blp-wins-contested-application-predictive-coding
- https://www.theguardian.com/technology/2017/jan/12/give-robots-personhood-status-eu-committee-argues

[9] https://www.theguardian.com/technology/2017/jan/12/give-robots-personhood-status-eu-committee-argues.

AT A CROSSROADS: THE CASE OF `PATHOLOGICAL ARBITRATION CLAUSES` WHICH DETERMINE A JURISDICTIONAL FIGHT

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Abstract

The so-called 'pathological arbitration clauses' are ambiguously drafted arbitration agreements which disrupt the setting in motion of an arbitration proceeding. A particular situation is the case where parties refer both to the jurisdiction of the arbitration tribunals and to that of the domestic courts in their contracts, without giving further detail. Such agreements may be interpreted in different ways and they currently cause controversy among several theorists and practitioners. However, in recent years the arbitration tribunals strive to maintain the validity of the defective arbitration clauses by preferring an interpretation which gives effect to the clauses over one which does not. Our paper briefly examines this kind of defective arbitration clauses and the solutions provided by doctrinaires and courts. In the end, we assess the issue and attempt to establish the parties' true intention in order 'to remedy' the pathology.

Keywords: *pathological arbitration clauses, defective arbitration agreements, defective clauses, arbitration problems, jurisdictional fight.*

1. Introduction

The *'pathology'* of arbitration clauses is, unfortunately, an "evergreen" phenomenon. It is neither new nor uncommon for law practitioners to encounter hypotheses when parties insert ill-drafted arbitration agreements which generate confusion surrounding the setting in motion of an arbitration proceeding. The ambiguity of such contractual terms is rarely intentional. It is true that in certain hypotheses the contractual party who drafts the arbitration clause voluntarily refers to equivoque arbitration procedures or to the jurisdiction of domestic courts in order to discourage the other party to follow the arbitration path. However, in most cases, parties do not act in bad faith. Instead, they usually lack basic knowledge for drafting contractual terms and do not incorporate the arbitration agreements generally recommended by international arbitration courts.

In my opinion, which may be slightly different to the ones of other law theorists, *'pathological arbitration clauses'* are not to be confused with null or void clauses. The latter are terms that deviate from one or more of the validity conditions.

Being accepted as a distinct agreement, separate from the underlying agreement[1], the arbitration clause must comply with the essential validity requirements of any contract. Under Romanian law[2], a contract is valid when the parties have the required capacity to conclude it, their consent is freely and validly expressed, respectively the agreement has a specific and lawful subject, a legal and moral aim and a proper form.

Furthermore, any arbitration clause concluded under Romanian law shall comply with the following additional validity requirements:

a) The contracting parties shall have full exercise of their rights[3];
b) The potential litigation considered by the arbitration clause shall be arbitrable[4];
c) The agreement to arbitrate must be concluded in written form[5].

In most cases, *`pathological arbitration clauses`* are valid agreements, which comply with all the legal requirements highlighted above, but their wording is faulty and they may lead to legal effects other than the ones envisaged by parties at the time of conclusion of the contract.

Stricto sensu, from a practitioners' perspective[6], `pathological arbitration clauses` are defective arbitration agreements of the following types:

a) Clauses where the agreement to arbitrate is absent or equivoque;
b) Clauses which are not clear in terms of the rules to be followed in the event of arbitration;
c) Ambiguous arbitration agreements that do not clearly designate the place of arbitration or the arbitrators;

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[1] See Article 550 paragraph (2) of the Romanian Code of Civil Procedure (Law no. 134/2010 regarding the Romanian Code of Civil Procedure, as republished in the Romanian Official Journal no. 247/2015 and last amended on March 24th 2017).

[2] See Article 1179 of the Romanian Civil Code (Law no. 287/2009 regarding the Civil Code, as republished in the Romanian Official Journal no. 505/2011 and last amended on March 24th 2017).

[3] See Article 542 of the Romanian Code of Civil Procedure.

[4] See Article 1112 of the Romanian Code of Civil Procedure.

[5] See Article 548 paragraph (1) of the Romanian Code of Civil Procedure.

[6] From a theoreticians' perspective, see Jacques Beguin, Michel Menjucq, *Droit du commerce international (International Trade Law)*, Lexis Nexis Publishing House, Paris, 2011, p. 1092 and Nigel Blackaby, Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration*, Oxford University Press, New York, 2009, pp. 146-149.

d) Arbitration agreements that name arbitrators who are now deceased, incapable or refuse to act;
e) Agreements that provide unreasonably short deadlines in the arbitration procedure;
f) Arbitration clauses which contain various internal contradictions *etc.*

Among these kinds of ill-drafted terms, one of the most encountered `pathological clauses` are the so-called *`optional arbitration agreements`*[7] where parties are allowed to choose between an arbitration tribunal and a domestic court of law for settling a potential dispute.

The current paper briefly covers the issue of *`pathological optional arbitration agreements'*, due to the wide variety of interpretation problems they raise in practice.

This matter is not new to doctrinaries. Actually, the term *`pathological clauses`* ('clauses pathologiques`) was introduced 44 years ago by a French law theorist named Frédéric Eisemann[8]. There is also a rich jurisprudence related to this legal phenomenon. However, the issue still determines many controversies in practice and is not sufficiently debated in the Romanian legal literature.

The aims of this article are to raise awareness on defective arbitration agreements in order to limit the common occurrence of improper drafting and, respectively, to provide remedies for the *`pathology`* of *`optional arbitration clauses`*, being inspired by international doctrine and case law.

2. The Pathology of Optional Arbitration Clauses

2.1. General Remarks

Both law theorists and practitioners expressed various opinions concerning the hypothesis of ill-drafted *`optional arbitration agreements`*.

Among the most frequently encountered types of *`pathologies`*, I have considered the following to be examined by the current article:

a) The case where parties incorporated two jurisdiction clauses with different provisions, respectively: *(i)* an arbitration clause according to which all disputes arising under it shall be settled by an arbitration tribunal and *(ii)* a jurisdiction clause which established that all litigation shall be solved exclusively by a particular domestic court or courts.
b) The hypothesis where parties referred to both the jurisdiction of a particular arbitration tribunal and the one of national courts within the same clause, without giving priority to any of them;
c) The situation where parties incorporated an alternative jurisdiction clause which stipulates that in the event of litigation they shall submit it to arbitration or to national courts.

In all three cases the contracting parties refer both to arbitration and to the jurisdiction of national courts without giving priority to one or another. In such cases, arbitrators have the task to determine the parties' true intention. Commonlly, courts are in favour of saving to the arbitration agreement. However, sometimes the contradiction is so flagrant, that the respective clause or clauses are held void[9].

In the following sections I have grouped the main doctrinary and jurisprudential orientations into three categories, namely:

I. Opinions in favour of arbitration, according to which the claimant has the right to choose between the two types of jurisdiction;
II. Opinions which favour the exclusive competence of ordinary courts of law in case of ambiguity;
III. Opinions which consider that both jurisdiction clauses should be held ineffective.

2.2. Opinions in Favour of Arbitration

At present, a number of courts from many jurisdictions, including Romania, favour the enforceability of arbitration agreements by using the principle of effective interpretation provided by Article 4.5 of the 2016 UNIDROIT Principles[10].

The principle was also incorporated in the Romanian Civil Code[11]. According to Article 1268 paragraph (3), clauses shall be interpreted so as to be effective, rather than not to give any effect[12].

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[7] To a certain extent, the phrase `optional arbitration agreements`is inaccurate. Actually, either party has the option to choose between arbitration or ordinary courts when the other party is pasive. Under these considerations, theorists proposed a different term for describing such clauses, respectively *`non-mandatory arbitration agreements`* (*E.g.* see Gary B. Born, *International Commercial Arbitration, Volume I. International Arbitration Agreements*, Wolters Kluwer International, 2014, p. 789). However, I consider that the latter descriptive phrase is not the appropriate one for describing the defective agreements envisaged by this article because it also designates other types of ill-drafted clauses, such as hypotheses where parties provide that they *`may`*resort to arbitration in case of litigation, not being bound by their arbtration agreement.

[8] See Frédéric Eisemann, *"La clause d'arbitrage pathologique"*, published in Commercial Arbitration Essays in Memoriam Eugenio Minoli, Unione Tipografico-editrice Torinese, Torino, 1974. According to Frédéric Eisemann, back then honorary Secretary General of the International Chamber of Commerce from Paris, the term `pathological arbitration clauses` designates arbitration agreements that contain defects which may disrupt the smooth progress of the arbitration procedure.

[9] Emmanuel Gaillard, John Savage (ed.), *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, Citic Publishing House, 2003, p. 270

[10] The Principles of International Commercial Contracts (hereinafter reffered to as `the UNIDROIT Principles` is a document elaborated under the auspices of the International Institute for the Unification of Private Law which intends to help harmonize international commercial contracts law. The last edition of this code of contractual practices was last published in 2016. According to Article 4.5 of the UNIDROIT Principles 2016, *"Contract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of effect"*.

[11] Law no. 287/2009 regarding the Civil Code, published in the Romanian Official Journal no. 409/2011.

[12] For a detailed presentation of this principle, see Dragoş-Alexandru Sitaru, *Dreptul comerţului international. Tratat.Partea Generală (International Trade Law. General Part)*, Universul Juridic Publishing House, Bucharest, 2017, pp. 534-535.

In Romania, under an extensive doctrinary interpretation[13], it was held that if parties did not intend to submit their dispute to be settled through arbitration, they would have ignored any possibility of solving the litigation by an arbitration court. By considering the hypothesis of arbitration, both parties expressed a *"stronger consent"* in favour of arbitration than the one according to which any litigation falls under the competence of ordinary courts jurisdiction. The latter is, nonetheless, implied in the absence of an arbitration agreement.

Romanian courts also provided an extensive interpretation, in line with the one expressed by Romanian doctrine. In one case[14], the court established that in the presence of an alternative arbitration clause with the following content: *"Any disagreement between parties concerning the execution of the current contract shall be settled amiably. In the event that is not possible, the litigation shall be solved by the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania or by a competent court, in accordance with the Romanian law"*, the non-competence defence raised by the defendant is overruled. The court grounded its decision on the principle of effective interpretation and the rule which states that a contract shall be interpreted according to the common intention of the parties, both provided by the Romanian Civil Code. Furthermore, the tribunal stated that by not giving effect to the arbitration agreement, the settlement of the dispute will be unjustifiably delayed and the parties' right to a speedy trial will be violated. Thus, the court decided that the claimant was entitled to resort to arbitration without seeking the subsequent consent of the defendant.

In another relevant case[15], a Romanian arbitral court decided that when the parties established that potential disputes arising from their contracts shall be resolved either by an arbitral tribunal, either by an ordinary court, then the claimant gains the right to choose between the two jurisdictions in the event of litigation.

A similar approach is found in a more recent arbitral award[16]. The court held that the alternative feature of the `optional arbitration agreement` means that any party is allowed to designate the competent court. The claimant's option does not need to be validated by the defendant, so if he filed a petition for legal action at the Bucharest Court of Arbitration, then the respective arbitral tribunal becomes competent to settle the dispute. Likewise[17], when the parties incorporated an alternative jurisdiction clause without establishing any criterion concerning the priority of competence, the right to choose between jurisdictions belongs to the claimant.

Another arbitral court[18] explained that by requiring a separate agreement in case the arbitration clause does not specify who has the right to choose between the two jurisdictions and does not impose certain conditions for the exercise of the respective right would be the equivalent of rendering the arbitration clause ineffective. Once the claimant submitted the case to an arbitral tribunal, the arbitration clause became valid.

Otherwise, if the action was filed to an ordinary court of law, then the latter would become competent to settle the dispute between the contracting parties[19].

The Romanian courts' interpretation is also encountered in foreign jurisdictions.

In the United States of America there is an extensive case law regarding this legal issue. Under the Federal Arbitration Act (hereinafter abbreviated as *`the U.S. F.A.A.`*)[20], courts generally gave effect to `optional arbitration agreements` by stating that they permit

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[13] See Viorel Roș, *Arbitrajul comercial internațional (International Commercial Arbitration)*, Regia Autonomă Monitorul Oficial Publishing House, Bucharest, 2000, p. 158.

[14] See the Bucharest Court of Appeals (Curtea de Apel București), Judgement of April 24th 2002 from Case File no. 390/2001, in Mesagerul economic, a publication of the Chamber of Commerce and Industry of Romania, no. 32 from August 11th 2002 *apud* Giorgiana Dănăilă, *Procedura arbitrală în litigiile comerciale interne (Arbitration Procedure in Domestic Commercial Litigation)*, Universul Juridic Publishing House, Bucharest, 2006, p. 97. Similarly, see the reasoning of the Bucharest Court of Appeals in Award no. 144 of September 28th1999 from Case File no. 92/1998.

[15] See the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Award no. 124 from July 22nd 1999. Similarly, see the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Award no.145 from December 27th1996. Both decisions are published in excerpt in *Jurisprudența Comercială Arbitrală (Arbitral Commercial Jurisprudence) 1953-2000*, edited by the Chamber of Commerce and Industry of Romania, Bucharest, 2002, p.10.

[16] See the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Arbitral Award no. 283 from November 25th 2009, published in Vanda Anamaria Vlasov, *Arbitrajul comercial. Jurisprudență arbitrală 2007-2009. Practică judiciară (Commercial Arbitration. Arbitral Jurisprudence 2007-2009. Judicial Practice)*, Hamangiu Publishing House, Bucharest, 2010, pp. 8-9.

[17] See the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Arbitral Award no. 21 from February 7th 2008, published in Vanda Anamaria Vlasov, *op.cit.*, pp. 9-10. For a similar point of view, see the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Arbitral Award no. 233 from November 16th 2007, published in Vanda Anamaria Vlasov, *op.cit.*, pp. 10-11.

[18] See the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Arbitral Award no. 274/2006 from Case File no. 116/2006, published in the Romanian Journal of Arbitration (Revista Română de Arbitraj) no. 4 (8), October-December 2008, edited by the Chamber of Commerce and Industry of Romania, Rentrop & Straton Publishing House, Bucharest, pp. 45-46.

[19] See, for instance, the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Arbitral Award no. 250/2007 from Case File no. 236/2007, published in the Romanian Journal of Arbitration (Revista Română de Arbitraj) no. 3 (7), July-September 2008, edited by the Chamber of Commerce and Industry of Romania, Rentrop & Straton Publishing House, Bucharest, pp. 64-65.

[20] The United States Arbitration Act, more commonly referred to as the Federal Arbitration Act or FAA, was first enacted on February 12th 1925 and is currently part of the Code of Laws of the United States of America, the official compilation and codification of the general and permanent federal statutes of the United States (Title 9, Section 1-14).

either party to initiate the arbitration procedure, which afterwards becomes mandatory for both parties[21].

The English courts usually adopted a similar point of view. In a case[22] where parties incorporated, in two different articles of their contract, an arbitration agreement and a clause which provided for the exclusive jurisdiction of the English courts, the High Court maintained the arbitration clause by rulling that *"the reference to English courts applied only to incidents arising during the conduct of the arbitration"*.

French courts were also *in favorem validitatis* of the arbitration agreement.

According to the Paris Tribunal of First Instance[23], an equivoque arbitration clause shall be interpreted by considering that if the parties did not want to settle their potential disputes through an arbitration procedure, then they would have refrained from mentioning the possibility of arbitration by incorporating an arbitration clause in their contract. By doing so, they understood that they shall submit, on a prioritary basis, any disputes arising from their contract to the arbitral tribunal.

In another case[24], the Paris Court of Appeals held that in contracts containing an `optional arbitration clause`, the jurisdiction clause which attributes the competence of ordinary courts of law is subordinated to the arbitration agreement and is inserted by parties *"to cover the eventuality that the arbitral tribunal is unable to rule"*.

Another example is given by the jurisprudence of the International Court of Arbitration attached to the International Chamber of Commerce from Paris (hereinafter referred to as *`ICC Arbitration Court`*). In an award[25] made by this arbitration tribunal, a clause which stipulated that *"an arbitral tribunal sitting in Algiers would resolve disputes in first and last instance"* and a second clause which stated that *"in last instance"* the Algerian courts have exclusive jurisdiction was interpreted as meaning that the arbitration agreement is effective and the latter provision refers *"only to the recourse available under Algerian law against awards made in Algeria"*.

2.3. Opinions That Favour the Exclusive Competence of Ordinary Courts

There are, however, cases where `pathological arbitration agreements` were considered optional, in the sense that the ordinary courts of law became competent in case of ambiguity and the parties were required to arbitrate only when they subsequently concluded a separate agreement to arbitrate.

In Romania, there were law theorists[26] who stated that according to its "normal meaning" the optional contractual clause puts the arbitration tribunals and ordinary courts on an equal footing. The exercise of the right to choose between the two jurisdictions is, nonetheless, subordinated to the subsequent agreement to arbitrate that shall be concluded by the two contracting parties.

In the Romanian jurisprudence there was a case[27] concerning the interpretation of an arbitration agreement incorporated into a contract which stipulated that *"all potential litigation between parties shall be solved amiably; otherwise, the litigation shall be settled by the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania or by an ordinary court"*.

The claimant submitted a dispute related to the underlying contract to the arbitration tribunal, but the defendant alleged that the parties are not bound to arbitration unless they conclude a subsequent agreement to arbitrate. The court agreed with the defendant by reasoning that, by using the conjunction *"or"*, the contracting parties did not establish a clear hierarchy between arbitration and the ordinary procedure. It ended by stating that the exercise of the option is subordinated to the subsequent consent of the two parties. Thus, this consent not being obtained, the agreement to arbitrate is not held effective.

In my opinion, such interpretations are in flagrant contradiction with the principle *in favorem validitatis* of the arbitration agreement. When parties referred even marginally to arbitration, they took into account the possibility of arbitration at the moment they concluded the underlying contract. If these agreements were meant only to establish the parties' duty to negotiate the settlement of their potential dispute through arbitration in the future, then these contractual terms would be ineffective, not serving any purpose.

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[21] See Gary B. Born, *op. cit.*, p. 789.

[22] See The English High Court of Justice, *Case Paul Smith Ltd. v. H&S International Holding Inc*. (1991), in XIX Y.B. Com. Arb. 725 (1994) *apud* Emmanuel Gaillard, John Savage (ed.), *op. cit*., p. 271.

[23] See the Paris Tribunal of First Instance (TGI Paris), Decision from February 1st 1979, *Techniques de l'ingenieur*, in Revue d'Arbitrage no. 101, 1980 *apud* Emmanuel Gaillard, John Savage (ed.), *op. cit*., pp. 270-271.

[24] See the Paris Court of Appeals, Decision from November 29th 1991, *Case Distribution Chardonnet v. Fiat Auto France*, in Revue d'Arbitrage no. 617 (1993) *apud* Emmanuel Gaillard, John Savage (ed.), *op. cit*., p. 271. Similarly, see The French Cour of Cassation, *Case Brigif v. ITM-Entreprises*, in Revue d'Arbitrage no 544 (1997), with the comments of Daniel Cohen, in *Arbitrage et groupes de contrats*, *apud* Emmanuel Gaillard, John Savage (ed.), *op. cit*., p. 271.

[25] See ICC Arbitration Case No. 6866 of 1992, published in the ICC Bulletin, Vol. 8, No. 2, 1997, available online at *htttp://library.iccwbo.org/dr-awards.htm* (Last consulted on April 4th 2018).

[26] See Octavian Căpățână, *Convenția arbitrală deficitară (Defective Arbitration Agreement)*, in Revista de drept comercial (Commercial Law Journal) no. 12/1999 *apud* Viorel Roș, *op. cit.*, p. 158.

[27] See Bucharest Court of Appeals, Judgement no. 179 from November 15th 1999 in Case File no. 250/1998, not published, available in excerpt in Giorgiana Dănăilă, *op.cit.*, p. 96.

2.4. Opinions Which State That Both Jurisdiction Clauses Should Be Held Ineffective

These opinions are rather isolated, being rarely encountered in practice. However, there were cases when both jurisdiction clauses were considered ineffective.

For instance, there was a French court[28] which held that the arbitration agreement, which expresses the will of the contracting parties to give the arbitrators the power to settle their dispute, clearly excludes the intervention of the state judge. Thus, the respective clause is certainly in contradiction with the clause conferring jurisdiction to the Paris Commercial Court. Consequently, the disputed jurisdiction clauses are irreconciliable and shall be deemed not written. Pursuant to the rules of civil procedure law, the litigation was placed within the jurisdiction of the commercial court of the place where the defendant had its headquarters.

In another interesting case[29], the ICC Arbitral tribunal considered that by means of a clause incorporated in their contract, the parties wanted to *"preserve"* an alternative that allows them to choose between a consular and an arbitral jurisdiction. However, if there is any doubt related to the content of the respective jurisdiction clause, it shall be interpreted *contra proferentem*. In this hypothesis, the arbitration agreement drafted by the claimant being ambiguous, the arbitral tribunal considered it was not competent to settle the respective dispute.

3. Conclusions

To sum up, this paper presents the issue of *`pathological`* clauses where the contracting parties refer both to the jurisdiction of arbitration tribunals and national courts without giving priority to one or another.

Doctrinaries and practitioners expressed several opinions concerning the hypothesis of such defective agreements, which can be grouped into three categories, namely:

I. Opinions in favour of arbitration, according to which the claimant has the right to choose between the two types of jurisdiction;
II. Opinions which favour the exclusive competence of ordinary courts of law in case of ambiguity;
III. Opinions which consider that both jurisdiction clauses should be held ineffective.

Each category has many followers. However, the opinions which are in favour of arbitration are the dominant ones, while the opinions that held the jurisdiction clauses ineffective are rather isolated.

I rally with the first category. In my opinion, there are three main principles that shall be observed when interpreting any *`pathological`* arbitration agreement.

Firstly, courts need to establish the genuine intention of parties at the moment they drafted the respective agreement. In order to achieve that, they need to examine all relevant circumstances, including the ones provided by Article 4.3 of 2016 UNIDROIT Principles, especially the preliminary negotiations between parties, their practices and conduct subsequent to the conclusion of the contract. By doing so, practice showed me that this would reveal previous actions which may give us valuable hints that parties wanted to submit their potential disputes to arbitration.

Secondly, if the true intention cannot be accurately established, the arbitration agreement shall be always interpreted *in favorem validitatis*. If parties referred to arbitration in their contracts, it would be irrational to consider that they did not take into account the possibility to resort to arbitration in case of a potential dispute at the moment of conclusion of the respective contracts. Parties incorporate clauses in their contracts with the will to make them effective.

Thirdly, this kind of jurisdiction clauses is generally encountered in commercial contracts. When interpreting commercial law rules we need to be flexible and to observe the principle of celerity. By refusing to recognise the competence of the arbitration tribunal that was appointed by the claimant, the procedure length is considerably increased, which is contrary to the parties' right to a speedy trial. Therefore, the claimant shall have the right to choose between the two jurisdictions given to him as option.

In the end, I hope this paper raises awareness on the phenomenon of *`pathological optional arbitration agreements`*, which are rarely discussed by theorists, even if they are commonly encountered in practice, and it serves as an inspiration for future research on this issue, by considering a more extensive jurisprudential approach.

References

- Jacques Beguin, Michel Menjucq, *Droit du commerce international (International Trade Law)*, Lexis Nexis Publishing House, Paris, 2011
- Nigel Blackaby, Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration*, Oxford University Press, New York, 2009
- Gary B. Born, *International Commercial Arbitration, Volume I. International Arbitration Agreements*, Wolters Kluwer International, Alphen aan den Rijn (The Netherlands), 2014

[28] See *Case Epoux Saadi v. Huan*, C. Paris, November 22nd 2000, in Alexis Mourre (ed.), *Les Cahiers de l'Arbitrage (Arbitration Notebooks)*, Gazette Du Palais, Edition Juillet 2002, p. 294.

[29] See Partial Judgment from 2006 from ICC File no. 13921, in Charles Kaplan, Alexis Mourre (ed.), *The Paris Journal of International Arbitration (Les Cahiers de l'Arbitrage)*, L.G.D.J. Publishing House, Paris, May 2010, pp. 91-93.

- Giorgiana Dănăilă, Procedura arbitrală în litigiile comerciale interne (Arbitration Procedure in Domestic Commercial Litigation), Universul Juridic Publishing House, Bucharest, 2006
- Frédéric Eisemann, "La clause d'arbitrage pathologique", published in Commercial Arbitration Essays in Memoriam Eugenio Minoli, Unione Tipografico-editrice Torinese, Torino, 1974
- Emmanuel Gaillard, John Savage (ed.), *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, Citic Publishing House, 2003
- Charles Kaplan, Alexis Mourre (ed.), *The Paris Journal of International Arbitration (Les Cahiers de l'Arbitrage)*, L.G.D.J. Publishing House, Paris, May 2010
- Alexis Mourre (ed.), *Les Cahiers de l'Arbitrage (Arbitration Notebooks)*, Gazette Du Palais, Edition Juillet 2002
- Viorel Roș, *Arbitrajul comercial internațional (International Commercial Arbitration)*, Regia Autonomă Monitorul Oficial Publishing House, Bucharest, 2000
- Dragoș-Alexandru Sitaru, Dreptul comerțului international. Tratat.Partea Generală (International Trade Law. General Part), Universul Juridic Publishing House, Bucharest, 2017
- Vanda Anamaria Vlasov, Arbitrajul comercial. Jurisprudență arbitrală 2007-2009. Practică judiciară (Commercial Arbitration. Arbitral Jurisprudence 2007-2009. Judicial Practice), Hamangiu Publishing House, Bucharest, 2010
- The ICC Bulletin, Vol. 8, No. 2, 1997, available online at *htttp://library.iccwbo.org/dr-awards.htm* (Last consulted on April 4th 2018)
- The UNIDROIT Principles of International Commercial Contracts (2016), available at *https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf* (Last consulted on April 15th 2018)
- ***, Jurisprudența Comercială Arbitrală (The Arbitral Commercial Jurisprudence) 1953-2000, edited by the Chamber of Commerce and Industry of Romania, Bucharest, 2002
- ***, Revista Română de Arbitraj (The Romanian Journal of Arbitration) no. 3 (7), July-September 2008, edited by the Chamber of Commerce and Industry of Romania, Rentrop & Straton Publishing House, Bucharest
- ***, Revista Română de Arbitraj (The Romanian Journal of Arbitration) no. 4 (8), October-December 2008, edited by the Chamber of Commerce and Industry of Romania, Rentrop & Straton Publishing House, Bucharest

THE REGIME OF THE LETTER OF GUARANTEE UNDER THE ROMANIAN LEGISLATION AND INTERNATIONAL LEGAL PROVISIONS

Florin CONSTANTINESCU[*]

Abstract

The letter of guarantee is widely utilized in the international trade relations and its regime was regulated through three publications issued by the International Chamber of Commerce from Paris (Publication no.325, Publication no.458 and Publication no. 758); at the same time, it is well known that some of the European countries (and not only) enacted internal laws with regard to the letter of guarantee. The putting into operation of the domestic and international provisions in the field of the letter of guarantee has generated miscorrelations and/or legal conflicts mostly settled by decisions issued by the Courts of Law or by uniform practices accepted by the players from market.

The present article aims at providing a legal analysis of the letter of guarantee taking into consideration mainly the legal traits, the types of the letters of guarantee, the modalities of issuance and utilization, the publicity, the assignment of the receivables deriving from the letter of guarantee.

Also one of the envisaged scope is to submit proposals to amend the current legislation for the large benefit of the business community, legal professionals or theoreticians.

Keywords: *Letter of Guarantee, Mortgage, Receivables, Assignment, Trade Finance, Joint-Stock Company, Limited Liability Company.*

1. Introduction

1.1. What matter does the paper cover?

The subject matter of the present study is to emphasize the role performed by the letter of guarantee and also its strategic importance in the banking industry from Romania, under the Publication no.325, Publication no. 458, Publication no. 758 issued by the International Chamber of Commerce from Paris and also under the internal legislation; it is important to be highlighted that the letter of guarantee was not expressly regulated by the national legislation until the entering into force of the new Civil Code (October 1st, 2011).

In accordance with the former legislation, the letter of guarantee was compared with the *surety (Rom. fideiusiune)* but maintaining its particular traits meaning the autonomy towards the underlying transaction.

To the same extent, the letter of guarantee was called "autonomous guarantee" or "demand guarantee".

Thus, the present paper will provide a legal analysis of the letter of guarantee taking into account the following: the definitions and the evolution of the concept over the time, the legal nature of the letter of guarantee, the main legal traits of the letter of guarantee, the principal types of the letter of guarantee used in Romania, the extent to which the receivables deriving from a letter of guarantee may form the subject of a movable mortgage as provided by the new Civil Code, the publicity related to the letter of guarantee and/or related to the movable mortgage set over the receivables coming from the letter of guarantee, the legal report between the international rules and the national legislation (inclusively the potential conflicts), proposals to amend the existing legislation.

Nowadays the letter of guarantee are issued by the institutions of credit like banks and non-financial institutions the main scope being to safeguard the commercial and financial interests of the beneficiary in case of a non-compliant event (regarding the performance of the underlying transaction) shall be generated by the applicant.

Taking into account the fact that the letter of guarantee is currently regulated by the new Civil code, the first covered domain is the civil law.

At the same time, it has to be underpinned that the letter of guarantee is applied to the trade relations (national or international) between the companies; so the second covered domain is the commercial law.

Although there are contradictions displayed by the local doctrine regarding the autonomy of the commercial law[1], we consider that the commercial law has full autonomy towards the civil law, even the commercial law derives from the civil law. The civil law and the commercial law may peacefully coexist for the benefit of the business environment and legal professionals.

1.2. Why is the studies matter important?

The importance of the present paper consists mainly in the following:

a) to gather the relevant arguments with the scope to deliver an overall legal analysis of the letter of guarantee applicable in the current business

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[1] Stanciu D. Carpenaru, *Treatise Of Romanian Commercial Law* (Bucharest: Universul Juridic Publishing House, 5th edition, updated, 2016), 21;

milieu;
b) to point-out the practicality and the real benefits issued by the use of the letter of guarantee in trade relations (domestic and international);
c) to submit amendments regarding the applicable legislation.

The pursued objectives of the study are:
a) to strengthen the importance of the letter of guarantee as an instrument prone to streamline the business relations;
b) to outline the aspects needed to be improved and/or shifted;
c) to present in greater details the modalities by which the international regulations in the field of the letter of guarantee may be harmonized with the national legislation in this regard.

1.3. How does the author intend to answer to this matter?

The means aimed to be utilized in order to complete the research are:
a) the critical and contrastive analysis of the foregoing and current applicable legislation;
b) the investigation of the relevant practice;
c) the study of the significant legal doctrine.

The main methods that will be used are: the logical method, the contrastive method and the historical-teleological method.

1.4. What is the relation between the paper and the already existent specialized literature?

The existent legal literature has not sufficiently debated the following aspects:
a) a) the difficulty of proper application of the Article 2321 (regarding the letter of guarantee) from the new Civil Code versus the issues arising from the legal practice;
b) b) the possibility to established a mortgage over the receivables arising from letter a guarantee;
c) c) the possibility to be taken into guarantee the beneficiary's right to claim the payment deriving from the letter of guarantee.

Bearing in mind the aforesaid, the present paper intends to supply arguments, ideas, solutions in order to streamline and also to facilitate the trade finance relations.

2. The letter of guarantee. Concept. Traits. Legal nature

2.1. As provided by the Article 2321 from the new Civil Code, the letter of guarantee is the irrevocable and unconditional commitment by which a person called "issuer" undertakes, upon the request of the other person, called "applicant", in consideration of a prior obligational report, to pay an amount of money to a third party, called "beneficiary", in compliance with the already assumed commitment.

2.2. In the architecture of the new Civil Code, the letter of guarantee is an autonomous guarantee, which is a sub-category of the personal guarantee. It means that the entire patrimony of the issuer will be dedicated to the payment of the letter of guarantee, in case of a demand in this regard (usually, a payment demand is made when an event of default-deriving from the trade relation between applicant and beneficiary- occurs).

2.3.Until the entering into force of the new Civil Code, there was no specific regulation with regard to the letter of guarantee.

The letter of guarantee was called "independent bank guarantee" and the general opinion was that such atypical guarantee is generated by the bank customs.

In fact, the aforesaid bank customs were originated by the uniform rules regarding the letter of guarantee, issued by the International Chamber of Commerce from Paris, France.

The first step in the direction to codify the applicable rules regarding the letter of guarantee was the year 1978 when the International Chamber of Commerce from Paris issued the Publication no.325 on demand guarantee aiming at assure the uniformity of the practices based on a fair balance between the contracting parties[2].

Following the same trend and taking into consideration the latest developments in the trade finance relations, the International Chamber of Commerce from Paris issued (in 1992) a new set of Uniform Rules on Demand Guarantee, applicable since January 1st, 1994 (Publication no. 458).

The latest version of the abovementioned uniform rules was provided in 2010 through the Publication no. 758 – Uniform Rules on Demand Guarantee, issued by the International Chamber of Commerce from Paris.

In order to avoid any doubt it has to be mentioned that the Publication no. 758 hasn't abrogated the Publication no. 458 but it has updated the Publication no. 458.

2.4. It has to be highlighted that, in accordance with the Article 2 from the Publication no. 458, a demand guarantee was defined as any guarantee, obligational title or payment commitment (however it would be called or depicted by a bank, insurance company or any other natural person or legal entity), provided in writing, for the payment of an amount of money at the presentation (in conformity with the assumed commitment) of a written payment requirement and any other documents that may be mentioned with the demand guarantee, based on the assumed commitment: (i) upon request or based on the instructions and on a party's liability (applicant); (ii) upon request or based on the instructions and on a liability of a bank, insurance company or any other natural person or legal entity, acting based on the

[2] Boroi, Gabriel, Ilie, Alexandru. The Commentaries of the Civil Code. The personal guaranties. The privileges and the real guaranties (Bucharest: Hamangiu Publishing House, 2012), 64;

applicant's instructions in the benefit of a third party ("beneficiary").

With regard to the abovementioned definition, it is worthy to mention that 3 principles[3] were generated by the Publication no. 458 meaning:

a) a demand guarantee is irrevocable (Article 5);
b) the documentary trait of a demand guarantee;
c) a demand guarantee is a formal title, respectively the guarantor will pay only if the payment requirement and/or the documents are conformable with the text of the demand guarantee.

2.5. Legal traits

A demand guarantee has the following traits:

a) it is an irrevocable title, as moment as the Article 2321, 1st paragraph from the new Civil Code stipulates that a letter of guarantee is an irrevocable title. It means that the demand guarantee may be not retracted before the expiry date;
b) it is an autonomous title in comparison with the underlying transaction. Thus, the issuer may not sustain before the beneficiary the legal exceptions arising from the obligational report prior to the assumed commitment; moreover, the issuer may be not held to pay in case of an abuse or obvious fraud.
c) it is an independent title, meaning the safeguard provided is not ancillary to the secured obligation in comparison with the surety (where the surety is an accessory of the secured obligation), as provided by the Articles 2288-2290 from the new Civil Code);
d) it is a formal title, as moment as the payment will be made in accordance with the terms of the assumed commitment, as provided by the Article 2321, 1 st paragraph from the new Civil Code. Moreover, this trait is also supported by the Article 14 from the Publication no.758 based on which the payment demand under the guarantee shall be supported by other documents as the guarantee specifies;
e) it is an unilateral document because the issuer obliges to pay an amount of money for the benefit of a third party. Although, the Article 2321 from the new Civil Code uses the wording "at the applicant's request", this fact will not negatively impact the unilateral trait because the applicant's offer is a simple proposal; furthermore, the issuer may be not obliged by the applicant to issue a demand guarantee. The issuance of such guarantee is the result of the issuer's will;
f) it is an unconditional title meaning the payment will be made at first and simple request of payment, following the terms and conditions as provided by the demand guarantee;
g) it is a documentary title, as moment as the payment shall be made in accordance with the terms and conditions as stipulated by the demand guarantee;
h) it is an *intuitu personae* title, meaning the guarantee may be not transmitted concomitantly with the transfer of the rights and obligations deriving from the prior obligational title, in lack of a contrary provision, as provided by the Article 2321, 5th paragraph from the new Civil Code;
i) it bears a connection with the prior obligational report which shall not impact the autonomy of the letter of guarantee;
j) it bears a financial trait, meaning the letter of guarantee is expressed in money;
k) it is considered issued when is out of the issuer's control (Article 5 from the Publication no. 758).

3. Legal nature. Form. Types

3.1. The letter of guarantee is a personal guarantee, being framed as an autonomous guarantee.

3.2. A letter of guarantee must be issued in a written form although it is not expressly mentioned by the law. The main argument in this regard is based on the customs specific to the banking activity meaning the formalism and the documentary requirement.

We have in mind the provisions of the Article 121 from the Emergency Govern Ordinance no.99/2006 on the credit institutions and the adequacy of the capital, based on which the credit institutions must keep an exemplar of the document contracts at its offices.

Moreover, the letter of guarantee is a writ of execution and during the foreclosure process the lender must prove/document the real existence of the letter of guarantee.

To the same extent, we emphasize that the letter of guarantee is subject to the communication, taking into consideration its trait of unilateral act, as provided by the Article 1326, 1st paragraph from the new Civil Code.

3.3. The Romanian banks mostly issue the bid bond, the performance bond, the advance payment guarantee, the payment guarantee etc.

4. The legal relation between applicant and issuer

4.1. It is undoubtedly that there is a relation of mandate between the applicant and the issuer, as moment as the letter of guarantee shall be issued by bank upon the applicant's request as provided by the Article 2321, 1st paragraph from the new Civil Code.

With regard to the mandate, we underline that there is a mandate without representation, as provided by the Article 2039, 1st paragraph from the Civil Code.

The relation of mandate does not impact the autonomy of the letter of guarantee towards the underlying transaction, because the applicant undertakes to pay independently towards the prior

[3] Negrus Mariana, Payments and international guarantees (Bucharest: C.H.Beck, 3rd edition, reviewed and updated, 2006), 336

obligational report, in accordance with the Article 2321, 1st paragraph from the new Civil Code.

4.2. Having in mind the above, the applicant has the following obligations:

a) to furnish instructions to the issuer

In this respect, the Article 8 from the Publication 758 provides that the instructions must be clear, precise and should avoid the excessive detail; the letter of guarantee must specify, amongst others, the following: the applicant, the beneficiary, the issuer, the guarantor, the amount or maximum amount payable and the currency, the expiry date, the party liable for the payment of any charges etc.;

b) to pay an issuance fee to the bank, in conformity with the Article 32 from the Publication no.758

Moreover, this fee is justified because the issuing bank grants a loan to the applicant fact that ensues some outlays for the bank; to the same extent, the bank is a joint-stock company that must pursue to gain profit;

c) to reimburse the issuer with the amount that represents the object of the letter of guarantee

The bank supplies a non-cash loan to the applicant and the repayment also includes the related interests and other bank fees;

d) to provide collaterals to the bank[4]

The usual guarantees requested by the Romanian banks are: (i) movable mortgage over the receivables arising from the underlying agreement, enrolled with the Electronic Archive; (ii) movable mortgage over the bank account open by the applicant to the issuing bank enrolled with the Electronic Archive; (iii) mortgage over a real estate, enrolled with the Land Book.

Regarding the beneficiary of a letter of guarantee, he may dispose by the proceeds deriving from the letter of guarantee. It means that a different bank than the issuing bank may set movable mortgage over such proceeds under the condition that the letter of guarantee is transferable and the conditions stipulated by the Article 33 from the Publication no.758 are followed.

Pursuant to a prudential approach a bank will require previously the documents attesting that the beneficiary of the transferred letter of guarantee had took over all the rights and obligations deriving from the letter of guarantee [Article 33, letter d), subpoint i) from the Publication no. 758].

The aforesaid movable guarantee will be enrolled with the Electronic Archive.

Also, it is worthy to be mentioned that the issuing bank may take into guarantee the beneficiary's right to claim the payment (deriving from the letter of guarantee) unless otherwise is provided; this operation may be set through a movable mortgage enrolled with the Electronic Archive. The new Civil Code took over the aforesaid principle mentioned by the Article 4 from Publication no. 458 based on which the beneficiary's right to request the payment of the guarantee is transferable unless otherwise is provided by the letter of guarantee.

4.3. The issuer has the following obligations:

a) to examine the payment demand

The issuer has to make a formal check of the payment demand because the letter of guarantee is independent towards the underlying transaction;

b) to pay or to reject the payment demand

The issuer may be not hold to make the payment in case of an abuse or obvious fraud, as provided by the Article 2321, 3rd paragraph from the new Civil Code;

The abuse of law may occur when the a right is exerted with the scope to harm or to prejudice a third party or in an excessive way contrary to the good faith, based on the Article 15 from the new Civil Code. From a practical perspective, it means that a payment demand must be exerted with an explicit aim (as mentioned above) and the issuing bank should have a clear representation of this thing based inclusively on the held information, documents regarding the beneficiary, its status etc.

The new Civil Code documents the fraud at law; in accordance to the Article 1237 from the new Civil Code, the cause is illicit when the agreement is the mean by which the putting into operation of a legal imperative norm is breached. From a practical perspective, it means that a payment demand is made in flagrant contradiction with the law, being the modality by which the law is breached.

Regarding the both cases as mentioned above, the assessment of the bank must be performed very carefully taking into consideration the potential indemnities that the bank shall pay to the beneficiary if a Court of Law will decide otherwise.

We deem that the assessment should be as much objective as possible based on effective evidences that may be submitted before a Court of Law; therefore it is advisable that the bank should display good faith and needed prudence in accordance with the law and with the professional customs applicable in the business milieu.

4.4. The issuer who made the payment may claim the paid amount from the applicant

Obviously the issuer is entitled to receive the paid amount, the issuance fee and the related interest.

5. The legal relation between issuer and beneficiary

5.1. The letter of guarantee is the legal foundation of the relation between issuer and beneficiary.

5.2. The first obligation of the issuer is to pay the guarantee at first and simple demand coming from beneficiary.

The issuer has to decide if a guarantee is payable or not in 5 days (Article 20 from the Publication 758); if the issuer's representation is that the payment demand is not conformable it may contact the beneficiary aiming to remediate the irregularities, if possible. On the contrary, the beneficiary will be acknowledged in writing with regard to the rejection

[4] Nedelea Zina, The banking demand guarantee (Bucharest: C.H.Beck Publishing House, 2010), 83-85

and the reasons on which the rejection was grounded (Article 24, letter d from the Publication 758).

6. The legal relation between beneficiary and applicant

6.1. The underlying transaction is the fundamental relation between beneficiary and applicant.

6.2.Besides the applicant's main undertaking to provide a letter of guarantee, the applicant must find a bank able to issue a letter of guarantee taking into consideration the underlying transaction.

6.3. The applicant may claim the restitution of the paid amount from the beneficiary who displayed a fraudulent conduct (if the case).

7. The governing law. The cessation of the letter of guarantee

The governing law is the law applicable to the registered office of the issuer if it is not otherwise provided by the letter of guarantee. As a rule, the national laws are mostly preferred as governing law; as a consequence, the international provisions (comprised in publications) complement (and detail) the national legislation.

The letter of guarantee is ceased at the expiry date mentioned with the letter of guarantee independently by the remittance of the original unless it is otherwise provided (Article 2321, 6th paragraph from the new Civil Code).

8. Conclusions

8.1. Main outcomes of the study

The main outcomes of the present paper are:

a) an overall presentation of the legal regime of the letter of guarantee with focus on the relevant aspects;
b) the highlight of some new securities that may be set by the issuing bank in connection with the letter of guarantee meaning the movable mortgage over the proceeds deriving from the letter of guarantee (if the letter of guarantee is transferable) and also over the beneficiary's right to transfer the right to claim the payment of the letter of guarantee.
c) a screening of the relevant former and current legislation;
d) the applicability of the national legislation of the issuer, the international provision being secondary;
e) the proposal to amend the new Civil Code as follows: (i) to be expressly mentioned the possibility to be settle the securities as provided by the letter b) above and their registration with the Electronic Archive; (ii) to be detailed the concepts of abuse and obvious fraud as provided by the Article 2321, 6th paragraph from the new Civil Code and the criteria based on which the issuing bank may or must consider when it decides to reject a payment demand.

8.2. Expected impact of the outcomes

The impact of the outcomes consists mainly in the following:

I. to strengthen the importance of the letter of guarantee in the current business relations due to its direct, streamlined and agile way of doing business;
II. to create the context by which the recommendations contained by the Article VIII.1, letter a) above shall be transposed into legal norms;

8.3. Suggestions for further research

The main suggestion is to amend the new Civil Code as follows:

I. to be expressly mentioned the possibility to be settle the securities as provided by the Article VIII.1, letter b) above and their registration with the Electronic Archive;
II. to be detailed the concepts of abuse and obvious fraud as provided by the Article 2321, 6th paragraph from the new Civil Code and the criteria based on which the issuing bank may or must consider when it decides to reject a payment demand.

References

- Stanciu D. Carpenaru, *Treatise Of Romanian Commercial Law* (Bucharest: Universul Juridic Publishing House, 5th edition, updated, 2016), 21
- Boroi, Gabriel, Ilie, Alexandru. The Commentaries of the Civil Code. The personal guaranties. The privileges and the real guaranties (Bucharest: Hamangiu Publishing House, 2012), 64
- Nedelea Zina, The banking demand guarantee (Bucharest: C.H.Beck Publishing House, 2010), 83-85
- Negrus Mariana, Payments and international guarantees (Bucharest: C.H.Beck, 3rd edition, reviewed and updated, 2006), 336

THE EUROPEAN UNION DIRECTIVE PROPOSAL ON RESTRUCTURING AND SECOND CHANCE: A CHECK OF COMPLIANCE BY ROMANIAN LAW

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Abstract

The European Commission is highly active in the field of insolvency, by making big steps towards reforming the concept of insolvency, beginning with the Recast of the European Insolvency Regulation, which has entered into force on 26th of June 2017, with small exceptions. On 22nd November 2016, the European Commission presented the Proposal for a Directive on restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/UE. The Proposal itself aims at reforming the concept of insolvency by trying to build a new entrepreneurial culture, based on rescuing financially distressed yet viable debtors. The effects of the actual European culture regarding insolvency, which prioritizes liquidation, have been quantified in job losses, a high rate of non-performing loans and low percentage of creditors' recovery rate. The Proposal invites Member States to put in place its provisions, by offering them a set of key principles and rules. The Proposal's general objective is to eliminate the barriers to the free flow of capital, but it also provides adjacent targets, which encourage cross-border investments and limit the rate of non-performing loans. This paper aims to analyze a check of compliance by Romanian law, in order to identify the way that our national law will need to be adapted to the Proposal's provisions.

Keywords: *financial difficulties, preventive restructuring frameworks, insolvency, second chance, debt discharge.*

1. Introduction

The European Commission is continuously working on increasing the efficiency of the single market. In order to fulfill this objective, the Capital Markets Union Action Plan[1] has been developed. One of the key objectives of the Action Plan is to stimulate the free flow of capital in the single market by eliminating identified barriers, some of which result from the differences among Member States' restructuring and insolvency frameworks. The first step towards identifying the barriers has been the quantification of the current situation in Europe regarding insolvency. As a result, statistics show that less than 50% of businesses survive for a five-year period.[2] Bankruptcy comes along with the stigma of failure and it's also the main fear of Europeans if they were to start a business.[3] Considering the high rates of business deaths in several Member States[4], due to the priority of liquidation instead of restructuring, their impact upon the single market and also the Europeans' fear of becoming an entrepreneur, the European Commission has issued a Recommendation on a new approach to business failure and insolvency[5] (the Recommendation) that aims at providing early restructuring frameworks for viable businesses and also a second chance for bankrupt but honest entrepreneurs. A next step in reforming the concept of insolvency consisted of the adoption of the European Insolvency Regulation of 20 May 2015[6] (EIR), which extended its field of application, therefore including pre-insolvency proceedings. In 2014, INSOL Europe has submitted a study to the European Commission[7], entitled *Study on a new approach to business failure and insolvency – Comparative legal analysis of the Member States' relevant provisions and practices*[8], which revealed that 13 Member States haven't put in place early restructuring frameworks. Thus, as a next step, in order to accelerate and consolidate a business rescue culture and a second chance for entrepreneurs, the European Commission has presented, on 22nd November 2016, the proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU[9] (the Proposal). This legislative initiative

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[1] Brussels, COM/(2015) 468 final: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0468&from=EN

[2] http://ec.europa.eu/eurostat/statistics-explained/index.php/Business_demography_statistics#High_growth_enterprises

[3] Flash Eurobarometer 354 (2012) Entrepreneurship in the E.U. and beyond, p. 72

[4] http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Figure6_Trend_of_enterprise_death_rates,_business_economy,_2014-2015_ (%25).png

[5] Brussels, 12.3.2014, C(2014) 1500 final, available at http://ec.europa.eu/justice/civil/files/c_2014_1500_en.pdf

[6] Regulation (E.U.) 2015/848 of the European Parliament and the Council of 20 May 2015 on insolvency proceedings (Recast), O.J.E.U., L141/19.

[7] https://www.insol-europe.org/eu-study-group-publications

[8] Stefania Bariatti, Robert van Galen, TENDER No. JUST/2012/JCIV/CT/0194/A4, available at : http://ec.europa.eu/justice/civil/files/insol_europe_report_2014_annexes_en.pdf

[9] Strasbourg, 22.11.2016, COM (2016) 723 final : http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0723&from=EN

is an ambitious European project that stimulates Member States' cooperation in achieving the E.U.'s goals. The Proposal offers Member States minimum standards regarding pre-insolvency, insolvency and discharge proceedings. Insolvency has also been reformed in Romania, by adopting the Law no. 85/2014 regarding pre-insolvency and insolvency proceedings[10]. This paper aims to analyze the way that the Romanian law complies with the Proposal's provisions. A check of compliance is necessary because once the Proposal becomes binding[11], Member States will need to take measures to ensure that their national legislative context complies with the Proposal's provisions. If the Romanian law regarding pre-insolvency, insolvency and discharge proceedings doesn't fully comply with the Proposal's provisions, it will need to undergo several amendments in order to fulfill the minimum standards promoted by the European Commission.

1.1. The Proposal's structure

The Proposal is structured into 47 recitals and 36 articles focusing on three main concepts: access to preventive restructuring frameworks, second chance for honest entrepreneurs and increasing the efficiency of restructuring, insolvency and discharge procedures through targeted measures.

1.2. The Proposal's objective(s)

The Proposal itself is a European objective that accelerates an insolvency reform. It is a flexible instrument setting minimum standards that Member States will use in order to comply with the current needs of the single market. As it mentions, the key objective is to reduce the barriers to the free flow of capital stemming from differences in Member States' restructuring and insolvency frameworks. Moreover, the Proposal's provisions themselves are objectives that need to be fulfilled by Member States. The aim is also to provide a common E.U.-wide framework, ensuring the removal of obstacles to the exercise of fundamental freedoms, such as the free movement of capital and freedom of establishment. Over-indebted debtors that don't have access to debt discharge proceedings may change their jurisdiction in order to benefit from a true second chance, so it might be said that they no longer have the freedom of establishment. The free movement of capital consisting in cross-border investments is also discouraged by the length and costs implied by an insolvency proceeding. Lastly, even though the Proposal doesn't specify, another objective is to stimulate Member States into putting their efforts to ensure the implementation and development of efficient legislative frameworks covering these matters. Reforming the concept of insolvency and consolidating a business rescue culture is a process that needs time, and also synergic efforts of European institutions, on one side, and Member States on the other side.

2. A check of compliance by the Romanian law

Insolvency has been reformed in Romania though the adoption of the Law no. 85/2014, just a few months after the European Commission has issued the Recommendation on a new approach to business failure and insolvency. However, the Proposal sets targeted rules that Member States are invited to put in place. A check of compliance is not only an analysis of the Romanian law, but also an indicator of its standards in relation to the European standards.

2.1. Preventive restructuring frameworks

Preventive restructuring frameworks are regulated by Title II of the Proposal. In the European vision, preventive restructuring frameworks are important because they could be used as an instrument that reduces the rate of unnecessary business liquidations. If debtors across Europe had access to efficient, early restructuring frameworks, negotiations carried out with creditors may be eased, especially if they are managed by a *practitioner in the field of restructuring*, as they are defined in Article 2 (15) of the Proposal. A specialized negotiator will have two main objectives: they shall manage the difficulties that may cause a state of insolvency while making sure that the debtor's liabilities are covered. The Proposal aims at ensuring the availability of preventive restructuring frameworks in all Member States, which may decrease the rate of insolvent businesses. Preventive restructuring proceedings are to be triggered when there is likelihood of insolvency. Their role is to restore and enhance the debtor's viability through restructuring, while aiming at avoiding insolvency. Preventive restructuring frameworks are not limited, since the Proposal mentions that they may consist of one or more procedures and measures. The involvement of judicial or administrative authorities is limited to where it is necessary and should ensure the protection of affected parties' rights. Preventive restructuring proceeding may be accessed by the debtor, or by creditors which have the debtor's consent. In Romania, preventive restructuring frameworks have been a traditional commercial instrument, since the adoption of the Commercial Code in 1887, which regulated the pre-bankruptcy moratorium. The preventive composition has been firstly regulated by the Law of preventive composition from 1929, which has been abrogated in 1938. In the modern context, the traditional pre-bankruptcy moratorium took the shape of the ad-hoc mandate, which, along with the preventive composition, is regulated today by the Law no. 85/2014 regarding pre-insolvency and insolvency proceedings. Therefore, in Romania, two types of pre-insolvency proceedings are made available. They can

[10] Published in the Official Journal of Romania, Part I, no. 466 from 25th of June 2014

[11] The Proposal will enter into force on the twentieth day following the day of its publication in the Official Journal of the European Union.

be triggered only by the debtor[12], when there is likelihood of insolvency. Both of them are submitted to confirmation by the Court. If the Court states that the debtor is in a state of insolvency, the pre-insolvency proceedings will not be opened. The state of financial difficulty is the main condition that needs to be fulfilled in order to access either the ad-hoc mandate, either the preventive composition. The Law no. 85/2014 provides several measures which can be adopted by the debtor in order to avoid insolvency through restructuring, but they have an exemplary and not a limiting nature. If voted by creditors, any measures considered adequate could be adopted. The Court's involvement is limited but also necessary. When accessing the preventive composition proceeding, the debtor may request, under several conditions, a temporary stay of individual enforcement actions. If admitted by the Court, a certain protection of creditors' rights is required. The Court's involvement in pre-insolvency proceedings is limited to the legal aspects implied by each proceeding. In regards of the availability of early restructuring frameworks, the Romanian law fully complies with the Proposal's provisions. In terms of facilitating negotiations in order to adopt a preventive restructuring plan, the Proposal provides the following minimum standards. First of all, the debtor should remain totally or at least partially in control of their assets and day-to-day operation of the business. This requirement is particularly important due to the separation of preventive restructuring from formal restructuring unfolded in an insolvency proceeding, where the debtor may or may not remain in possession. The Proposal also states that appointing a practitioner in the field of restructuring shall not be mandatory in every case. This particular requirement targets micro, small and medium enterprises, which may not carry out the costs implied by an early restructuring proceeding. According to the Annual Report on SMEs[13], *firms with 0 and 1 to 4 employees accounted for 98% or more of all business deaths in 15 Member States (...) and for between 95% and 97% of all business deaths in 9 other Member States (...)* This shows us that the Proposal is flexible enough to provide an efficient preventive restructuring framework for SMEs, in order to stimulate entrepreneurship. In the Proposal's view, the appointment of a practitioner in the field of restructuring may be required in two cases: if the debtor is granted a general stay of individual enforcement actions and where the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down. The Romanian law maintains the debtor in possession, but in a preventive composition proceeding, if the debtor seriously violated the terms negotiated with creditors, through actions such as favoring one/more creditors or asset alienation, the creditor's meeting may decide to file a request of the composition's resolution. There is no sanction for the debtor that limits the control over the business. However, the Romanian law provides that during the proceeding, the debtor has control over the business and day-to-day operations, in the terms negotiated in the preventive composition and under the supervision[14] of the assigned insolvency practitioner. As we can see from above, the Romanian law complies with the Proposal's provisions regarding the debtor in possession, except the provisions which state that the appointment of a practitioner in the field of insolvency shall not be mandatory in every case. According to the Law no. 85/2014, the organs applying the ad-hoc mandate are the president of the Court and the insolvency practitioner, while the organs applying the preventive composition proceeding are the syndic-judge and the insolvency practitioner. A financially distressed debtor may resort to an informal mediation procedure, where the appointment of an expert is not mandatory, but these types of proceedings are not recognized as pre-insolvency proceeding by the law. In means of a temporary stay of individual enforcement actions, the Proposal provides that Member States shall provide a framework which allows a debtor to benefit from a temporary stay of individual enforcement actions, if and to the extent such a stay is necessary to support the negotiations of a restructuring plan. The temporary stay of individual enforcement actions may also target secured creditors, and may be general (covering all creditors) or limited (covering one or more creditors). So far, the Romanian law complies with the Proposal's provisions, since the preventive composition allows the debtor to benefit from a temporary stay of individual enforcement action, if and only if at least 75% of the value of creditors' claims is engaged in the proceeding. However, the Proposal limits the stay of individual enforcement actions to 4 months. This period may be extended under the following conditions: firstly, if there is evidence that progress has been made in the negotiations of a restructuring plan and secondly, if the extension of the stay does not unfairly prejudice the rights or interests of any affected parties. The total duration of the stay of individual enforcement actions should be limited, in the Proposal's view, to maximum twelve months. In this matter, the Romanian law does not comply with the Proposal's provisions, since the preventive composition allows a debtor to benefit from a temporary stay of individual enforcement actions throughout the whole duration of the proceeding, respectively 24 months from the date of the composition's homologation, with the possibility of extending it with maximum 12 months. The debtor may

[12] However, article 26 (2) from the Law no. 85/2014 provides that the negotiations (but not the proceeding) may also be initiated by the creditors or by the debtor's shareholders.

[13] Patrice Muller, Shaan Devnani, Jenna Julius, Dimitri Gagliardi, Chiara Marzocchi, Annual Report on European SMEs 2015/2016, November 2016, p. 58, available at: https://ec.europa.eu/jrc/sites/jrcsh/files/annual_report_-_eu_smes_2015-16.pdf

[14] The Law no. 85/2014 doesn't provide a definition of the conciliator's supervision, but provides instead a definition of the supervision exercised in an insolvency proceeding.

also request a temporary stay of individual enforcement actions even before the composition's homologation. Moreover, the Law no. 85/2014 provides that the conciliator may file for approval a request to postpone the payment of dissent creditors' claims with maximum 18 months, under the condition of offering these creditors equivalent guarantees. In matters of the period of the stay of individual enforcement actions, the Romanian law exceeds the period recommended by the Proposal. Also, it doesn't provide the possibility of lifting the stay of individual enforcement actions, but instead provides that when the creditors' meeting decides to file for the preventive composition's resolution, the preventive proceeding is suspended *ope legis*. If the preventive composition is suspended, creditors may continue their enforcement actions. In terms of consequences of the stay of individual enforcement actions, provided by Article 7 of the Proposal, the aim is to facilitate the debtor's restructuring while protecting the interests of affected parties. Therefore, the Proposal provides that the obligation of filing for insolvency proceeding should be suspended for the duration of the stay. The Romanian law doesn't clearly specify it, but a homologated composition may still continue when the debtors becomes insolvent, if they fully respect the terms negotiated with creditors. The law also provides that when a debtor is in a negotiation[15] process with its creditors and meanwhile becomes insolvent, the obligation of filing for insolvency proceedings arises in a period of 5 days from the date of the negotiations' failure. Also, if the preventive composition is homologated, insolvency proceedings may not be commenced. In reference to those creditors whose claims arise after the stay is granted, the Romanian law provides two alternatives: either they adhere to the preventive composition by their inclusion in negotiations, either they may recover their claim by any other means provided by the law. In matters of the restructuring plans content, stated in Article 8 of the Proposal, a minimum amount of information is required, as following. Firstly, the debtor's identity is required, as well as a valuation of the present value of the debtor/debtor's business and a reasoned statement on the causes and the extent of the financial difficulties. Secondly, the identity of the affected parties and their claims/interests covered by the restructuring plan is required. Also, affected parties should be grouped in classes, in order to exercise their vote upon the restructuring plan, while mentioning the value of claims in each class. Non-affected parties are also to be mentioned in the plan, along with a statement of reasons why it is not proposed to affect them. Furthermore, another minimum requirement of the Proposal concerns a reasoned statement by the person responsible for proposing the plan which explains why the business is viable, how implementing the proposed plan is likely to avoid insolvency and restore long-term viability. Lastly, in terms of the plan, the minimum requirements of the Proposal consist of three main elements: its proposed duration, any proposal by which debts are rescheduled or waived or converted into other forms of obligations and any new financing anticipated as part of the restructuring plan. Looking at the Law no. 85/2014, the formalities of the preventive composition are commenced in the base of the preventive composition offer, which will be submitted for approval to the creditors. The offer will include the following: the preventive composition's project, a list of known secured and unsecured creditors including the value of their claims and the debtors' state referring to its financial difficulties. Furthermore, the preventive composition's project needs to include the following:

I. the analytic situation of the debtors' assets and liabilities (certified by an expert accountant or audited by an authorized auditor)
II. the causes of financial difficulties including planned measures taken by the debtor in order to overcome these difficulties (until the moment of the offer's submission for approval)
III. a projection of the financial and accounting evolution on the following 24 months
IV. a detailed recovery plan.

The recovery plan in the preventive composition proceeding resembles the recovery plan as part of a judicial reorganization proceeding. The Romanian law also requires the recovery plan to include the following: the debtor's activity reorganization and targeted measures planned to be adopted in order to avoid insolvency. The law gives some examples of several measures which could be adopted. In reference to the plan's content, the Romanian law fully complies with the Proposal's provision. It doesn't specifically require a reasoned statement of the person proposing the plan which explains why the business is viable, how the plan's implementation is going to result in avoiding insolvency and restore the business's long-term viability. However, considering that the recovery plan is the main instrument in a preventive composition proceeding, it cannot be elaborated without approaching these requirements. Pre-insolvency and insolvency proceedings, in Romanian law, commence based on the state of the debtor: a debtor in state of insolvency needs to file for insolvency proceedings and a debtor in state of financial difficulty will file for pre-insolvency proceedings (ad-hoc mandate or preventive composition). Thus, in order to access pre-insolvency proceedings, the state of financial difficulty must be reasoned and proved. One of the Proposal's most significant provisions requires Member States to make a model for restructuring plans available online, in national and other languages, containing at least the information required under national law and also general and practical information on how the model is to be used. This particular requirement is highly beneficial for micro, small and medium enterprises but

[15] The Romanian law limits the duration of negotiation to a period of maximum 60 days. The prior regulation of pre-insolvency proceedings (Law no. 381/2009, currently abrogated) provided a maximum period of 30 days.

also for the entrepreneurial environment. In Romanian law, the preventive composition proceeding is based on the creditors' votes upon the preventive composition offer. The recovery plan may include rescheduled and/or reduced claims and also new financing. After the creditors approve the preventive composition offer, the practitioner in the field of restructuring will file for the Court's approval a request of the composition's homologation. The syndic-judge verifies if the debtor fulfills the following legal requirements: (i) the value of challenged claims doesn't overcome 25% of the total value of claims and (ii) the composition has been approved by creditors holding at least 75% of the total value of accepted and unchallenged claims. Also, the syndic-judge verifies the preventive composition offer, with all included documents. The judicial involvement is limited to verifying if the debtor fulfills the legal conditions. The aspect of opportunity that lies in the debtor's recovery and its possibility to avoid insolvency is fully control by the creditors. The syndic-judge doesn't have the possibility to refuse confirming a restructuring plan that doesn't have a reasonable prospect of preventing the debtor's insolvency and ensuring the viability of the business. In reference to the plan's confirmation duration, the Romanian law provides that the parties will be summoned by the syndic-judge within 48 hours from the day the request was filed and decisions shall be urgently adopted. Even though the list of creditors mentions the nature and value of the claim, creditors are not divided into classes; the law only requires mentioning which creditors are secured and unsecured. Their right to vote upon the restructuring plan and its further amendments is determined by reporting the value of their claim to the total value of claims. The Romanian law doesn't require the approval of at least one class of affected creditors. In reference to equity holders, article 27 (6) of the law provides that they may vote upon the restructuring plan, only if they are given less than they would receive in case of bankruptcy (a liquidation value is to be determined). In regard of creditors, if they challenge the restructuring plan on grounds of an alleged breach of the best interest of creditors' test, the Romanian law doesn't explicitly provide the obligation of determining the liquidation value. However, in practice, even though pre-insolvency proceedings are rarely used, the syndic-judge may order an evaluation of the debtor's business, which shall be elaborated by an appointed expert. In terms of the effects of restructuring plans, the Romanian law provides that, if creditors holding at least 75% of the total value of claims vote in favor of the restructuring plan, it will be submitted for the Court's confirmation and after its confirmation, it becomes binding upon all participant creditors, including those creditors who voted against the plan. If new claims arise during the preventive composition proceeding, held by creditors who weren't initially involved in the plan's adoption, these particular creditors aren't affected in any way by the plan. The decision which confirms the plan's adoption may be appealed within 7 days, calculated from its pronouncing for those who were present, and from its communication, for those who weren't present. Filing an appeal against the decision which confirms the plan's adoption has no suspensive effects on the plan's execution. The judicial authority which adopts a decision in regards to an appeal is the Court of Appeal, which may decide to reject the restructuring plan's adoption. However, if the Court of Appeal decides in favor of the plan's adoption, dissenting creditors will not be granted monetary compensation. The reason is because, according to the legal definition of the state of financial difficulty, the debtor pays or is able to pay its obligations and is not insolvent. This is also the reason why the law doesn't provide a priority rule in terms of payments. It is assumed that the debtor is able to pay all its obligations, but accesses the preventive composition in order to re-negotiate or reschedule some of these payments, to prevent a future state of insolvency. In respects to Article 16 of the Proposal, which provides protection for new and interim financing, the Romanian law's provisions comply. Actually, the Law no. 85/2014, which consisted of a national insolvency reform, has adopted 13 fundamental principles[16] which apply to both pre-insolvency and insolvency proceedings. The eighth principle states that debtors should be granted access to financing in pre-insolvency proceedings, in the observation period and also in judicial reorganization, while creating an adequate regime in order to protect these claims. Therefore, article 24 paragraph (2) point b) states that in the preventive composition proceeding, in the debtor is granted new financing, these claims benefit from a priority in distribution, after the procedural expenses. Actually, this particular provision is the only one mentioning a certain priority rule in the preventive composition. New and interim financing benefit from the same protection regime, both in the observation period [art. 87 paragraph (4)] and judicial reorganization [art. 133 paragraph (5) point b)]. The Romanian law doesn't provide that grantors of new and interim financing shall be exempted from liability in case of the debtor's subsequent insolvency, but this is because creditors control the opportunity aspects of reorganization (both in insolvency and pre-insolvency proceedings). Therefore, no financing will be granted without the creditors' favorable vote, in the stated conditions for each type of proceeding. In respects of Article 17 of the Proposal, some transactions mentioned at point 2 are included in the restructuring plan, which is submitted for the creditors' approval, and transactions regarding restructuring fees and the appointment of a practitioner in the field of restructuring are also submitted for the creditors' confirmation, before the plan. In order to elaborate a restructuring plan, the practitioner and its emolument

[16] The fundamental principles were inspired from the World Bank's principles.

need to be previously submitted for the creditors' approval and only after a decision is made, the plan may be drafted. Actually, any transaction, measure or premise must firstly be submitted for the creditors' approval and then submitted for the syndic-judge's confirmation. In regard to Article 18 of the Proposal, which states the directors' duties in the likelihood of insolvency, it might be said that the Romanian law doesn't provide any kind of obligation. Accessing pre-insolvency proceedings is the debtor's option, while accessing insolvency proceedings is indeed an obligation. The *likelihood of insolvency* may be translated in the *state of financial difficulty* provided by the Romanian law.

2.2. Second chance for entrepreneurs

Second chance for honest but bankrupt entrepreneurs is regulated by Title III of the Proposal. According to Articles 19-23 of the Proposal, Member States are invited to put in place debt discharge proceedings, in order to give honest but bankrupt entrepreneurs a true second chance. The discharge period is also a key factor in ensuring over-indebted entrepreneurs a second chance. Therefore, the discharge period is recommended to take no longer than 3 years starting from: (a) the date on which the judicial or administrative authority decided on the application to open such a procedure, in case of a procedure ending with the liquidation of an over-indebted entrepreneur's assets; or (b) the date on which implementation of the repayment plan started, in case of a procedure which includes a repayment plan. Member States also need to ensure that on expiry of the discharge period, over-indebted entrepreneurs are discharged of their debts. At the end of the discharge period, the entrepreneur is protected by any disqualifications related to the over-indebtedness. Member States are given the option to derogate from these provisions, by maintaining or introducing provision restricting the access to discharge proceedings, when justified by a general interest. As examples, the Proposal provides the following cases: (i) when the over-indebted entrepreneur acted dishonestly or in bad faith towards the creditors when becoming indebted or during the collection of the debts, (ii) when the over-indebted entrepreneur does not adhere to the repayment plan or to any other legal obligations aimed at safeguarding the creditors' interests; (iii) in case of abusive access to discharge proceedings and (iv) in case of repeated access to discharge procedures within a certain period of time. Member States are given the option to exclude several categories of debts from discharge, such as secured debts, debts arising out of criminal penalty or tortious liability. The Proposal also treats situations where over-indebted entrepreneurs having both professional and personal debts, by stating that all debts should be treated in a single proceeding, for the purpose of obtaining a discharge. The Proposal also provides derogation, stating that both proceedings should be coordinated for the purposes of obtaining a discharge. The Proposal's provision regarding second chance frameworks are the result of constant analysis made at E.U. level, which revealed that a true second chance given to the entrepreneur to re-launch a business and also to the entrepreneur as a natural person may easily contribute to strengthen the single market's efficiency. Actually, 82% of Europeans[17] believe that people who started their own business and failed should be given a second chance. The Romanian law doesn't provide a debt discharge framework for over-indebted entrepreneurs. It is true that a debtor going bankrupt will be discharged of the debts which couldn't be covered by liquidation, but this is only because after bankruptcy proceeding ends, the debtor ceases to exist and only if it is proven that the debtor acted honestly and in good-faith. Also, these provisions regard strictly the debtor as a legal person and not as a natural person. There is no other law beside the Law no. 85/2014 that provides a debt discharge framework. In this particular matter, the national law doesn't comply at all with the Proposal's provisions. The insolvency of a natural person is not regulated by the Law no. 85/2014, but by the Law no. 151/2015, which began to be applied starting with 1st of January 2018 and therefore the legislative outcomes are not yet known. In the doctrine it has been shown[18] that a debt discharge may, is some hypothesis, take more than 12 years. Therefore, it is recommended for our national law to implement the Proposal's provisions even before the deadline, since it has been proven that a second chance benefits the economic environment.

2.3. Measures to increase the efficiency of restructuring, insolvency and second chance

In the Proposal's view, the judicial or administrative authorities applying the proceedings should receive initial and further training to a level appropriate to their responsibilities, in order to ensure expeditious treatment of the procedures. The same condition is requested for practitioners in the field of restructuring, be they mediators, insolvency practitioners or other practitioners appointed in the restructuring, insolvency and second chance matters. The goal is for them to provide their services in an effective, impartial, independent and competent way in relation to the parties. The Romanian law provides initial and further training for both judicial authorities and practitioners in insolvency. Organs applying the proceedings operate under their specific Code of ethics. In reference to the appointment of the practitioners in the field of restructuring, in both pre-insolvency and insolvency proceedings the practitioner's appointment must be approved by creditors and subsequently

[17] Flash Eurobarometer 354 (2012) Entrepreneurship in the E.U. and beyond, p. 9.

[18] Gavrilescu Luiza Cristina, O analiză a conformității legii române a insolvenței personale cu recomandările Comisiei Europene sub aspectul reglementării eliberării de datorii a debitorului, the Romanian Magazine of Business Law no. 7/2015, article consulted in the database www.sintact.ro.

confirmed by the judicial authority. The Romanian law also provides clear criteria of the practitioner's removal and resignation. In pre-insolvency proceedings, the practitioner in the field of restructuring is named by the debtor and must be then approved by the creditors and confirmed by the judicial authority (the president of the Court in case of ad-hoc mandate or the syndic-judge in case of preventive composition). Creditors may decline the appointment of a practitioner in insolvency, and suggest the appointment of another practitioner, but he/she still must be approved by at least 50% of the votes of creditors which are present to the meeting (or send their vote electronically). In insolvency proceedings, the practitioner in insolvency may be appointed either by the debtor or creditor, either by the Court. The practitioner in insolvency may decline its appointment. But if accepted, he/she still must be confirmed by at least the majority of creditors in meetings unfolded in the presence of at least 30% of the value of claims. The procedure-related fees undergo the same conditions. In complex cases, the appointment of the practitioner in the field of restructuring may be considered in respects to their experience and expertise. Both pre-insolvency and insolvency proceedings are being judicially supervised. The syndic-judge verifies all legal aspects of the proceeding, ensuring protection of the creditors' and debtor's interests. In relation the Article 28 of the Proposal referring to the use of electronic means of communication, the third fundamental principle of pre-insolvency and insolvency proceedings states that organs applying the proceedings shall ensure an efficient proceeding, including adequate mechanisms of communication, in order to unfold the proceeding in a reasonable time, objectively and impartially, with a minimum of costs. The Romanian law encourages the use of electronic means of communication, in order to limit the costs and make the proceeding as efficient as possible. In reference to Title V of the Proposal, which treats the monitoring of restructuring, insolvency and discharge procedures, Member States are invited to ensure and sort data collection for the first full calendar year following the date of application of implementing measures, in accordance with Article 29 of the Proposal, which will be annually transmitted to the Commission, by 31st of March of the calendar year following the year for which the data is collected. This requirements is explained by the review clause, stated in Article 33 of the Proposal, according to which no later than 5 years from the date of start of application of implementing measures and every 7 years thereafter, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Directive, including on whether additional measures to consolidate and strengthen the legal framework on restructuring, insolvency and second chance should be considered. " The Proposal does not provide rules regarding the way data will be collected, which means that Member States have the liberty of creating their own suitable context that will ensure this obligation's fulfillment."[19]

3. Conclusions

The Law no. 85/2014 on pre-insolvency and insolvency proceedings is considered to be a modern law[20], which responds to the current needs of the market. However, if we refer to pre-insolvency proceedings, they are rarely accessed (official statistics revealed that there were around 200 preventive compositions accessed by debtors from 2009 to 2017). The Romanian law, as we saw, mostly complies with the Proposal's provisions in relation to Title II and Title IV. In relation to Title III however, the Romanian law doesn't comply at all, since debt discharge proceedings (as an effect of the Law no. 85/2014 for legal persons and of the Law no. 151/2015 for natural persons, and not a separate accessible proceeding), may exceed the period of 3 years recommended by the Proposal. In conclusion, the Romanian law doesn't comply with the following Proposal's provisions: Article 3, Article 5 paragraph (2), Article 6, Article 8 paragraph (2), Article 10 paragraph (3), Article 13 and Title III. Therefore, the Romanian law shall adopt several amendments in order to fulfill the Proposal's requirements. It is recommended that, after the final draft of the Proposal is published, the Romanian law shall adopt the minimum standards even before the deadline. Creating a uniform framework across Member States would ensure a more stable economy, by eliminating insolvency-related risks and fears for investors and also by limiting the non-performing loans.

References

- Brussels, COM/(2015) 468 final
- http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0468&from=EN
- http://ec.europa.eu/eurostat/statistics-explained/index.php/Business_demography_statistics#High_growth_enterprises
- Flash Eurobarometer 354 (2012) Entrepreneurship in the E.U. and beyond, p. 72

[19] Costea Corina Georgiana, *The E.U. Directive Proposal on restructuring an second chance: an analysis of the most relevant concepts*, in process of publication on www.insol-europe.org, essay presented on 19th of January 2018, on The High Level Course on Insolvency Law in Eastern European Jurisdictions 2017/2018, Bucharest.

[20] Insolvency, at national level, has been reformed by the Law no. 85/2014, which brought several substantial modifications.

- http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Figure6_Trend_of_enterprise_death_rates,_business_economy,_2014-2015_(%25).png
- Brussels, 12.3.2014, C(2014) 1500 final, available at http://ec.europa.eu/justice/civil/files/c_2014 _1500_en.pdf
- Regulation (E.U.) 2015/848 of the European Parliament and the Council of 20 May 2015 on insolvency proceedings (Recast), O.J.E.U., L141/19
- https://www.insol-europe.org/eu-study-group-publications
- Stefania Bariatti, Robert van Galen, TENDER No. JUST/2012/JCIV/CT/0194/A4, available at
- http://ec.europa.eu/justice/civil/files/insol_europe_report_2014_annexes_en.pdf
- Strasbourg, 22.11.2016, COM (2016) 723 final
- http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0723&from=EN
- Patrice Muller, Shaan Devnani, Jenna Julius, Dimitri Gagliardi, Chiara Marzocchi, Annual Report on European SMEs 2015/2016, November 2016, p. 58, available at: https://ec.europa.eu/jrc/sites/jrcsh/files/annual_report_-_eu_smes_2015-16.pdf
- Gavrilescu Luiza Cristina, O analiză a conformității legii române a insolvenței personale cu recomandările Comisiei Europene sub aspectul reglementării eliberării de datorii a debitorului, the Romanian Magazine of Business Law no. 7/2015, article consulted in the database www.sintact.ro
- Costea Corina Georgiana, *The E.U. Directive Proposal on restructuring an second chance: an analysis of the most relevant concepts*, in process of publication on www.insol-europe.org, essay presented on 19th of January 2018, on The High Level Course on Insolvency Law in Eastern European Jurisdictions 2017/2018, Bucharest

THE RIGHT OF THE DONOR/RECIPENT TO INFORMATION IN THE CASE OF TRANSFER AND TRANSPLANT OF ORGANS, TISSUES AND HUMAN CELLS FOR THERAPEUTIC PURPOSES

Ramona DUMINICĂ*

Abstract

The current study starts from the fact that, in the contemporary society, the patient can no longer be considered a simple consumer of services totally subordinated to the doctor, but he is an active participant in the performance of the medical act, having a series of rights, among which his right to information. This right completes the right to life and to health, his right to physical and psychical integrity, the right to dispose of oneself and the right over his own body. Knowing, accepting and bearing the consequences of his own (in) actions are important aspects for each individual, more valuable for the person subjected as donor or recipient of a transplant of organs, tissues or human cells for therapeutic purposes, given the implications of such a procedure. This is why a decision concerning the human body and health of an individual can be taken only after serious, real and intelligible information regarding the risks and benefits of the intervention to which that individual shall be subjected to.

Keywords: *right to information, donor, recipient, doctor's obligation to inform, organ transplant, human tissues and cells for therapeutic purposes.*

1. Introduction

Starting from the fact that in many cases the conflict between the doctor and the patient occurs because the patient has not been informed about the specificity of the illness, the difficulties of the medical profession and the sometimes limited possibilities of medical science[1], was adopted the European Charter of patients' rights that expressly entitle the patient to be informed. In the same meaning, the Convention on Human Rights and Biomedicine ratified by Romania by Law No 17/2001, states in Art 10 Para 2 that "Everyone is entitled to know any information collected about his or her health. However, the wishes of individuals not to be so informed shall be observed".

In the same spirit, the Romanian legislator expressly stated the right of the patient to be informed, by Law No 46/2003 on the patient's rights[2].

By "patient", according to Art 1 Let a) of the above mentioned law, it is defined the healthy or ill person benefiting from a health insurance. In the virtue of the legal provisions, the person shall have the right to be informed regarding: the available medical services, their means of use, the identity and professional status of the health services providers, his own health condition, the proposed medical services, the potential risks of each procedure, the existing alternatives for each proposed procedure, including about risks of non-complying with the treatment or with the medical recommendations, as well as information regarding the diagnosis and prognostics. Also, the hospitalized patient has the right to be informed regarding the rules and customs to be complied with during his hospitalization.

In the same time, the Law No 46/2003 acknowledges for the patient the possibility to decide if he wants to be informed if the medical data presented to him would cause sufferance, having the right to expressly ask for him not to be informed and to appoint another person to receive the information.

Correlative with the patient's right to information, the Deontological Code of the Romanian College of Physicians[3] states the doctor's obligation to inform. Thus, Art 14 states that no intervention in the health condition shall be performed without the consent of the person to be subjected to it. The consent shall be asked for only after the doctor has given appropriate information regarding the purpose and nature of the intervention, regarding the consequences and risks of the intervention. As far as possible, the language shall be appropriate for each patient, clear and respectful, minimizing as possible the specialist terminology, and if the patient is not familiar with the language, the information shall be brought to them knowledge in the native language or in the language they know or, where appropriate, another form of communication will be sought.

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[1] Liviu Oprea, "Un studiu analitic asupra relației medic-pacient" (Part 1), in *Romanian Magazine of Bio-ethics*, 7th Volume, No 2 (2009): 57-70; G. C. Curcă, "Aspecte conceptuale privind răspunderea deontologică și malpractica medicală", *Romanian Magazine of Bio-ethics*, 8th Volume, No 1(2010): 51-59.

[2] Official Gazette of Romania, No 51/20 January 2003.

[3] Official Gazette of Romania, No 981/7 December 2016.

2. The donor/recipient's right to information in the case of organs, tissues and human cells harvesting and transplant for therapeutic purposes

The Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin, signed in Strasbourg on 20 February 2015 and ratified by Romania in 2016 by the Law No 9/2016[4] guarantees, without discrimination, the compliance with the human integrity and with the other types of rights and fundamental freedoms in the field of transplantation of organs and tissues of human origin.

For the purposes of the Protocol, the term "transplantation" covers the complete process of removal of an organ or tissue from one person and implantation of that organ or tissue into another person, including all procedures for preparation, preservation and storage; and the term "removal" refers to removal for the purposes of implantation.

Similarly, Law No 95/2006 on healthcare reform[5] defines the transplant as being that medical activity which, for therapeutic purposes, within the body of a patient, named recipient, is transplanted or grafted an organ, tissue or cells harvested from another person, named donor", and the harvesting as being "the removal of healthy organs and/or tissues and/or human cells for the purpose of a transplant".

Currently, in Romania, the harvesting and transplant of organs, tissues or human cells from a living patient are being performed in accordance to Art 68 of the Civil Code and the Law No 95/200 on health care reform, republished.

The legislator also states that the harvesting and transplant of organs, tissues or human cells from living donors shall be made exclusively for the cases and conditions states by the law, based on the written, free expressed and prior agreement and only after they have been informed upon the risks of the procedures. For all cases, it is forbidden the harvesting of organs, tissues or human cells from minor persons, as well as from living persons without discernment due to a mental handicap, a serious mental disorder or from another similar reason, except the cases mentioned by the law. As exceptions, the republished Law No 95/2006 states in Art 145 Para 2 that the harvesting of bone marrow (hematopoietic stem cells) can also be performed from a minor person relative up to the 4th degree with the recipient, in compliance with the following conditions: the harvesting shall be performed only with the consent of the minor who has turned the age of 10 and the written agreement of his legal representative (parents, guardian or curator), according to the form approved by a Minister's order. If the minor is under the age of 10, the harvesting can be performed with the legal representative's consent. The written or verbal consent of the minor aged at least 10 years old shall be expressed in front of the president of the court, after a mandatory psycho-social investigation of the General Directorate of Social Assistance and Child Protection.

Therefore, from the above-mentioned legal provisions result the following conditions to be fulfilled by the consent given for the harvesting and transplant of organs, tissues and human cells[6]:

- The consent shall be free, namely not altered by any vice of consent, being forbidden the harvesting of organs and/or tissues and/or human cells if the procedure is performed due to the physical or moral constraint of a natural person, this being the case of the violence as vice of consent;
- The consent must be prior, its subsequent expression not being allowed;
- The consent must be expressed, not deduced from the concerned person's behavior nor determined under certain aspects by a third party, as for the common law;
- The consent must be informed regarding the possible physical, psychical, family and professional risks and consequences resulting from the harvesting.

The harvesting of organs, tissues or human cells from a living donor shall be performed with the approval of the commission for approvals of transplants from living donors, established in the hospital in which the transplant is being performed, thus guaranteeing the free, informed and altruistic features of the consent. The members of the commission shall also sign the document expressing the consent for harvesting, thus certifying that all legal conditions have been fulfilled. In his position, the recipient shall sign this document after being informed about the risks and benefices of the procedure, as stated by Art 150 of the Law No 95/2006. By signing the document by the recipient, he is confirming that the harvesting is not the object of legal acts or facts, for the purpose of receiving a material benefit or of other nature. This is the proof of complying with another legal condition: the harvesting must be performed only for a transplant whose beneficiary shall be a certain person. Signing that document also by the recipient does not turn the donation of cells, tissues or human organs into a contract, the human body not being tradable[7].

For the case in which the recipient is not able to express his consent, it can be given in written by one of the family members or by his legal representatives. The transplant can be performed even without the prior consent if, due to objective circumstances, cannot contact as soon as possible the family or the legal representative, and the delay would inevitably result in the death of the patient, this situation being reported by the chief doctor and the patient's doctor, using the form

[4] Official Gazette of Romania, No 62/28 January 2016.
[5] Republished in the Official Gazette of Romania, Part I, No 652/28 August 2015.
[6] See also Eugen Chelaru, *Drept civil. Persoanele, în reglementarea NCC*, 4th Edition (Bucharest: C.H. Beck, 2016), 31-32.
[7] Chelaru, Drept civil. Persoanele, în reglementarea NCC, 30-31; Eugen Chelaru and Ramona Duminică, „Brief considerations about the informed consent of the patient", in Legal and administrative studies, No 2 (2017): 7-27.

approved by Minister's order. As exception, for the minors or persons without capacity of exercise, the consent shall be given by the parents or other persons legally representing the minor.

For the purposes of harvesting and transplant of organs, tissues or human cells it is mandatory the information both of the donor, as well as of the recipient[8] by the doctor, social assistant or other medically trained persons on the possible risks and consequences for the physic, psychic, family and professional, resulted from the procedure.

In this meaning, Art 5 of the Strasbourg Protocol states that "the recipient and, where appropriate, the person or body providing authorisation for the implantation shall beforehand be given appropriate information as to the purpose and nature of the implantation, its consequences and risks, as well as on the alternatives to theintervention", while Art 12 states that "the donor and, where appropriate, the person or body providing authorisation [...] shall beforehand be given appropriate information asto the purpose and nature of the removal as well as on its consequences and risks.They shall also be informed of the rights and the safeguards prescribed by law for theprotection of the donor. In particular, they shall be informed of the right to have access toindependent advice about such risks by a health professional having appropriate experience and who is not involved in the organ or tissue removal or subsequent transplantation procedures".

The condition for the information of the donor about the risks deriving from the procedure has been stated in order to insure the informed consent of the donor, who has the possibility of rejecting, at any moment, the offer of harvesting the tissue should they consider that they would suffer unacceptable damage[9].

After harvesting, the physical perfection of the donor's body, as well as the physic and psychical potential shall be reduced or even disappear, there may be possible professional damaging risks or consequences, as well as a new attitude of the family members regarding the harvesting and the subsequent physical and psychical state of the donor, aspects to be known and accepted before the medical intervention.

From this perspective, the draft-project of the Law for human transplantation, in public debate, represent a step forward from our perspective, maintaining the direction established by the Law No 95/2006 and bringing a series of novelties and clarifications in the shape of certain guarantees for the donor/recipient's right to be informed about the procedure to which he shall be subjected to. Thus, Art 46 of the draft-project details the conditions in which the harvesting of organs, tissues or human cells from a living donor shall be performed:

a) The harvesting of human organs, tissues or cells for the purpose of a human transplantation, shall be performed from living major persons, with full capacity of exercise, after receiving their informed, written, free, prior and express consent, according to the form approved by a Minister's order. Thus, it is forbidden the harvesting of organs, tissues and/or human cells from persons without capacity of exercise;
b) The consent shall be signed only after the donor has been informed by the doctor, social assistant or other persons with specialized training about the possible physical, psychical, family, professional and social risks and consequences resulting from the harvesting;
c) The donor can reconsider his given consent, until the moment of harvesting;
d) The harvesting and transplantation of organs, tissues and/or human cells as result of a physical or psychical constraint against a person are strictly forbidden;
e) The harvesting and transplantation of organs, tissues and/or human cells cannot represent the object of legal actions or facts for material purposes for themselves and/or third parties;
f) The donor and the recipient shall sign an authenticated document declaring that the harvesting of human organs, tissues and/or cells shall have a humanitarian purpose, altruistic and shall not represent the object of legal actions or facts for the purpose of receiving material benefits or of other nature, according to the form approved by Minister's order;
g) The donor of hematopoietic stem cells shall sign an authenticated document stating that the donation shall have a humanitarian purpose, an altruistic feature and shall not represent the object of legal actions or acts for the purpose of receiving material benefits or of other nature, according to the form approved by a Minister's order;
h) As exception from Let f) and g) if the donor does not wish to reveal his identity, the confidentiality shall be preserved;
i) The donor shall be exempted from the payment of hospitalization resulted from the harvesting, as well as from the costs of the periodical medical controls post-harvesting.

3. The obligation for information of the doctor

Correlative to the right of the patients to medical information, Art 649 of the Law No 95/2006[10]and the Code of Deontology of the Romanian College of

[8] Ovidiu Ungureanu, "Noile dispoziţii legale privind prelevarea şi transplantul de organe, ţesuturi şi celule de origine umană în scop therapeutic", *Dreptul Magazine*, No 5(2007): 19.

[9] In the same meaning, see also Chelaru, *Drept civil. Persoanele, în reglementarea NCC*, 30-31.

[10] Official Gazette of Romania, Part I, No 372/28 April 2006.

Physicians[11] states the obligation of the medic to correct, complete and understandable information given to the patient or other designated personto approve the medical intervention.

For the harvesting and transplant of organs, tissues or human cells, the doctor has the obligation to really inform the donor, without minimizing or exaggerating the damaging consequences[12]. Also, he has the obligation to specifically, really and intelligibly inform the recipient regarding the risks and benefits of the procedure and, when appropriate, his family members, his legal representative, aiming the legitimate purpose of protecting the persons involved and thus excluding the possibility of distorting the intention to carry out the transplant.

Guaranteeing an informed consent of the donor/recipient assumes the provision of all the relevant information by the doctor using an easily understandable for the patient to be able to decide fully aware of the situation. Also, it refers to the evaluation of the patient on the understanding of the information and the insurance that, as it is possible, the patient has the freedom to choose between medical alternatives without coercion or manipulation[13].

The obligation to information for the donor/recipient and/or legal representative has the nature to remove the possibility of any vice of consent, such as the error or the dolus. This does not mean that, practically, they cannot exist, being situations in which there is the complicity or unprofessionalism of the one compelled to inform the donor/recipient. For example, the literature[14] has showed that any form of reluctance of the donor in expressing his approval must be seen as vice of consent.

This is why the professional obligations of the doctor[15] towards its patients are the base of the legal construction of the medical malpractice, representing a starting point in the evaluation of the behaviour of the responsible. According to Art 653 Para 1 Let b) of the Law No 95/2006, malpractice represents the "professional error committed in the performance of the medical or medical-pharmaceutical act causing prejudices for the patient, by implying the civil liability of the medical personnel and of the supplier of medical, sanitary or pharmaceutical services and products".

Regarding the obligation for information, it is considered[16] that it is an obligation of result, whose violation may entail the liability of the doctor on objective grounds, namely that of the risk of his profession, Art 653 Para 3 of the Law No 95/2006 establishing that the medical personnel is civil liable also for the prejudices resulted from the non-compliance with the regulations regarding the informed consent of the patient.

By entailing the civil liability does not exclude the criminal liability, if the action which generated the prejudice represents an offence according to the law and/or of the disciplinary liability of the doctor. According to Art 155 of the Law No 95/2006 it represents an offence the harvesting or transplant of organs and/or tissues and/or human cells without the consent given as stated by the law.

Also, the violation of the patient's right to medical information may entail the disciplinary liability of the doctor[17], as mentioned by Art 37 of the Law No 46/2003 and the Code of Ethics. Non-compliance of the rules of medical ethics, including of those regarding the obligations correlative with the patient's rights, shall entail such liability.

4. Conclusions

Given the importance of the rights endangered in case of a transplant of organs, tissues or human cells of therapeutic purposes, the statement of the right to information of the patient has represented a necessity for the performance of the medical act.

The patient's consent represents an important decision regarding his life, health and body integrity, this is why he shall base the decision on correct information provided by his doctor.

References

- Boilă, Lacrima-Rodica. *Răspunderea civilă delictuală subiectivă*, 2nd Edition, Bucharest: C.H. Beck, 2009
- Boilă, Lacrima-Rodica. "Malpraxis. Propuneri legislative privind despăgubirea victimelor accidentelor medicale". Romanian Private Law Magazine, no. 5 (2012): 29-55
- Butnariu, Angela, Iustin Lupu and Mircea Buta. "Consimţământul informat în practica pediatrică şi în cercetarea vizând copilul". *Romanian Bioethics Magazine* VII, no. 7 (2009): 38-46
- Chelaru, Eugen. *Drept civil. Persoanele, în reglementarea NCC*, 4th Edition. Bucharest: C.H. Beck, 2016

[11] Official Gazette of Romania, Part I, No 981/7 December 2016.

[12] Iancu Tănăsescu, Gabriel Tănăsescu and Camil Tănăsescu, *Transplantul şi prelevarea* (Bucharest: C.H. Beck Publ.-house, 2008), 48-52.

[13] Angela Butnariu, Iustin Lupu and Mircea Buta, "Consimţământul informat în practica pediatrică şi în cercetarea vizând copilul", *Romanian Magazine of Bio-ethics*, 7th Volume, No 1(2009): 40-41.

[14] Ungureanu, "Noile dispoziţii legale privind prelevarea şi transplantul de organe, ţesuturi şi celule de origine umană în scop therapeutic", 19; Chelaru, *Drept civil. Persoanele, în reglementarea NCC*, 32.

[15] For an analysis of these obligations, see also Lacrima-Rodica Boilă, "Malpraxis. Propuneri legislative privind despăgubirea victimelor accidentelor medicale", in *Romanian Magazine of Private Law*, no. 5 (2012): 52.

[16] Lacrima-Rodica Boilă, *Răspunderea civilă delictuală subiectivă*, 2nd Edition (Bucharest: C.H. Beck, 2009), 392-393; Chelaru and Duminică, „Brief considerations about the informed consent of the patient", 7-27.

[17] Silviu Morar, Horatiu Dura, Mihaela Cerunşcă-Miţariu and Adrian Cristian, "Reflectarea drepturilor pacienţilor în noile coduri deontologice din domeniul medical", in *Acta Universitatis Lucian Blaga*, No 1(2013): 34.

- Chelaru, Eugen and Duminică Ramona. „Brief considerations about the informed consent of the patient". *Legal and administrative studies*, No 2 (2017): 7-27
- Curcă, G. C. "Aspecte conceptuale privind răspunderea deontologică şi malpractica medicală". *Romanian Magazine of Bio-ethics*, 8th Volume. No 1(2010): 51-59
- Morar, Silviu, Mihaela Cernuşcă-Miţariu, Horaţiu Dura and Adrian Cristian. "Reflectarea drepturilor pacienților în noile coduri deontologice din domeniul medical". *Acta Universitatis Lucian Blaga* no. 1 (2013): 25-35
- Oprea, Liviu. "Un studiu analitic asupra relaţiei medic-pacient" (Part 1). *Romanian Magazine of Bio-ethics*, 7th Volume. No 2 (2009): 57-70
- Tănăsescu, Iancu, Tănăsescu Gabriel and Tănăsescu Camil. *Transplantul şi prelevarea*. Bucharest: C.H. Beck Publ.-house, 2008
- Ungureanu, Ovidiu. "Noile dispoziţii legale privind prelevarea şi transplantul de organe, ţesuturi şi celule de origine umană în scop terapeutic". *Dreptul* no. 5 (2007): 14-19

THE TRADE FUND AS A CONTRIBUTION TO THE FORMATION OR INCREASE OF THE SHARE CAPITAL OF A COMPANY

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Abstract

Through this paper, the authors propose to go through some of the practical problems that may arise in the event of a legal act having as object the bringing of the trade fund as a contribution to a commercial company. The fact that until the conclusion of the legal act itself, there is doctrinal confrontations regarding the establishment of the legal nature of the trade fund in the context of theoretical regulations that do not cover a topic of overwhelming importance in the exploitation of an enterprise lead us to emphasize the importance of a more fluid regulation and more adapted to the economic realities. Although there is no longer a definition of the fund, the references to it have not been eliminated and we are considering the regulations regarding the legal acts the object of which is it and those concerning its elements constitutive of tangible or intangible assets, mobile or immovable . In the light of the newly emerged regulations on the patrimony of affection and under the provisions of the Civil Code defining the patrimony divisions, it would also be necessary to amend the Law.no26/1990 regarding the trade register, first of all to clarify its legal regime .Business and asset transfer, legal acts on the trading fund and trends in its qualification and the applicable legal regime represent several landmarks in dealing with the proposed subject.

Keywords: *trade fund, legal nature of the trade fund, factual universality, business transfer, asset transfer.*

1. Introduction

Although the references to the trade fund are maintained under the Trade Register Law no.26 / 1990, the normative acts do not currently offer the notion of the commerce fund, so that the doctrine in this context has the role of formulating more theories about its legal nature. The article is an attempt to present some of the most important theories regarding the notion of *trade fund* and some of the differences between trade fund input operation to the share capital of companies governed by Law no. 31/1990 on transferring companies and the transfer of assets as defined by national legislation and European acts.

The goods used by professional traders in the course of their activity form a universality intended to carry out various commercial operations, called the "trading fund".

In the literature[1], the trading fund is defined as "a set of movable and immobile, corporeal and incorporeal goods that a trader affects in the conduct of his commercial activity in order to attract clients and, implicitly, to obtain profits." The trading fund is not confused with the notion of patrimony, as the trading fund is the whole of the movable and immovable, corporeal or incorporeal assets afflicted by the trader in the course of a commercial activity, while the patrimony represents all the trader's rights and obligations of economic value.

Currently[2], without defining the fund, the Law no. 26/1990 on the Trade Register stipulates in art. 21 lit. a) that in the Trade Register will be recorded the "donation, sale, hiring or real security on the fund of commerce, as well as any other act amending the recordings in the trade register or terminating the firm or fund trade". Also, the same normative act sends in art. 41 to the notion of a trading fund, stipulating that the acquirer under any title of a fund may continue to work under the earlier firm in the cases provided for by law, with the express agreement of the previous holder or his successors in title and with the obligation to mention the quality of that successor company".

The legislator of the Civil Code does not repeal the notion of the commerce fund and uses it in the various legal texts, art. 340, art. 745, art. 2638, but without giving a definition of it. Starting from the notion, the doctrine has developed several theories that try to establish the juridical nature of the fund of commerce in relation to the notions of patrimony or enterprise[3], being more of a consideration taken from the doctrinal opinions the theory that approximates the legal nature of the fund of commerce to that of the patrimony of affection[4], namely the theory that regards the fund of commerce as a factual universality[5].

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[1] St.D. Cărpenaru, Commercial Treaty, 5 th edition, Legal Universe Publishing House, Bucharest, 2016, p. 96.

[2] The main regulation of the trade fund was found in the content of art. 11 lit. c) of Law no. 11/1991: "the trade fund shall be the whole of the movable and immovable, tangible and intangible assets (trademarks, firms, emblems, patents, inventions) used by a trader for the purpose of carrying out its activity", which has not been maintained by the legislator in the amendment to Law no. 11/1991 through O.U.G. no. 12/2014

[3] ST.D. CĂRPENARU,cited work., 2016, p. 98, GH. PIPEREA, Commercial Law, vol. I, Publishing House .CH Beck, Bucharest, 2016, p. 98

[4] ST.D. CĂRPENARU,cited work., 2016, p. 102

[5] I. SCHIAU, MONICA IONAŞ-SĂLĂGEAN, *About dedicated assets* in Romanian Journal of Business Law. no. 6 , 30 of June 2016

Moreover, beyond the idea of the universality actually defined by Article 541 paragraph 1 Civil code as the whole of the goods belonging to the same person and having a common destination established by its will or by law, paragraph 2 of the same article states that the goods that make up the universality in fact, together or separately, may be the subject of separate legal acts or relationships. Starting from this text, it can be appreciated that the trade fund may also be distinct from the constituent rights, as an embedded mobile asset, even if the content of universality includes immovable property (except in the case that all its assets are immovable), since the object of the legal acts referred to in paragraph 2 of the article may be the goods separately (as patrimonial rights) as well as the factual universality itself. The fact that the legal acts referred to in the text may include alienation or dismantling (Article 745 Civil code) makes universality the object of a property right in atypical form, thus qualifying it as an incorporeal movable asset[6].

2. Transmitting the trading fund as a contribution to the capital of trading company

The most numerous legal acts concluded in practice in connection with the fund of commerce, both as universality and as separate elements, are: the sale of the purchase, the contribution in a company, the lease, the mortgage and the pledge[7], which are governed, in the absence to special legal regulations, to the common law represented by the Civil Code.

The transaction of transferring ownership of the fund as a contribution to the company differs from the sale of the trading fund. The Fund Transmitter acquires the status of associate and, instead of the price, will receive shares according to the legal form of the company. For this reason, the transmission of the fund as a contribution to society is governed by Law no. 31/1990 on societies.

The latter normative act stipulates in art. 16 the main ways of contribution, namely the cash contributions, mandatory for the constitution of any form of society, the contributions in kind necessary to be economically evaluable, admitted to all forms of society and paid by transferring the corresponding rights and by effectively transferring to the company the goods in use and the contributions in debt, which have the legal status of contributions in kind, being not admitted to the public limited liability companies, nor to the limited partnerships shares and limited liability companies.

We may consider that the rules applicable to the sale of the fund are also applicable if it is contributed as a contribution in kind to the formation or increase of the share capital of a company to which the fund holder participates, but the two transactions must not be confused. The sales contract may also have as its object only one of the elements of the trading fund, and such a sale will have to take into account the legal provisions specific to the item that is the subject of the sale. Among the elements of the trade fund that can be sold separately are the emblem, as well as industrial property rights and copyright, the firm being exempt from the separate sale (Article 42 of Law 26/1990) and for reason identity, we believe that the same solution should be applied when the entire trading fund is brought in as a contribution in kind to the formation or increase of the share capital of a company. A short observation is to be made regarding the firm(the name of the company). Regarding the indissoluble link between the commerce fund and the denomination it is necessary to observe that the text of the law does not refer to the mark but to the name under which the trader carries out his activity. In this sense, it is useful to distinguish between the role of the trade name and the brand. As the Court pointed out "The use of a social name, trade name or emblem in accordance with its functions and within the limits of the protection conferred on its holder by its registration in the trade register, the identification of the company or designation of the fund of commerce, cannot be forbidden by the proprietor of the trade mark because the social name, trade name or emblem does not in itself have the function of distinguishing goods or services, a function which is specific to the marks. As such, in the context of the application of the provisions of Article 36 paragraph 2 (b) of Law 84/1998, it is necessary to determine whether using the signing of the sign takes place 'for goods or services', that is, if such use is made by affixing the sign which constitutes the trade name on the goods marketed or, even in the absence of the sign on the goods, it is used in such a way that it is established a link between the sign which constitutes the trade name and the products marketed, that is to say, if the trade name is used as a trade mark and thus affects the functions of the trade mark, in particular, to guarantee the origin of the goods or services to consumers. Such an analysis must be carried out by the court in relation to the concrete way in which the incriminated sign is used "[8].

Also, in case of such a contribution, it is necessary to evaluate it. In this respect, Law no. 31/1990, art. 16, par. 2, according to which "in-kind contributions must be economically measurable. They are admitted to all forms of society and are paid through proper transfer of rights and by the effective surrender of the goods in use to society "and the Methodological Norms concerning the way of keeping the trade registers, recording and disseminating information, approved by Order No. 2594 / C / 2008, article 137, letter c), according to which "The application for registration of the mention of the increase of the share capital by contributions in kind shall be attached: ... c) the evaluation report .

[6] V.Stoica**,**Incorporeal goods notion in Romanian Civil Law**,** Journal of Private Law no 3 - 2017, available at idrept.ro
[7] V Nemeş, Commercial Law, 3 rd edition, Hamangiu Publishing House, Bucharest 2018 , p 82.
[8] decision no. 331/31 st January 2014, ICCJ, www.scj.ro

According to the doctrine[9]," The contribution to the formation or increase of the share capital of a company is a legal act itself, more precisely, an act of disposition, through which the associate transfers the right of ownership, another right or the right to use one's property in the patrimony of the society. If contributions consist of goods (corporeal or incorporeal), rights or claims, it is necessary to individualize them".

Regarding the composition of the commerce fund and the individualization of its elements, the problem in the practice of the courts of law was raised by the possibility that through the operation of alienation of the commerce fund (the situation in question can be evaluated also from the perspective of bringing the trade fund as contribution to the formation or increase of the share capital of a company) to commit a fraud to the law by circumventing certain provisions that require the acquiring company to obtain special authorizations for the activity it will carry out as a result of the transmission of this fund.

The promoted action raised in The Court the question of whether the Ministry of Health may issue operating licenses for new holders as a result of the purchase of operating licenses from their holders, in the appearance of the sale or purchase of a trade fund to which such a license would belong. In the opinion of the plaintiff , if a company buys the fund of commerce of a Community pharmacy, it does not acquire also the Community pharmacy which is a place of business of the trading company that sold the fund. The plaintiff pointed that In this case it is clear that the company acquires the vocation to obtain a new authorization for the operation of its new pharmacy (set up as its place of business) in the same way as any other company that has to fulfill the legal conditions for the establishment of a pharmacy no matter the place of its location, in compliance with the provisions of art. 10 of the Law no. 266/2008 .

The Purchaser of the Pharmacy Fund cannot acquire a special priority, because in fact the vendor of the trade fund cancels the Community pharmacy, clearing his place of business , so that without his subject the authorization ceases to operate due to the cessation of the activity of the pharmacy (the terminated place of business) and the buyer of the trade fund sets up a new place of business for which it must obtain the operating authorization as for any new Community pharmacy in compliance with the provisions of art. 12 of the same law. According to the pronounced Court ruling, under art. 11 paragraph 2 of the Emergency Ordinance no. 130/2010, "The change of the operating authorizations which have is done with the keeping of the operating authorization number at the request of the legal entity, by issuing a new authorization, on the basis of the documents stipulated in the norms for the application of the Law no.266 / 2008, republished, for the following situations: a) change of the holder - the legal person, entered as a mention on the operating authorization issued prior to the coming into force of the present emergency ordinance" . By applying the rule of interpretation, where the law does not distinguish, the interpreter must not distinguish, "it follows that any change of the owner leads to the fact that any change of the legal person on whose behalf the original authorization was issued justifies the release a new authorization for the new legal entity, and not only in the case the reorganization of the legal person. In this case, there was a change of the legal person, to which belongs the Community pharmacy, as a result of the sale of the trade fund. The right over the trade fund has no character intuitu personae. Nor is the authorization for operation to be intuitu personae, since the law permits the change of the legal person on whose behalf the authorization was issued and the issuance of a new authorization for the new legal entity. The claimant's claim that the "extension of the legal capacity to use" of the defendant "by issuing the operating authorization" was generated, is not correct. The right to carry out the pharmaceutical activities was not born at the time of the takeover of the commerce fund, but at the date of the issuance of the operating authorization from 06.07.2012, changed on 04.09.2012[10].

It should also be borne in mind that the trade fund is not only a corpus of corporeal and incorporeal assets but an activity present on the market which can be assigned a turnover, the object of the transfer being an independent economic activity.

In this respect, at the time of the contribution, must not be ignored the provisions of point 21 of the Competition Council's Instructions of 5 August 2010[11] on the concepts of economic concentration, the undertaking concerned, full operation and turnover, according to which "the acquisition of control is carried out on entities with legal personality or just legal assets. Asset control is considered an economic concentration only if these assets constitute the entire trading fund of the enterprise or a part of it, namely a commercial activity present on the market, to which it may assign a turnover. "

In the last part of this paper we aim to take a look at the concept of transfer of business that can be achieved also by the contribution of the commerce fund to the formation or increase of the share capital of a company. Although not defined by the Commercial Law, the notion of business transfer was considered by the doctrine[12] as representing "the operation through transferring one or more branches of activity or part of a branch of activity, namely organized and independent economic activities between two legally independent companies / entities, irrespective of the type of

[9] St. D. Carpenaru, Gh. Piperea, S. David, Company Law -Articles comments -5 th edition , CH.Beck Publishing House, Bucharest, p 13, p 112
[10] decision no.1717 from 30.05.2014, Court of Appeal Bucharest, Secţia a VIII-a C Administrativ şi Fiscal, available at http://www.rolii.ro/
[11] Official Journal, I st part , no. 553 bis 5th of august 2010
[12] L.Tuleaşcă, Transfer of business, Romanian Journal of Business Law no. 7/2016 , p. 53-71

agreement or the name used by the parties to the contract: transfer of assets, transfer / assignment of business, usufruct or lease of an enterprise, sale / transfer of a trade fund, transfer of the patrimony of affinity, fiduciary contract, merger, division ".The transfer of a business finds a place in the Fiscal Code in the form of the transfer of assets. According to art. 32 par. (1) lit. (d) Fiscal Code, the transfer of assets is defined as the operation by which a company transfers, without dissolving, all or one or more branches of its business to another company in exchange for the transfer of the units representing the capital of the recipient company. The concept was taken into account in the Sixth Council Directive 77/388 / EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment ('the Sixth Directive') , currently Council Directive 2006/112 / EC on the common system of value added tax of the EU. The concept of transfer of assets was also interpreted by the ECJ as meaning that it includes the transfer of a trading fund or an autonomous part of an undertaking comprising tangible and, where appropriate, intangible assets which together constitute an undertaking or a part of an undertaking which is capable of carrying on an autonomous economic activity but that it does not include mere disposal of goods such as the sale of a stock of products.[13] Transfer of assets is not a mere transfer of assets or a set of rights and obligations (assets and liabilities), but is a total or partial transfer of assets, not individually treated, but as a unitary one, representing an independent business, being essential that all the assets or assets transferred be sufficient to allow the continuation of the economic activity carried out by those assets. In the light of the above, the doctrine rightly appreciated that the "transfer of assets" does not necessarily have the same meaning as the transfer of a branch of activity, but it may also be broader but not narrower[14].

In order to identify the situations in which we can assume that we are in the presence of a transfer of assets, a useful tool is even the ECJ case law. Thus, in Christel Schriever (C-444/10), we are in the presence of a transfer of assets, of liabilities; a trader gives up the shop lease contract plus the stock of merchandise and commercial furniture in the store he owns; the first question to the Court was whether 'there is a' transfer 'of all assets within the meaning of Article 5 (8) of the Sixth Directive ... when an entrepreneur transfers ownership of the stock of goods and the equipment of his sales unit the retail of a buyer and just rents the commercial space he owns? ".The question was also whether it is a transfer of assets, even if the lease could be terminated at any time by both sides, which casts a shadow over the continued exploitation of the assets. The Court notes that the first sentence of Article 5 (8) of the Sixth Directive provides that Member States may take the view that, in the event of the transfer of all the assets of a company or part thereof, there is no supply of goods and the person to whom the goods are transferred is the successor of the transferor. It follows that when a Member State has made use of this possibility, the transfer of all or part of the assets is not considered a supply of goods of the Sixth Directive and is therefore not subject to VAT under Article 2 of that directive. As for the concept of 'transfer for consideration or not in the form of contribution to a company, other assets or part thereof', referred to in the first sentence of Article 5 (8) of the Sixth Directive, the Court emphasized that already it constitutes an autonomous concept of Union law that must be interpreted uniformly throughout the Union. In the absence of a definition of this notion in the Sixth Directive or an express reference to the law of the Member States, its meaning and scope must be determined by reference to the context of the provision and the objective pursued by that legislation (Zita Modes, C-497 / 01, paragraphs 32-35). It follows that, in order to establish the transfer of a trading fund or an autonomous part of a undertaking within the meaning of Article 5 (8) of the Sixth Directive, all the elements transferred must be sufficient to permit the continuation of an autonomous economic activity.

3. Conclusions

Through this paper the authors have proposed to go through some of the practical problems that may arise in the event of a legal act having as object the bringing of the trade fund as a contribution to a commercial company without claiming that they have exhausted the whole range of implications of the transfer. While there is a theoretical level of controversy both in terms of the applicable special rules or in the plan of the common law, both regarding the legal nature of the trade fund or the way of concluding and the content of the legal acts underlying the transfer as well as regarding the applicable tax regime, given the increase in the number of operations that have this object, we believe that, also as a result of the practice in the field, the theoretical notions will be clarified.

References

- St.D. Cărpenaru, Commercial Treaty, 5 th edition, Legal Universe Publishing House, Bucharest, 2016
- Gh. Piperea, Commercial Law, vol. I, Publishing House .CH Beck, Bucharest, 2016
- V Nemeş, Commercial Law, 3 rd edition, Hamangiu Publishing House, Bucharest 2018

[13] case Zita Modes, C-497/01, recital 40, case Schriever, *C-444/10*, recital 24, available at curia.europa.eu

[14] R Bufan, Transfer of business, fiscal effects, Romanian Journal of Business Law no. 3/2015, available at https://idrept.ro/

- St. D. Carpenaru, Gh. Piperea, S. David, Company Law -Articles comments -5 th edition , CH.Beck Publishing House, Bucharest, 2014
- I. Schiau, Monica Ionaş-Sălăgean, About dedicated assets in Romanian Journal of Business Law. no. 6- 30 of June 2016
- V.Stoica, Incorporeal goods notion in Romanian Civil Law**,** Journal of Private Law no 3 - 2017, available at idrept.ro
- L.Tuleaşcă, Transfer of business, Romanian Journal of Business Law no. 7/2016
- R Bufan, Transfer of business, fiscal effects, Romanian Journal of Business Law no. 3/2015, available at https://idrept.ro/
- decision no. 331/31 st January 2014, ICCJ, at www.scj.ro
- decision no.1717 from 30.05.2014, Court of Appeal Bucharest, Secţia a VIII-a C Administrativ şi Fiscal, available at http://www.rolii.ro/
- case Zita Modes, C-497/01, case Schriever, C-444/10, available at https://curia.europa.eu

THE POSIBILITY OF THE DEBTOR TO REQUEST PUBLIC JUDICIAL ASSISTANCE IN THE FORM OF BAIL EXEMPTION OR REDUCTION DURING A PROVISIONAL SUSPENSION OF THE FORCED EXECUTION CASE

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Abstract

The situation is becoming more and more common nowadays. A debtor, lacking in sufficient fonds, is forced to request public judicial assistance from the Court so that he may be exempted from the obligation of paying bail during a provisional suspension of the forced execution case. The article shall focus on the applicability of Article 6 of the E.C.H.R., on the national provisions and on whether or not they may allow such a request to be analysed by the Court and not be rendered inadmissible. Some practitioners have viewed this possibility as inadmissible in accordance to our national legislation. In their view, no legal text allows the debtor to request this type of aid and no legal means are offered to regulate this type of legal problem. Others have granted public judicial assistance after careful consideration of the economic situation of the debtor, in regards to the fact that his right to a fair trial extends even to this particular situation. By not granting him the opportunity to present his arguments at this stage of the trial due to a lack of funds, a sort of discrimination may be generated in favour of the debtors who can financially afford to present their case as opposed to those who cannot. The article shall thus carefully ponder the interests and obligations of the parties involved in the trial so as to establish some useful conclusions or good practices regarding the issue at hand.

Keywords: *public judicial assistance, bail exemption, provisional suspension, forced execution, Court's role.*

1. Introduction

1.1. What matter does the paper cover?

The paper deals with the situation of a forced execution of a legal title. The debtor considers that his creditor is not entitled to execute the title and thus calls upon the court to suspend the execution. However, the timing is not financially acceptable for the debtor. He is unable to pay bail, despite the obligation as laid out in Article 719 par. 7 of the Civil Procedural Code[1] and thus his request to suspend the execution cannot be analysed by the court. Thus, some debtors have chosen to employ the use of Emergency Ordinance no. 51/2008, soliciting public judicial assistance in the form of the exception or reduction of the bail fees. The effect of this request means placing the judge into a situation of not being able to establish the legal text that may address this particular issue.

The main objective of the study is to come accros an acceptable solution for this legal difficulty, one which may provide the legal subjects with a means of establishing both a predictable and accessible course of action as laid out in the jurisprudence of the European Court of Human Rights.

1.2. Why is the studied matter important?

The studied matter is very important because there are a great number of cases regarding a provisional suspension of the execution of the title in which the debtor has invoked the right to be exempted from bail or at least it's reduction. Finding a balance between his interests and the interests of the creditor is of the utmost importance, and the courts are obligated to balance the two so as to reach an equitable solution. In doing so, potential infringements of Article 6 of the European Convention of Human Rights[2] may be avoided, thus allowing for a lawful trial and a proper analysis of the merits of the suspension request.

1.3. How does the author intend to answer to this matter?

After a proper analysis of the applicable legal texts, and a further study of the opinion of nationally renowned authors, some key insights regarding the issue may be found. Thus, a future consensus may be reached between both the courts and the other legal subjects, so as to avoid inconsistencies in the jurisprudence of the courts, which have generated tremendous inequalities in the past. The European Court of Human Rights jurisprudence shall also be the subject of scrutiny, in order to retain the conventional standard applicable in this legal situation and thus align the potential solution to the rigours of European values regarding the civil rights of the individual.

1.4. What is the relation between the paper and the already existent specialized literature?

Despite the evident importance, there are only a few analyses regarding the proper course of action which is to be employed in order to solve the legal

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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] European Convention on Human Rights: " In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law "

problems which stem from the application of Emergency Ordinance no. 51/2008 in this particular situation. The merits of each opinion expressed by the studied authors shall receive the proper attention, in enabling the article to establish acceptable solutions which may be easily implemented in practice.

2. The legal applicable texts and European Court of Human Rights rullings

2.1. The Civil procedural Code

Firstly, our national Civil Procedural Code[3] outlines in Article no. 719 the legal framework regarding the suspension procedure of the forced execution: " *Until the appeal to the enforcement or other enforcement request has been resolved at the request of the interested party and only for good reasons, the competent court may suspend execution. Suspension may be requested with the challenge of execution or separate request.*

(2) In order to order the suspension, the person who requests it must give a preliminary bail, calculated at the value of the object of the appeal, as follows:…

(6) On the request for suspension, the court shall, in all cases, pronounce by conclusion, even before the time limit set for the examination of the appeal. The parties will always be quoted, and the conclusion may be appealed separately, only on appeal or, if it is delivered by the court of appeal, only on appeal, within 5 days of pronouncement for the present part, or from the communication for the missing one.

(7) If there is an emergency and if, in the cases provided in paragraph (2) and paragraph (3), the bail was paid, the court may order, by concluding and without summoning the parties, the provisional suspension of the execution until the settlement of the request for suspension. The decission is not subject to any appeal. The bail referred to in this paragraph shall remain unavailable even if the application for interim suspension is rejected and is deductible from the final bail, as the case may be…"

The law has sought to establish a general rule regading the issue at hand, by obligating the debtor to forfeit a fixed sum of money in order to protect the interests of the creditor. The fonds are to remain unavailable so as to serve four purposes, in accordance with Article no. 720 of Civil Procedural Code: " *If the appeal is rejected, the claimant may be ordered to* ***pay damages for infringements caused by delay of execution****, and when the contestation was* ***conducted in bad faith****, he will also be liable* ***to pay a fine from 1,000 lei to 7,000*** *lei … When the appeal was dismissed, the sum representing the bail will remain unavailable, and will serve* ***to cover the receivables shown in par. (3)*** *or* ***those established by the enforceable title****, as the case may be, in which case the bailiff will be notified and the receipt for the payment of this amount.* "

2.2. Emergency Ordinance no. 51/2008

Article 1 of the Emergency Ordinance no. 51/2008[4] points out the main objective of the law: " Judicial public assistance is that form of State assistance **aimed at ensuring the right to a fair trial and guaranteeing equal access to justice**, for the realization of legitimate rights or interests by judicial process, including the enforcement of judgments or other enforceable titles ".

The forms in which the scope may be attained are laid out in Article no. 4 -" Any natural person may solicit the provision of public legal aid under this Emergency Ordinance in the event that he or she **can not afford the costs of a trial** or those involving legal advice to defend a right or legitimate interest in the law, **without jeopardizing his or her family's maintenance**. " and in Article no. 6 :" Public judicial assistance **may be granted in the following forms:…**(d) **exemptions, reductions, staggered payments or deferrals from the payment of legal fees provided for by law**, including those due at the forced execution stage. ".

As it can be easily noticed, the list of possible methods of soliciting the aid of the state in order to avoid " ***jeopardizing his or her family's maintenance*** " is an exhaustive one. No other requests can be made, should the natural person wish to invoke these legal texts. **There are no express provisions regarding the exemption or reduction of bail fees.**

2.3. European Court of Human Rights rulling in the case of Weissman and Others v. Romania- 63945/00 [2006]

The conventional standard is indicated at par. no. 37[5] and reads as follows: " the amount of the fees, assessed in the light of the particular circumstances of a given case, including the applicant's ability to pay them and the phase of the proceedings at which that restriction has been imposed, are factors which are material in determining whether or not a person enjoyed his or her right of access to a court or whether, on account of the amount of fees payable, the very essence of the right of access to a court has been impaired " thus leading the Court to concur that " the State failed to strike a fair balance between, on the one hand, its interest in recovering the costs of proceedings and, on the other, the applicants' interest in having their claims examined by the courts."

There are cases in which the debtor bases his request of bail exemption or reduction on the Emergency Ordinance no. 51/2008, Article 6 of the European Convention on Human Rights or on the jurisprudence of European Court of Human Rights.

[3] 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.
[4] Emergency Ordinance no. 51/2008, published in the Official Gazette of Romania no. 327 of April 25, 2008
[5] Weissman and Others v. Romania- 63945/00 [2006] European Court of Human Rights.

2.3. European Court of Human Rights rulling in the case of Iosif and Others v. Romania- 10443/03 [2006]

The conventional standard is indicated at par. No. 60[6] and reads as follows:" The Court observes that the obligation imposed on the applicants to pay an **extremely high sum of money to enable them to bring an action was deprived of the opportunity to obtain an examination of the substance of the case** and, consequently, of their right of access to a court. Moreover, it notes that the Constitutional Court, which has been notified in another case with an exception to the unconstitutionality of the legal provision on the establishment of the value of the bail, decided that it was not in compliance with the Constitution ".

3. The interpretation of the courts and legal authors

3.1. The opinion of the Courts

Most of the cases in which the matter at hand has been brought before the courts, the solution was to repeal the request as inadmissible, given the fact that no legal framework has been provided in order to regulate this type of situation.

With an almost overwhelming majority, the request has been repelled, with the mention of the possibility for the applicant to subject it to a re-examination by another judge, in accordance with article no. 43[7] par. 4 :" *Against the conclusion, interested parties may file a review request within 5 days of the date of the communication of the conclusion. The request is exempt from stamp duty.*".

The opinion can be subjected to criticism, given the fact that since the request was deemed as inadmissible in the first place, it is evident that the review itself is inadmissible. Despite this, some judges indicate a means of appealing an initial decision that is not mentioned in any legal text.

Other judges[8] base their analysis on the European Court of Human Rights conventional standard previously indicated, interpreting it in such a way that a reduction or exemption be granted in order to avoid an infringement to the right of the debtor to a fair trial. The precarious economic situation of the debtor is invoked to justify the measure, given the fact that the request may be the only chance that he shall have to temporarily suspend the execution before a proper analysis can be made regarding the opportunity of suspension in accordance with article no. 719 par. 1 of the Civil Procedural Code.

3.2. The opinion of the legal authors

Some legal authors have expressed the idea that it is mandatory for the courts to perform the analysis of the request, since it is not inadmissible. " *It is clear that the courts can not refuse to hear claims for reduction or exemption from bail. On the contrary, they have to analyze on the merits such requests, assessing, in particular, whether they are founded or not. In this approach, the courts will consider various criteria, such as: the amount of the bail, the income of the party, the stage of the procedure, the purpose of the tax, the proportionality of the interference for that purpose, the procedural guarantees granted to the party, the foreseeability of the tax.* "[9]

Other legal authors, in recently analysing the jurisprudence of the European Court of Human Rights have stated that " the Court's reasoning shows that Article 6 of the Convention is applicable, under certain conditions, also to those procedures referred to by the Court of Justice, that is to say those procedures which do not directly address the substance of civil rights and obligations (such as, for example, with the proceedings for suspension of enforced execution, discussed in the present case, other procedures such as the presidential orders or the precautionary measures, etc[10])."

Another prominent author[11] has stated that the analysis of the conditions needed to temporarily suspend the execution of the title is more formal, and that a more thorough one is to be carried out later on. This is indicative of the fact that the request usually is subjected to a proper inquiry only during the debate during the normal suspension request, as stated in Article no. 719 par. 1 of the Civil Procedural Code.

The matter has been further treated in other works. Another problem has been identified by an author[12], in the sense that the judge who has already expressed his opinion regarding the necessity of the provisory suspension may be incompatible to decide on the suspension request until the first instance court's decision.

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[6] Iosif and Others v. Romania- 10443/03 [2006] European Court of Human Rights.

[7] Emergency Ordinance no. 80/2013, published in the Official Gazette of Romania no. 392 of June 29, 2013

[8] https://www.luju.ro/static/files/2013/octombrie/09/madularescu_ghica_Incheieri_26.09.2013-dosar_37103.pdf

[9] Marinela CIOROABĂ, Florin RADU, „ *Despre reducerea cautiunii sau scutirea de la plata acesteia in materia suspendarii executarii silite*", last modification 27.02.2018. https://www.juridice.ro/126524/despre-reducerea-cautiunii-sau-scutirea-de-la-plata-acesteia-in-materia-suspendarii-executarii-silite.html

[10] Claudiu Drăgușin, „ Aplicabilitatea art. 6 CEDO în privința cererilor de suspendare a executării silite, în special sub aspectul scutirii / reducerii / eșalonării sumelor stabilite cu titlu de cauțiune - decizia de inadmisibilitate în cauza S.C. Eco Invest S.R.L. și Ilie Bolmadar c. României", last modification 27.02.2018. http://www.hotararicedo.ro/index.php/news/2017/01/aplicabilitatea-art-6-cedo-cererilor-suspendare-a-executarii-silite-scutirii-reducerii-esalonarii-cautiune-inadmisibilitate-sc-eco-invest-srl-ilie-bolmadar-c-romaniei

[11] Răducan, Gabriela et Dinu, Mădălina (2016), „ Fișe de procedură civilă "[Civil Procedure Charts], București: ed. Hamangiu, p. 387.

[12] Boroi, G. (ed.), (2013), „ Noul Cod de Procedură Civilă Comentat, vol.2 " [The Commented New Civil Procedural Code, vol. 2], București: Ed. Hamangiu, p. 213.

4. The interpretation of the author

Firstly, upon a proper analysis of the European Court of Human Rights jurisprudence, one can note that article 719 par. 7, in its present form has never been the subject of any criticism.

Also, the Constitutional Court of Romania has never stated that this legal text may be unconstitutional. Neither the interpretation of Emergency Ordinance no. 51/2008 in the sense that such a request is inadmissible. Thus, at this moment, until further notice, the provisions and their interpretation are valid in the opinion of the two Courts.

However, the interpretation can be justfully criticised up to one point.

Should the judge establish a bail obligation for the debtor based on improper calculations, the debtor, under article 6 of the Europeean Convention on Human Rights should be allowed to subject the calculations to a proper re-examination by another of his colleagues. Despite the fact that our national legislation does not specify such a means, challenging the calculations should be allowed. Repealing such a request as inadmissible *prima facie* can be viewed as an infringement on the right to a fair trial of the debtor.

However, subjecting the request for public judicial assistance to an analysis in terms of the economic situation of the debtor in justifying a potential reduction or exemption of the fee can lead to an infringement of the rights of the creditor.

In the European Court of Human Rights case of Weissman against Romania, the impediment for the applicant was regarding the legal fees which would should have been paid to the state. Indeed, the margin of appreciation of the state in this regard may be reduced in **order to allow a private individual to present his case before the court**. Should he win, the costs shall be supported by the opposing party. Should he loose, the state may regain the sum, under the provisions of the article 19 par. 2 of the Emergency Ordinance no. 51/2008.

In the European Court of Human Rights case of Iosif against Romania, the impediment for the applicant was regarding the bail which had to be paid in order to be able to **challenge the legality of the forced execution**, in order to defend himself against the creditor. Not being able to present his defence due to a financial impossibility was justly viewed by the European Court of Human Rights as an infringement to the applicant's right to a fair trial.

However, the situation analised in the article deals only with the obligation to pay bail **in order to temporarily suspend the execution**. The amount of bail can in some cases prove rather burdensome for any individual. Despite this, the debtor is able to present his defences before the court regarding the legality of the execution itself. The failure to pay the bail fees can not constitute an impediment in exercising this legal right.

The greatest dangers which may arise from the impossibility of provisionally suspending the execution can stem from the sale of the property of the debtor at the price well bellow the market. Should he successfully contest the execution, he may request the return of his property, in accordance with article 723 par. 1 of the Civil Procedural Code[13]: " *In all cases where the enforceable title or enforcement itself is annuled, the person concerned has the right to return the enforcement by re-establishing the previous situation. The enforcement costs for the acts performed remain with the creditor*." He may also request the difference between the actual value of the goods and what the adjudicating third party paid for them, in accordance with article 1349 of the Civil Code since the fault for an unlawfull execution belongs to the creditor.

Thus, the risks involved for the debtor which may arise from not paying the bail fees are less problematic that in the past when the old legislation obligated him to pay them in order to be able to **annul the execution itself**.

Another important matter that is relevant to the subject at hand is to weigh in these risks with the ones created for the creditor should the request be admitted.

Firstly, should the request for bail reduction or exemption be accepted by the judge, the imminent danger may arise from the deprivation of the creditor of the sums of money needed to fulfil one of four purposes stated in article 720 of the Civil Procedural Code: " ***pay damages for infringements caused by delay of execution***, *and when the contestation was* ***conducted in bad faith***, *he will also be liable* ***to pay a fine from 1,000 lei to 7,000*** *lei When the appeal was dismissed, the sum representing the bail will remain unavailable, and will serve* ***to cover the receivables shown in par. (3)*** *or* ***those established by the enforceable title***, "[14].

No doubt these specific provisions have been drafted in order to ensure certain rights for the creditor, so that he may satisfy his claim.

To infringe upon them, by limiting his capability to satisfy his claim, to prolong the moment of execution, just because the other party is unable to support the financial burden of paying the bail fees, is by itself an infringement on the creditor's right to property.

Should a hypothetical claim be made before the European Court of Human Rights by the creditor in which he would raise these arguments, soon after it would be established that both Article no. 6 and Article no. 1 of Protocol no. 1 are applicable. The analysis would then concentrate on whether or not the measure was in accordance with the national provisions.

Most certainly, the European Court of Human Rights would not be able to find a legal provision that could regulate the benefit created for the debtor and limit the right of the creditor to benefit from the sums paid as bail fees. " *The principle of lawfulness also*

[13] 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.
[14] 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.

presupposes that the applicable provisions of domestic law be sufficiently accessible, precise and foreseeable in their application "[15]. Since there are no legal texts which may allow for the judge to grant such a request, there can be no discussion regarding the *accessible, precise and foreseeable* conditions for the text in order to justify the measure.

Thus, the evident conclusion would be that a violation of the rights of the creditor protected by Article 1 of Protocol 1 and Article no. 6 of the Europeean Convention on Human Rights has taken place. And the analysis would not even reach the point of verifying whether or not a fair balance has been maintained between the interests of the debtor and those of the creditor.

The state, which enjoyes a large margin of appreciation in this respect in regulating the conditions needed to solicit the temporary suspension, has established the obligation to pay the bail fees.

To interpret the legal texts in order to justify such a measure by the judge, under the umbrella of the necessity to respect the debtor's right to a fair trial is erroneous and unlawfull.

It would also create a difficult situation for the creditor, who after the efforts of obtaining the executory title, has to support the risks of the postponed execution, without the scenario ever even been regulated by law.

Moreover, the analysis of the European Court of Human Rights jurisprudence as previously laid has yielded the fact that the obligation to pay the bail fees by the debtor beforehand, should he solicit the temporary suspension of the execution, has never been viewed as problematic in the case law.

5. Conclusions

5.1. Summary of the main outcomes

There is no doubt that there are some who view the solution of granting the request of bail exemption or reduction as equitable and in complete accordance with the highest values promoted by the European Court of Human Rights.

Indeed, the aid for the debtor is evident, as he needs merely to prove his precarious financial situation in order to present to the court his arguments.

However, there are other interests involved which require a most careful analysis on whether or not to proceed with this course of action.

Given the arguments previously presented, the necessity to ensure the rights of the creditor, as granted to him by the state, should prevent any legal *contra legem* interpretations in order to avoid any violations of Article no. 6 or Article no. 1 of Protocol 1 to the Europeean Convention on Human Rights. The state has specifically established this safeguard for him, in order to discourage further impediments to this right to execute his title.

Since he has already reached the point where he is obligated to call upon the coercive force of the state because the debtor has failed to fulfil his obligations, to reach an equitable outcome would mean for the judge to refrain from granting the debtor's request.

5.2. The expected impact of the research outcomes

The aim of the article is to endeavour to shed light on the subject, in order to aid the reader to circumvent potential difficulties in deciding on the matter.

Also, it is also hoped to spread the idea of potential *de lege ferenda* sollutions in the form of explicitly mentioning in the provisions of *Emergency Ordinance no. 51/2008* that it is not applicable in this particular situation.

5.3. Suggestions for further research work.

Given the fact that the European Court of Human Rights can sometimes radically change its views, such as in the case of Micallef v. Malta of 2009, further research could potentially follow the case law of the Court, in identifying future instances in which the legal texts mentioned in the article have been subjected to an analysis.

References

- Law nr. 134/2010, republished in the Oficial Monitor, Part 1, no. 247/10.04.2015
- Emergency Ordinance no. 51/2008, published in the Official Gazette of Romania no. 327 of April 25, 2008
- Weissman and Others v. Romania- 63945/00 [2006] European Court of Human Rights
- Iosif and Others v. Romania- 10443/03 [2006] European Court of Human Rights
- Emergency Ordinance no. 80/2013, published in the Official Gazette of Romania no. 392 of June 29, 2013
- https://www.luju.ro/static/files/2013/octombrie/09/madularescu_ghica_Incheieri_26.09.2013-dosar_37103.pdf
- Marinela CIOROABĂ, Florin RADU, ,, Despre reducerea cautiunii sau scutirea de la plata acesteia in materia suspendarii executarii silite", last modification 27.02.2018. https://www.juridice.ro/126524/despre-reducerea-cautiunii-sau-scutirea-de-la-plata-acesteia-in-materia-suspendarii-executarii-silite.html
- Claudiu Drăgușin,,, Aplicabilitatea art. 6 CEDO în privința cererilor de suspendare a executării silite, în special sub aspectul scutirii / reducerii / eşalonării sumelor stabilite cu titlu de cauţiune - decizia de inadmisibilitate în cauza S.C. Eco Invest S.R.L. şi Ilie Bolmadar c. României", last modification 27.02.2018. http://www.hotararicedo.ro/index.php/news/2017/01/aplicabilitatea-art-6-cedo-cererilor-

[15] Dickmann and Gion v. Romania, 10346/03 and 10893/04 [2017] European Court of Human Rights.

suspendare-a-executarii-silite-scutirii-reducerii-esalonarii-cautiune-inadmisibilitate-sc-eco-invest-srl-ilie-bolmadar-c-romaniei

- Răducan, Gabriela et Dinu, Mădălina (2016), ,,Fișe de procedură civilă "[Civil Procedure Charts], București: ed. Hamangiu
- Boroi, G. (ed.), (2013), ,, Noul Cod de Procedură Civilă Comentat, vol.2 " [The Commented New Civil Procedural Code, vol. 2], București: Ed. Hamangiu
- Dickmann and Gion v. Romania, 10346/03 and 10893/04 [2017] European Court of Human Rights

UNLAWFUL CONDUCT ON THE CAPITAL MARKET

Cristian GHEORGHE[*]

Abstract

European Union Law had explicitly authorized the use of a double punishment (administrative and criminal) in the context of the fight against illegal conduct on the financial markets. Thus many facts and behaviours on the capital market have a double regulation, especially in the area of market abuse. For example, we have the misconduct of market manipulation punished with administrative (pecuniary) penalty and the market manipulation offense punished with criminal penalty. Criminal liability conditions are different from administrative liability but generating facts and behaviours are rigorously identical. Therefore acts of market manipulation are punished as misdemeanours (administrative procedure) when acts are committed without the form of guiltiness required by law to qualify them as offenses (criminal procedure).

The question raised by European and Romanian regulations on financial market is the compatibility with or violation of the European Convention on Human Rights (ECHR). In order to ensure the integrity of markets and to enhance investor confidence in those markets, European law has created broad administrative offences, which punish the risk of harm to the market with severe, pecuniary and non-pecuniary penalties. Access to a subsequent court in administrative proceedings is an evasive guarantee that does not compensate the unfairness of the administrative procedure. ECHR case law concluded that market pressure and need for compliance in that field cannot prevail over international human rights obligations of States bound by the Convention (ECHR).

Keywords: *capital market, market abuse, double punishment, ne bis in idem, ECHR.*

1. Introduction.

Many facts and behaviours on the capital market have a double regulation, especially in the area of market abuse. Romanian law provides the misconduct of market manipulation punished with administrative penalty[1] and market manipulation offense, punished with prison[2]. Of course, criminal liability is inflicted under different conditions than administrative contravention, but the facts are rigorously identical. This is even suggested by the law when declares guilt as the only difference between provisions. Thus acts of market manipulation are sanctioned as offenses when deeds are committed without the form of guiltiness required by law to qualify them as offenses[3].

2. Administrative liability and criminal liability on the Capital Market.

The Romanian Capital Market Law suggests a certain timeline in the investigation of the acts related to market abuse. Respectively the identification of such facts requires first a criminal investigation for criminal offense. If the criminal procedure is completed without incurring criminal liability and applying a penal penalty - explicitly the act was prosecuted as an offense and subsequently it was established that it constitutes an administrative contravention only - then administrative liability remains incumbent[4].

The applicable law on administrative contravention emphasizes the same indisputable principle of criminal liability primacy[5].

Administrative contraventions are generally defined by their legal object represented by social values threatened or injured through misbehaviours, values less important to be protected by criminal law. Theoretically it is not possible administrative liability overlapping criminal liability simply because the offense and the administrative contravention are mutually exclusive (have different legal object)[6].

However, capital market regulation, following the European regulation (Market Abuse Regulation), does not follow this exclusion[7]. Double regulation of the same acts as crimes and administrative offenses contravenes the general principles of national regulation.

The anticipated conduct of Romanian Authority of the Capital Market (Financial Supervisory Authority – FSA) seems to solve the overlapping of liabilities, in practice. Respectively the FSA will assess the possible criminal nature of the reported facts and notify the criminal investigation authorities for the investigation

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[1] Regulation (EU) no. 596/2014, Market Abuse Regulation (MAR), Art. 30 para (1) a) and Art. 15. Romanian Law no. 24/2017, Art. 132 para (1) which refers MAR.

[2] Law no. 24/2017, Art. 134 para (5).

[3] Law no. 24/2017, Art. 132, para (3) b) i).

[4] Law no. 24/2017, Art. 133 para (5).

[5] Government Ordinance (GO) no 2/2001, Art. 30.

[6] GO no 2/2001, Art. 1. The law (contravention) protect social values which are not protected by penal law.

[7] Administrative misbehaviours related to market abuse are enacted directly by European Regulation no. 596/2014 (MAR), Art. 30. Criminal liability are inflicted by European Directive on market abuse (for the same facts).

of the facts in criminal proceedings. To the extent that criminal liability is established and a criminal penalty will be imposed, any administrative procedure ceases. FSA will no longer apply any sanction.

This chronology of events is above all criticism. In the rest of the situations, however, the legal perspective is more tumultuous.

If criminal liability is not engaged (termination or acquittal in the criminal proceedings), FSA resumes its investigation, the statute of limitation for administrative procedure being declared suspended during criminal procedure[8].

At first glance this situation seems beyond any controversy. It not seems to be a double prosecution. The perpetrators are subject to a criminal investigation and then subject to an administrative investigation for the same facts.

The *non bis in idem* principle prohibits not only a double conviction but also a double trial or investigation for the same facts. The principle in question is a principle with wide international recognition, but in criminal law only.

3. Ne bis in idem.

Immunity acquired for the same facts as a result of a previous criminal trial has a wide European and international recognition, in a sensibly different form. United Nations Covenant on Civil and Political Rights states that: "*No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country*."[9]

Charter of Fundamental Rights of the European Union[10] reads as follows: "*No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law*."

American Convention on Human Rights[11] establishes that: "An accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the same cause."

The Court of Justice of the European Union (CJEU) has also enshrined the principle in its jurisprudence[12].

Of particular importance for European countries is the ECHR Convention[13]. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State[14].

If, in the past, the principle was assimilated to a negative effect of the double-jeopardy clause which protect defendants from the burdens of multiple trials, domestic law (procedural criminal law) has now included *ne bis in idem* by enacting that no person can be prosecuted for committing an offense when that person has been previously given a final criminal judgment on the same offense, even under a different classification of the offense[15].

In the ECHR case law a person enjoys three distinct guarantees derived from the *ne bis in idem* principle: he cannot be prosecuted, tried or punished twice for the same conduct. From this perspective, even if the first proceedings end with acquittal (criminal charges) and the person is subsequently subject to the second proceedings (administrative charges), there is a violation of the Convention. There is no need to be two convictions for the violation of the Convention. The ECHR expressed the view that the perpetrator's acquittal of the charge under the criminal code *did not deprive him of his status as a "victim"* of the alleged violation of Article 4 of Protocol No. 7 of the Convention[16].

4. Cumulation of criminal liability with administrative liability.

National law does not explicitly address aggregation of administrative and penal liability but excludes it by defining the concepts. Placing administrative penalties outside the object of the criminal offenses should make it impossible to overlap the two concepts. But the content of many criminal offenses contains elements or circumstances that may constitute contraventions. In the case of market abuse, the situation is even more manifest as the same conduct is also a criminal offense and a contravention so that cumulation of liabilities is a possible situation. If administrative investigation is found to be inadmissible after criminal liability and punishment as a criminal offense, in the rest of the cases administrative liability remains applicable. The administrative procedure, pending after the criminal nature has been removed in

[8] Law no. 24/2017, Art. 133 para (6). However in all cases an elapsed term of 4 years from time of facts excludes the application of a penalty.

[9] UN Convention, Art. 14 par. 7, adopted by UN General Assembly on December 16th 1966, http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx.

[10] Charter of Fundamental Rights of the European Union, proclaimed by the European Parliament, the Council and the Commission in Strasbourg on 12 December 2007 (OJ 14.12.2007), C 303/1, Art 50.

[11] American Convention on Human Rights, Art. 8 par. 4. http://www.cidh.org/basicos/english/basic3.american%20convention.htm.

[12] CJEU, https://curia.europa.eu/jcms. *Limburgse Vinyl Maatschappij NV (LVM) and Others v. Commission of the European Communities*, Joint cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P la C-252/99P and C-254/99 P, § 59, 15.10.2002. *Norma Kraaijenbrink*, Case C-367/05, 18.07.2007.

[13] Convention for the Protection of Human Rights and Fundamental Freedoms known as European Convention on Human Rights (ECHR).

[14] Article 4 of Protocol No. 7 ECHR.

[15] Romanian Criminal Procedure Code, Art. 6.

[16] *Sergey Zolotukhin v. Rusia*, Case no. 14939/03, ECHR Judgement on 10.02.2009, para (119).

a criminal proceedings, is expressly regulated (by suspending the prescription of the application of the sanction in investigation of the administrative nature). However, this case does not involve cumulation but a successive check of the conditions of the criminal liability and contravention.

The premise of undeniably cumulation is that of imposing an administrative sanction by the FSA (which may consider that no criminal investigation is required). Such conduct of FSA does not hinder by anything the subsequent action of criminal prosecution authorities. They have no impediment (*ex officio* or by criminal complaint of others than FSA) to pursue investigation as they are not held by the FSA's opinion that the conduct is a contravention, not a crime.

The French doctrine has constantly held that criminal liability and contravention have different grounds so that the situation of the cumulus of contravention liability with criminal liability is allowed[17]. Cumulation is unambiguously accepted in French law, with the imputation of the administrative fine on the possible criminal fine. Thus, when the competent authority (in France this is the Sanctions Committee of the Financial Market Authority - AMF) imposed a financial penalty that became final before the criminal court finally ruled on the same facts, the criminal court may order that the pecuniary sanction to be deducted from the fine the court may pronounce[18]. Such provision basically validates the right of the criminal court to impose a penalty (fine or imprisonment) in criminal proceedings, after an administrative proceedings.

The evolution of French law on the matter. After constant criticism in the doctrine regarding the double incrimination and non-compliance with the ECHR Convention, Constitutional Council of France declared unconstitutional the cumulating of criminal and administrative penalties for the same deed, in particular the situation in which the same facts are subject to a plurality of sanctions.

By allowing the prosecution of similar behaviours to those pursued before the administrative regulator (AMF) in violation of the non bis in idem principle, these provisions violate the principles of the necessity of offenses and punishments, the proportionality of the punishment and respect for legally acquired rights.[19]
Romanian law faces the same situation with respect to Art. 134 para (2) (offense of misuse of privileged information) and Art. 132 para (3) of the Law no. 24/2017 (contravention). Respectively for the same facts there are administrative and criminal proceedings that can lead to double incrimination.

5. Double incrimination on the Capital Market in ECHR case-law. Civil limb and criminal limb of the right to a fair trial.

French case law as well as European developments on capital market unlawful conducts have been strongly influenced by the constant jurisprudence of the European Court of Human Rights to classify administrative sanctions in this field as "criminal" in nature. This practice enables the *ne bis in idem* principle in order to stop the effects of double prosecution, judgments and incriminations.

The jurisprudence of the ECHR applicable to the capital market was strongly influenced by the case *Grande Stevens v. Italy*.[20] In essence, the case concerns market manipulation. The competent authority of the market has investigated and punished the unlawful conduct by imposing significant pecuniary penalty aimed to deter market manipulation. Criminal investigation authorities have also been referred to as a result of the right conferred on Member States to impose administrative sanctions without prejudice to the right of States to apply criminal sanctions[21].

The criminal court also pronounced a conviction for the same conduct of market manipulation. The ECHR first examined the application of the Art. 6 of the Convention (right to a fair trial). This rule has civil limb (civil rights and obligations) and criminal limb (criminal sanctions). The ECHR has invoked its consistent case-law that the existence of a "criminal charge" requires verification of three elements: the legal classification of the measure in national law, the nature of the measure and the nature and severity of the sanction[22]. These criteria are alternative and not cumulative. In the case, the conduct of market manipulation investigated by the competent authority does not constitute a criminal charge (under Italian law). The facts were punished with an "administrative" sanction. But the qualification given by the national law has only a relative value in terms of the applicability by the ECHR Court of Article 6 of the Convention in its criminal limb[23].

Deficiency of a fair trial. The Court of the ECHR analysed the sanctions imposed in the area of market abuse and concluded that they are of special gravity and

[17] A.-D. Merville, *Droit financier*, Gualino, 2015, p. 356. Constitutional Council of France formerly decided that double penalties, as they have different nature, are allowed and principle *non bis in idem* is not infringed, Decision 89-260 DC (Constitutional Council) from 18.07.1989.

[18] French Monetary and Financial Code, Art. L 621-16, quoted after https://www.legifrance.gouv.fr

[19] Constitutional Council of France, Decision no. 2014-453/454 QPC and 2015-462 QPC din 18.03.2015 - *John L. Daimler AG and others*, quoted after http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2015/2014-453/ 454-qpc-et-2015-462-qpc/version-en-anglais.143599.html.

[20] *Grande Stevens v. Italia*, Case no. 18640/10, ECHR Judgment from 4.03.2014, quoted after https://hudoc.echr.coe.int.

[21] Directive 2003/6/EC, Article 14, which invited the member States of the European Union to apply administrative sanctions against persons responsible for manipulating the market, contained in turn the phrase "without prejudice to the right of Member States to impose criminal sanctions". The provision is now in Regulation (EU) no 596/2014 (MAR), Art. 30 para (1) that replaces the Directive.

[22] *Engel and Others v. the Netherlands*, 8 June 1976, § 82, Series A no. 22.

[23] *Öztürk v. Germany*, 21 February 1984, § 52, Series A no. 73.

are of a criminal nature which leads to the application of Art. 6 § 1 of the Convention in its criminal limb. The requirements of a fair trial are stricter in the sphere of criminal law. The absence of a hearing is mainly the weakness of the proceedings before the competent authority. The Court concludes that the procedure before the authority, in the light of the classification of sanctions as criminal, is not satisfactory[24].

Independent and impartial tribunal condition. The Italian authority has an investigation office and the commission itself. The ECHR considers that they are departments of the same administrative body, acting under the authority of a single president. In this way the investigative and sanctioning functions are cumulated by a single body. In criminal matters such a combination of functions is not compatible with the requirements of impartiality laid down by Article 6 § 1 of the Convention[25].

Non bis in idem. ECHR has found that the unlawful conduct of market abuse is the same thing in administrative and criminal proceedings which means a double prosecution and breach of the Convention[26].

ECHR conclusions concern the regulatory capital market system of Italy and of all EU Member States that share the same legislation in the field. ECHR judgment is equally valid in its conclusions in Romania (lack of a fair trial, non-compliance with the requirement of the independent and impartial tribunal, *non bis in idem* in administrative and criminal proceedings for market abuse).

6. Conclusions

Judgment of the ECHR did not draw its conclusions, but dissenting opinion (partly concurring, partly dissenting opinion) pointed more precisely the context of the controversy.

European States are confronted with a dilemma. In order to ensure the integrity of European markets and to enhance investor confidence in those markets, States have created very broad administrative conduct-based offences, which punish the abstract risk of harm to the market with severe, undetermined pecuniary and non-pecuniary penalties, which are classified as administrative sanctions and applied by "independent" administrative authorities in inquisitorial, unequal and prompt proceedings. These authorities combine punitive and prosecutorial powers with a broad power of supervision over a particular sector of the market, and exercise the latter in such a way as to pursue the former, sometimes imposing on the supervised/suspected person an obligation to cooperate in the bringing of charges against him or her.[27]

Access to a subsequent court in administrative proceedings is only an evasive guarantee that does not compensate the unfairness of the procedure.

The conclusion of the divergent opinion of the ECHR is that market pressure cannot prevail over international human rights obligations of States bound by the Convention (ECHR).

We expect that this judgment will provide the domestic courts with an opportunity to deliver full justice to the applicants, and the Italian legislature with the incentive to remedy the structural deficiencies in the administrative and judicial procedure for the application and review of administrative sanctions by the CONSOB [Italian authority for Capital Market]. If the Italian legislature is up to this challenge, its work could provide an example of cross-fertilization to other legislatures which are faced with a similar systemic problem[28].

References

- St. D. Cărpenaru, *Tratat de drept comercial roman*, Bucharest: Universul Juridic, 2016
- St. D. Cărpenaru et al., *Legea societăților. Comentariu pe articole.* Bucharest: C.H. Beck, 2014
- C. Duțescu, Legea privind piața de capital. Comentarii pe articole, Bucharest: C.H. Beck, 2009
- I.L. Georgescu, *Drept comercial român*, Bucharest: All Beck, 2002
- Cristian Gheorghe, *Drept comercial român*,, Bucharest: CH Beck, 2013
- Cristian Gheorghe, *Dreptul pietei de capital*, Bucharest: CH Beck, 2009
- C. Hamangiu, I.Rosetti-Bălănescu, Al. Băicoianu, *Tratat de Drept Civil Român*, Bucharest: All, 1996
- N.K. Kubasek et al., *The legal environment of business*, Prentice Hall, Upper Saddle River, New Jersey, 1996
- A.-D. Merville, *Droit financier*, Issy-les-Moulineaux: Gualino, 2015
- O. Manolache, *Drept comunitar*, Bucharest: All Beck, 2003
- T. Prescure, N. Călin, D. Călin, *Legea pieței de capital, Comentarii și explicații*, Bucharest: C.H. Beck, 2008
- I. Tanoviceanu, *Tratat de Drept și Procedură Penală*, Tome V, Bucharest: Curierul Judiciar, 1927

[24] *Grande Stevens v. Italia*, para (123).
[25] *Piersack v. Belgium*, 1.10.1982, §§ 30-32, Series A no. 53 and *De Cubber v. Belgium*, 26 October 1984, §§ 24-30, Series A no. 86.
[26] *Grande Stevens v. Italia*, para (227), (228).
[27] *Grande Stevens v. Italia*, Case no. 18640/10, Partly concurring, partly dissenting opinion of judges Karakaş and Pinto de Albuquerque, para (32).
[28] Ibidem, para (33).

THEORETICAL AND PRACTICAL ISSUES REGARDING THE CHILD'S CARE

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Abstract

Following the entry into force of Law No. 257/2013 for the amendment of Law No. 272/2004 on the protection and promotion of the child's rights new provisions were adopted in relation with the child's protection whose parents work abroad. This regulation was necessary in view of the increasing number of parents who, due to the need to ensure a decent living for the dependent children, are forced to work outside of Romania, but for this reason they neglect to raise and to care for them. The study examines theoretical issues of the child's care that raise some debates in the doctrine. The research also consists in the analysis of the new regulation related to the child's care both from theoretical and practical perspectives. The authors intend to carry out an analysis of the relevant case law of the courts of law in the matter of child's care. From this perspective, there are some issues in relation to a child's dwelling when his parents do not live together anymore. As far as the change of the child's dwelling is concerned, we have to distinguish between the children entrusted to one of the parents according to the Family Code and the children for whom the parental authority has been ordered to be jointly exercised and to have their place of residence with one of their parents, according to the provisions of the Civil Code. With respect to the child's dwelling, both within the doctrine and the case law, it has emerged the notion of alternative or sharing dwelling of the child.

Keywords: *child's care, child's protection, child's dwelling, custody authority, parental authority.*

1. Introduction

This paper intends to clarify a few issues related to the child's care that raise some debates in the doctrine.

Two years after the entry into force of the Civil Code (Law no. 287/2009, republished)[1], it was adopted the Law no. 257/2013 on the amendment and addition of Law no. 272/2004 on the protection and promotion of the rights of the child, which governed for the first time within our legislation the child's protection whose parents are working abroad. After two more years from the entry into force of the Law no. 257/2013, it was adopted the Government Decision no. 691/2015 approving the Procedure of monitoring the way of raising and caring for the child with parents abroad and the services they can benefit from, as well as approving the Working Methodology on Collaboration between the general directions of social assistance and child protection and public social services and the standard model of documents developed by them. Therefore, a thorough analysis of these provisions regulating the child's protection whose parents work abroad is important not only for the authors of family law, but also for the legal practitioners.

Additionally, our intention is to examine some main theoretical issues of the child's care 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. The child's protection whose parents work abroad

As of the 3rd of October 2013, it was brought under regulation this new maintenance obligation cathegory, as a novelty, through the last amendments to the Law no. 272/2004 on the protection and promotion of the rights of the child, republished[2], with the following amendments and supplements[3].

As per article 104 paragraphs (1), (2) and (4) of Law no. 272/2004 on the protection and promotion of the rights of the child, the parent who solely exercises the parental authority or with whom the child is living, or the parents, who are about to go work abroad, have the obligation to notify this intention to the public social

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[1] Published in Official Gazette of Romania No. 505 of July 15, 2011 as further amended.

[2] Republished in the Official Gazette of Romania, Part I, no. 159 of March 5, 2014 under article V of Law no. 257/2013 on the amendment and addition of Law no. 272/ 2004 on the protection and promotion of the rights of the child, published in the Official Gazette of Romania, Part I, no. 607 of September 30, 2013, giving the text a new numbering.

[3] As amended and supplemented by Government Emergency Ordinance no. 65/2014 for amending and completing certain normative acts, published in the Official Gazette of Romania, Part I, no. 760 of October 20, 2014 and Law no. 131/2014 for the amendment of paragraphs (1) and (2) of article 64 of the Law no. 272/2004 on the protection and promotion of the rights of the child, published in the Official Gazette of Romania, Part I, no. 740 of October 10, 2014.

service from their domicile with at least 40 days before leaving the country, with the mandatory indication of the appointed individual who shall take care of the child during their absence.

According to this provision, the obligation to notify the intention of working abroad shall be beared by the following: either by (i) the parent who solely exercises the parental authority or with whom the child is living, or by (ii) both parents, should the parental authority is jointly exercised or by (iii) the tutor.

These individuals have the obligation to duly notify such intention with at least 40 days prior to leaving the country to the public social service in whose division they are domiciled.

Said notification must comprise all identification data of the individual who shall take care of the child during the parents' absence or of the tutor.

In order to be appointed for the temporary exercise of the parental authority with respect to a child, an individual must cumulatively fulfill the following conditions:

a) to be part of the extended family[4];
b) to be at least 18 years old;
c) to meet all material conditions and moral guarantees necessary for the raise and care of a child[5].

The public social services organised at the level of municipalities, cities, communes assure to the appointed individuals guidance and information with respect to the liability of the growth and development of the child on a period of time of 6 months[6].

The confirmation of the individual that shall take care of the child shall be made by the custody court[7].

The custody court shall rule the temporary delegation of the parental authority with respect to the child, during the parents' absence, but no longer than one year, to the appointed individual[8]. Therefore, said delegation shall regard only the personal aspect of the child's care, and not the parental authority exercice with respect to the child's assets. As far as the child's assets are concerned, as long as the law does not regulate anything, we consider that the custody court shall render, depending on the circumstances, either the joint exercise by both parents or the exercise by one of them, as in the other cases of parental authority delegation to a third person (as in the case of a divorce, the nullity of a marriage etc.).

The individual to whom the parental authority is to be delegated must express his/her personal consent in front of the custody court[9].

At this request shall be annexed documents attesting the fulfillment of the above-mentioned conditions with respect to the appointed individual[10].

The request of parental rights and duties delegation shall be settled in a non-contentious procedure, as per the Civil Procedure Code, in a 3 days term as of its registration to the custody court[11].

The rulling shall comprise the express mention of the rights and duties to be delegated and the period of time for which the delegation takes place, which, as we have already provided hereinabove, can not exceed one year[12].

Once the custody court decides to delegate the parental rights, the individual responsible for the childcare must follow a counseling program in order to prevent conflictual situations, misconduct, or negligence in the relationship with the child[13].

The court shall communicate a copy of the delegation ruling to the mayor from the parents' or guardian's domicile, as well as to the mayor from the domicile of the individual to whom the parental authority has been delegated[14].

As per article 106 of the Law no. 272/2004 on the protection and promotion of the rights of the child, republished, the local authorities through the public social security services can initiate, within the state or local budget provisions and within the revenue and expenditure budget having this destination, information campaigns for parents, in order to:

a) parenting awareness of the risks assumed by going to work abroad;
b) inform the parents with respect to their obligations in case they intend to leave abroad.

Two years after the entry into force of the Law no. 257/2013, the Government Decision no. 691/2015[15] approving the Procedure of monitoring the way of raising and caring for the child with parents abroad and the services they can benefit from, as well as approving the Working Methodology on collaboration between the general directions of social assistance and child protection and public social services and the standard model of documents developed by them[16] was adopted.

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[4] According to article 4 letter c) of Law no. 272/2004 on the protection and promotion of the rights of the child, republished, extended family means "the relatives of the child up to the fourth degree inclusive".
[5] Article 105 paragraph (1) of the Law no. 272/2004 on the protection and promotion of children's rights, republished.
[6] Article 105 paragraph (2) of the Law no. 272/2004 on the protection and promotion of children's rights, republished.
[7] Art. 104 paragraph (3) of the Law no. 272/2004 on the protection and promotion of children's rights, republished.
[8] Article 105 paragraph (3) of the Law no. 272/2004 on the protection and promotion of children's rights, republished.
[9] Article 105 paragraph (4) of the Law no. 272/2004 on the protection and promotion of children's rights, republished
[10] Article 105 paragraph (5) of the Law no. 272/2004 on the protection and promotion of children's rights, republished.
[11] Article 105 paragraph (6) of the Law no. 272/2004 on the protection and promotion of children's rights, republished.
[12] Article 105 paragraph (7) of the Law no. 272/2004 on the protection and promotion of children's rights, republished.
[13] Article 105 paragraph (8) of the Law no. 272/2004 on the protection and promotion of children's rights, republished.
[14] Article 105 paragraph (9) of the Law no. 272/2004 on the protection and promotion of children's rights, republished.
[15] Published in the Official Gazette of Romania, Part I, no. 663 of September 1, 2015.
[16] According to article 107 of Law no. 272/2004 on the protection and promotion of the rights of the child, republished, the procedure for monitoring the way of raising and caring for the child with parents who have left work abroad and the services to which they can benefit is

2.2. The child's dwelling

As per the provisions of article 496 paragraphs (1) and (2) of the Civil Code, the child lives with his parents, and when his parents are not living together, they shall mutually agree upon the child's dwelling.

Therefore, the rule in relation with the child's dwelling is that the child shall live with his parents and the exception shall be the situation when the parental authority is split, when the child's dwelling shall be established at one of the parents.

According to paragraph (3) of article 496 of the Civil Code, when the parents do not agree upon the establishment of the child's dwelling, the custody court shall decide, taking also into consideration the finding of the psychosocial inquiry report and listening of the parents and the child, in case the latter is 10 years old.

In the divorce matter we have the same regulation, according to which "in the absence of an agreement between the parents or if it is against the best interest of the child, the custody court shall establish, along with the divorce, the child's dwelling with the parent with whom the child usually resides"[17].

The Civil Code does not define the meaning of the phrase "with the parent with whom the child usually resides". We consider that this phrase should be understood as the situation where the child usually lives with one of his parents until the settlement of the divorce request. Such a situation may arise when the parents are living separately before the divorce is pronounced and the child lives with one of his parents.

In case the child has been living before the divorce with both parents, the court shall establish the child's dwelling at one of them, taking into account the best interest of the child[18].

In assessing the child's interest, the court may also consider aspects such as:[19]

a) the needs of physical, psychological developments, education and health, security and stability and family affiliation;
b) the child's opinion, depending on his/her age and maturity;
c) the child's history, taking into consideration, especially, the situations of abuse, neglect, exploitation or any other form of violence against the child, as well as the potential risk situations that may occur in the future;
d) the parents' capacity or the capacity of the persons that shall take care of the child to meet his concrete needs;
e) maintaining the personal relationships with the individuals with whom the child has developed attachment relationships;
f) the availability of each of the parents to involve the other parent in the decisions concerning the child and to respect the parental rights of the latter;
g) the availability of each of the parents to allow the other one to maintain the personal relationships;
h) the housing situation of each parent in the last 3 years;
i) the history of parental violence against the child or other individuals;
j) the distance between the domicile of each parent and the institution providing the child's education.

Although there is no express regulation on the criteria to be taken into consideration when establishing the child's home, it is equaly important to maintain the brothers together, by establishing their dwelling at the same parent. The separation of the children is possible in exceptional situations, provided they are in their best interest[20].

Article 400 paragraph (3) of the Civil Code stipulates that "exceptionally, and only if it is in the best interest of the child, the court can establish his dwelling at the grandparents or other relatives or individuals, with their consent, or at a care institution. They exercise the child's supervision and undertake all normal acts with respect to the health, education and teaching of the child".

As previously stated[21], within the case law of several European countries, the appreciation of the child's best interest in establishing his dwelling is also analysed from the point of view of the so-called "Californian Principle", according to which it represents an advantage the capacity of each parent to allow the other one to exercise his parental rights with respect to the child[22].

According to the provisions of article 400 of the Civil Code, the establishment of the child's dwelling must be made at one of the parents, according to his best interest, the law does not foresee whether it is necessary to establish the exact address at which the child will live with the parent. Therefore, it has been considered[23] that, in the silence of law, it is not mandatory to mention the address of the parent with

established by a Government decision, at the proposal of the Ministry of Labor, Family, Social Protection and the Elderly, in collaboration with the Ministry of Regional Development and Public Administration.

[17] Article 400 paragraph (1) of Civil Code.

[18] Article 400 paragraph (2) of Civil Code. See Court of Appeal of Bucharest, 3rd Civil Section, decision no. 112 of February 1, 2011, in C. Mareș, *Family Law*, Second Edition, C.H. Beck Publising House, Bucharest, page 217-218.

[19] Article 21 paragraph (1) and article 2 paragraph (6) of Law No. 272/2004 on the protection and promotion of the child's rights, republished.

[20] See Court of Appeal of Timișoara, 1st Civil Section, decision no. 831/2013, in Săptămâna Juridică 8 (2014), page 23; Court of Appeal of Craiova, Section for children and family, decision no. 9 of January 24, 2007, www.portal.just.ro; Neamț Tribunal, Civil Section, decision no. 345/AC/2008, www.portal.just.ro.

[21] Dan Lupașcu and Cristiana Mihaela Crăciunescu, *Family Law*, Third Edition, Universul Juridic Publishing House, Bucharest, 2017, page 363.

[22] In the French Civil Code this principle was introduced in Art. 373 2 11 (3), which states that the judge shall consider: "The ability of each of the parents to assume their obligations and to observe the rights of the other".

[23] See the Conference of the National Institute of Magistracy of February 20, 2012, entitled Provisions of the New Civil Code in the Field of Family Law - Unification of Practice, page 15 (http://www.inm-lex.ro/fisiere/pag_115/ det_1506/8453.pdf).

whom the child shall live, given the possibility of changing it even repeatedly[24]. Nevertheless, changing the child's dwelling must be made with the consent of the other parent, should it affect the parental authority exercise or other parental rights, in case of misunderstandings the custody court having the competence to decide. In this case, however, it has been considered that the court must specify where the new home of the child shall be established, at least in terms of the elements affecting the parental rights exercise, such as the country or locality.

At the same time, it has been shown that the child's dwelling can be also be established abroad, together with one of the parents, if this shall meet the best interest of the child. Whenever possible, it can be decided for a psychosocial inquiry report to be done, in order to know the conditions offered by the parent to whom the child will live.

The change of the circumstances envisaged in the judgment may entail the change of the measure establishing the child's dwelling, which can be settled at the other parent or at other individuals or care institutions if the case may be.

Changing the decision on the child's dwelling can only take place if his interest so requires, that is, only when the parent where the home was established can no longer provide him the necessary conditions for a proper development[25].

As far as the change of the child's dwelling is concerned, we have to distinguish between the children entrusted to one of the parents according to the Family Code[26] and the children for whom the parental authority has been ordered to be jointly exercised and to have their place of residence with one of their parents, according to the provisions of the Civil Code.

Thus, with respect to the child entrusted to one of the parents according to the Family Code, since the Civil Code provisions regulate the parental authority institution, without the institution of entrusting a child to one of the parents, it can be at any times requested changing the measure of his custody and, therefore, changing his dwelling from the parent to whom he was entrusted, even if the circumstances taken into consideration by the court at his entrustment have not changed.

As regards a child for whom the custody court has ruled, under the provisions of the Civil Code, that the parental authority shall be exercised jointly by both parents[27] or, by way of exception, only by one of them[28], being thus established the dwelling at one of the parents, changing said dwelling can only be requested in case the circumstances envisaged by the custody court have changed at the time when the change of the child's dwelling is requested.

Therefore, according to the new regulations, disregard the parent with whom the child's dwelling shall be established, the latter shall benefit from the care of both parents who, in the form of joint parental authority exercise, shall collaborate in taking all important decisions with respect to the child, being actively involved in raising and educating him.

The Family Code provided the possibilty of entrusting the child for his raise and education to one of the parents, which implies that the parent ensures the raising and education of the child, the other parent having the possibility to look after the manner in which these obligations are fullfiled. Therefore, the child lived with the parent to whom he was entrusted for his raise and education, whithout the court expressily rulling it.

In the application of the previous legislation, when the child was entrusted to be raised and educated by one of the parents, the supreme court has ruled that: "the choice of children to be entrusted to one of the parents does not have a preponderant role in adopting the solution, but can not be disregarded when they are at the age when they can properly appreciate their interest, but must be duly analysed and considered in relation to the other administered evidence"[29]. In this regard, we consider that the children's option regarding the establishment of their dwelling, in relation to their age and degree of maturity could also be envisaged in the current legislation (under article 264 of the Civil Code).

As per the provisions of article 496 paragraph (4) of the Civil Code, the "child's dwelling, established in accordance with this article, cannot be change without the approval of the parents, except in cases expressly provided by the law".

Moreover, article 497 paragraph (2) of the Civil Code stipulates that changing the child's dwelling, together with the parent with whom he lives, cannot occur without the prior consent of the other parent, in case it affects the exercise of the parental authority or other parental rights.

In case of misunderstandings between the parents, the custody court shall decide, according to the best interest of the child, taking into account the

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[24] See also C. Mareș, op. cit., page 219; 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 465.

[25] See Supreme Court of Justice, Civil Section, decision no. 2448/1993, *Buletinul Jurisprudenței. Culegere de decizii pe anul 1993*, Continent XXI & Universul Publishing House, Bucharest, 1994, page 109-112; Court of Appeal of Alba Iulia, Section for children and family, decision no. 64/R/2008 and no. 35/R/2008, http://www.jurisprudenta.org/; Court of Appeal of Cluj, Civil Section, of labour and social securities, for children and family, decision nro 237/R of January 25, 2008 and no. 1855/R of October 3, 2008, http://www.jurisprudenta.org/.

[26] Law no. 4/1953 entered into force on the 1st of February 1954, published in Official Gazette no. 1 of January 4, 1954, as further amended and supplemented.

[27] Article 397 and article 503 paragraph (1) of Civil Code.

[28] Article 398 and article 507 of Civil Code.

[29] See Supreme Court of Justice, Civil Section, decision no. 1848/1991, in *Probleme de drept din deciziile Curții Supreme de Justiție 1990-1992*, Orizonturi Publishing House, Bucharest, 1993, page 217-219; see also Court of Appeal of Iași, Section for children and family, decision no. 140/R of October 23, 2008, www.portal.just.ro.

conclusions of the psychosocial inquiry report and listening to the parents and to the child[30].

With respect to the child's dwelling, both within the doctrine and the case law, it has emerged the notion of alternative or sharing dwelling of the child.

Together with other authors[31], we consider that the legislator did not regulate the possibility of interchanging the child's dwelling from one parent to the other. Notwithstanding, should the parents agree with interchanging the child's dwelling from one to another and should this be considered in the best interest of the child, the court may rule in this respect based on the parents' mutual agreement and not based on a legal provision that would regulate this. On the contrary, in case the parents do not agree with interchanging the child's dwelling from one to another or in case this measure would not be in the best interest of the child, the court can not establish an alternative dwelling of a child at both parents.

According to another opinion[32], there is accepted the possibility of interchanging the child's dwelling from one parent to the other in case this is in the child's best interest and the parental authority is to be exercised by both parents.

We consider that, as per the provisions of article 400 of the Civil Code, it is not possible to establish an alternative dwelling of a child at both parents, the legislator stipulating under the paragraph (1) that, in case of misunderstanding between the parents or if such understanding shall be against the best interest of the child, the custody court shall determine, along with the divorce, the dwelling of the child at the parent with whom he usually lives and, under paragraph (2), that, if prior to the divorce the child lived with both parents, the court shall establish his dwelling at one of them, as per his best interest, excluding the possibility of establishing the alternating dwelling of the child.

At the same time, within the case law[33] it was noted that the principle 3.20 paragraph (2) from the Principles of the European Law on Parental Authority, adopted by the European Commision on the family legislation stipulates that " the child may alternatively reside with the holders of the parental authority, either as a result of an agreement approved by the competent authority or of a decision taken by the latter", but this recommendation is not mandatory, by means of a recommendation the institutions disclose their opinion and suggest ways of action, without imposing any legal obligation to the recipients of the recommendation, and the provisions of article 400 Civil Code, under their current form, do not allow the settlement of an alternating dwelling in case of divorce.

2.3. The competent court to settle the request for establishing the child's dwelling

As per article 107 paragraph (1) of the Civil Code, the proceedings undertaken by the Civil Code with respect to the protection of the individuals fall within the competence of the custody and family court, established according to the law. Moreover, according to article 94 point 1 letter a) of the Civil Procedure Code[34], the courts shall rule in trial court the claims provided by the Civil Code under the competence of the custody and family court, unless otherwise expressly provided by law.

Thus, the custody court has the jurisdiction to rule with respect to the relationships between the parents and their children during marriage and also in case of divorce of after their divorce. Futhermore, the court's jurisdiction shall exist with respect to the relationships between the parents and their children outside of marriage.

From the territorial point of view, according to article 114 paragraph (1) from the Civil Procedure Code, the requests for the individuals' protection, provided by the Civil Code under the jurisdiction of the custody and family court, shall be ruled by the court in whose territorial jurisdiction the protected individual is domiciled or resided, unless otherwise provided by law.

According to article 76 of the Law no. 76/2012 for the implementation of Law no. 134/2010 regarding the Civil Procedure Code[35], "until the organization of the custody and family courts, the courts or, as the case may be, the tribunals or specialized tribunals for children and family shall act as custody and family courts, having the jurisdiction as provided by the Civil Code, the Civil Procedure Code, the present law, as well as special regulations in force".

Therefore, as stated within the practice of the courts[36], in accordance with the legal provisions, the jurisdiction for ruling a case having as object the change of the child's dwelling lies with the court in whose territorial jurisdiction the domicile or residence of the protected individual is located, the exclusive competence regulated by the provisions of article 114 paragraph (1) of the Civil Procedure Code having the character of public order competence in relation to the provisions of article 129 paragraph (1) point 3 of the Civil Procedure Code.

2.4. The summons of the custody authority in the lawsuits with children

According to article 396 paragraph (1) and (2) of the Civil Code, the custody court shall rule, along with the divorce, with respect to the relationship between the divorced parents and their children, taking into account

[30] Article 497 paragraph (2) Civil Code.

[31] E. Florian, *Family law. Marriage. Matrimonial regimes. Filiation*, 5th Edition, C.H. Beck Publishing House, Bucharest, 2016, page 350; M. Avram, *Civil law. Family*, Hamangiu Publishing House, Bucharest, 2013, page 161.

[32] C. C. Hageanu, *Family law and the civil status acts*, Hamangiu Publishing House, Bucharest, 2017, page 205.

[33] Bucharest Tribunal, 5th Civil Section, civil decision no. 1282A of March 30, 2016, not published.

[34] Law no. 134/2010, republished in the Official Gazette of Romania no. 247 of April 10, 2015, as amended and supplemented.

[35] Published in the Official Gazette of Romania no. 365 of May 30, 2012, as subsequently amended and supplemented..

[36] High Court of Cassation and Justice, 1st Civil Section, decision no. 1007 of June 13, 2017, in Săptămâna Juridică 41 (2017), page 8-9.

the best interest of the children, the conclusions of the psychosocial inquiry report and, if case, of the parents' consent, whom the court shall listen to, but also of the child's opinion, also heard by the court (the provisions of article 264 of the Civil Code being applicable).

We consider that, within such cases with children, involving the parental authority exercise, establishing the child's dwelling, which falls under the jurisdiction of the custody and family court, it is necessary to summon the custody authority, which must draw up a psychosocial inquiry report, duly taken into consideration by the custody and family court when ruling within said case, corroborating it also with the rest of the evidence administered.

As previously stated[37], according to the provisions of the Civil Code, which regulates the necessity of a psychosocial investigation in cases concerning the dissolution or nullity of marriage, as well as those concerning the exercise of parental authority over children resulting from a concubinage relationship when the parents do not live together, the hearing of the custody authority and, as a consequence, its summons is necessary. Given that the pshychosocial investigation is mandatory in such cases, the custody authority must be summoned by the court in order to draft the psychosocial inquiry report.

According to another opinion[38], based on the provisions of article 396, the custody authority must not be summoned by the court, given that there is no express legal procedural provision in this respect. We consider that without the summons of the custody authority, the psychosocial inquiry report could not be drafted. Therefore, the summons of the custody authority is mandatory in order to inform this authority that a psychosocial inquiry report must be drafted, although a representative of such authority is not necessary to be present in front of the court.

3. Conclusions

In conclusion, the legal provisions on child's care whose parents go to work abroad regulate a social reality with a significant impact on raising and caring for children whose parents are forced to go abroad. This regulation was necessary in view of the increasing number of parents who, due to the need to ensure a decent living for the dependent children, are forced to work outside of Romania, but for this reason they neglect to raise and to care for them. Besides material means of subsistence, a child needs permanent care, which can not be ensured remotely by the parents.

With respect to the child's home, the custody court is obliged to decide where said dwelling shall be established, besides the way of exercise of the parental authority by the parents of a child.

The competent court to settle an application for a child's dwelling is the custody and family court in whose territorial jurisdiction the domicile or residence of the protected individual is located, unless otherwise provided by law.

As regards the evidence to be administrated in a case having as object the child's care, the exercise of parental authority, the establishment of the child's home, we consider necessary to summon the custody authority, given the fact that the court must take into account the conclusions of the psychosocial inquiry report, together with the best interest of the child and, as the case may be, the consent of the parents and the child's hearing.

References

- Marieta Avram, *Civil law. Family*, (Bucharest: Hamangiu, 2013, 2016)
- Emese Florian, *Family law. Marriage. Matrimonial regimes. Filiation*, Fifth Edition, (Bucharest: C.H. Beck, 2016)
- Cristina Codruța Hageanu, *Family law and the civil status acts* (Bucharest: Hamangiu, 2017)
- Dan Lupașcu and Cristiana Mihaela Crăciunescu, *Family Law*, Third Edition, (Bucharest: Universul Juridic, 2017)
- Cristian Mareș, *Family Law*, Second Edition, (Bucharest: C.H. Beck, 2015)
- Bogdan Dumitru Moloman and Lazăr-Ciprian Ureche, The new Civil Code. 2nd Book. About family. Articles 258-534. Commentaries, explanations and jurisprudence, (Bucharest: Universul Juridic, 2016)
- Bogdan Dumitru Moloman and Lazăr-Ciprian Ureche, Ancheta psihosocială a autorității tutelare – personaj special în distribuția cauzelor aflate pe rolul instanței de tutelă. Act adminsitrativ sau simplu mijloc de probă?, in Revista Română de Jurisprudență 3 (2013)

[37] B.D. Moloman, L.-C. Ureche, op. cit., page 420; B.D. Moloman, L.-C. Ureche, Ancheta psihosocială a autorității tutelare – personaj special în distribuția cauzelor aflate pe rolul instanței de tutelă. Act adminsitrativ sau simplu mijloc de probă?, in Revista Română de Jurisprudență 3 (2013), page 151.

[38] M. Avram, *Civil law. Family*, Hamangiu Publishing House, Bucharest, 2016, page 158.

REINSURANCE FORM THE PERSPECTIVE OF PROPERTY INSURANCE CONTRACT

Dănilă Ștefan MATEI[*]

Abstract

The most significant means by which insurance markets operate to spread risks beyond like risk pools is reinsurance.

The reinsurance operation has the advantage that the original insured can increase his financial capacity in order to cover the risks that he cannot bear alone. The risks are therefore spread and the danger of insolvency or of decreasing the financial capacities either disappears or is reduced.

The reinsurance involves a new insurance, carried out by a new policy, for the same original insured risk, for the purpose of compensating the insured persons for the previously concluded insurances. Both contracts exist at the same time.

By reinsurance the reinsurer receives reinsurance premiums, in return for which it contributes, according to the obligations assumed, to bearing the indemnities that the reinsured pays on the occurrence of the risk subject to reinsurance; the reinsured cedes reinsurance premiums, in return for which the reinsurer contributes, according to the obligations assumed, to bearing the indemnities that the reinsured pays on the occurrence of the risk subject to reinsurance.

The reinsurance does not terminate the insurer's obligations and does not establish any legal relationship between the insured and the reinsurer.

This paper offers an introduction to key features of reinsurance, and some of the sources of complexity in the legal issues that arise

Keywords: *reinsurance, property, risk, aggregate, insurance, retrocession, treaty, proportional, facultative*.

1. The concept of reinsurance

The practice of reinsurance is as old as insurance insurance itself.

Under the English law, the earliest definition of insurance belongs to Lord Mansfield[1] and is found in *Delver v Barnes*, a case law in which the Court of King's Bench[2] was asked to decide whether the defendant, an insurance broker, entered into a reinsurance contract.

On that occasion, Lord Mansfield indicated the fact that the reinsurance is a new insurance, effected by a new policy on the same initial insured risk, for the purpose of indemnifying the insured persons for the previously concluded insurances; both policies exist at the same time [3].

Other more modern definitions have described the reinsurance operation as follows: a contract whereby an insurer brings a third person to insure him against loss of liability due to an original insurance[4]; the reinsurance is the contractual liability insurance which involves the payment of claims arising under direct insurance or reinsurance contracts[5]; reinsurance includes those contractual arrangements through which an insurance company transfers to another company all the risks or only a part of the risk that it underwrites to that insurer[6].

In the national doctrine, reinsurance is defined as the contract by which the reinsurer, in proportion to the premiums received and the risks taken over from the reinsured, bears part of the insurance indemnity owed by the reinsured in case of occurrence of the sinister[7].

Art. 2240 para. 1 of the Civil Code of 2009 provides that the reinsurance is the operation of insurance of an insurer, as insured, by another insurer, as reinsurer.

Art. 2240 para. 2 of the Civil Code of 2009 provides that by reinsurance, the insurer receives reinsurance premiums, in return for which he

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[1] According to Wikipedia: William Murray, 1st Earl of Mansfield, (2 March 1705 – 20 March 1793) was a British barrister, politician and judge noted for his reform of English law.

[2] The Court of King's Bench (or "Court of Queen's Bench", during the reign of a female monarch), formally known as The Court of the King Before the King Himself, was an English court of common law in the English legal system. Created in the late 12th to early 13th century from the *curia regis*, initially following the monarch on his travels, the King's Bench finally joined the Court of Common Pleas and Exchequer of Pleas in Westminster Hall in 1318, making its last travels in 1421.

[3] "This contract, although it much resembles yet does not fully amount to a reassurance, which consists to a new assurance effected by a new policy on the same risk which was before insured in order to indemnify the underwriters from their previous subscriptions: and both polices are to be in existence at the same time."

[4] Graydon S. Staring, "*Law of Reinsurance"* (New York:Clark Boardman Callaghan, 1993), p 1-2

[5] Robert Carter Leslie Lucas & Nigel Rlph, "*Reinsurance 4 th Ed"*. (Great Britain: Reactions Publishing Group, 2000), p 5

[6] Aviva Abramovsky, *"Reinsurance: The Silent Regulator?"* (2008-9) 15 Conn. Ins. L.J. 345: Reinsurance agreements "likely lead to the institutionalization of systems beyond and not necessarily congruent with many of the expectations and avowed puposes of some regulatory activities"

[7] I. Sferdian, "*Dreptul asigurărilor",* Editura C.H. Beck, București, 2007, p. 26

contributes, according to the obligations taken, to bearing the indemnities that the reinsurer pays when bringing the risk that was the subject of reinsurance. The reinsured cedes reinsurance premiums, in exchange for which the reinsurer contributes, according to the obligations assumed, to bearing the indemnities that the reinsured pays on the occurrence of the event that was the subject of reinsurance." "Reinsurance does not understand the obligations of the insurer and does not establish any legal relationship between the insured and the reinsurer" (Art. 2240 paragraph 3 of the Civil Code of 2009).

Therefore, the insurance relationship takes place between the direct or initial insurer, which is a ceding company, and the reinsurer. There is no relationship between the original insured and the reinsurer. Thus, the loss suffered by a ceding company is spread to multiple companies, and so being more movable.

In fact, reinsurance is the insurance of the insurers, which is the most commonly used definition in the subject-matter.

The reinsured is the insurer of the original contract (the direct insurer or the ceding company that accepts the risk from his insured), but that cedes part of the risk to the insurer of another insurance or reinsurance company.

The two parties of the reinsurance contract are: the reinsured (or direct insured) and the reinsurer, who accepts the reinsurance from a direct insurer.

2. Purpose and reinsurance functions

To protect the direct insurer against the damages caused by the same event is the main role of the reinsurance

In the doctrine[8], other reinsurance objectives have also been identified, such as:

"Reinsurance permits the insurer to give cover which, because of the magnitude of the possible liability involved, could, might otherwise, be uninsurable by a single insurer without significant threat to both balance and solvency.

Reinsurance enables an insurer to maintain a certain stability in results from year to year and to operate without fear of unanticipated conincidence of expensive claims, which may arbitrarily and against the odds fall upon one office.

Last but not least, by operating across national boundaries, reinsurance may help to distribute amongst nations the domestic impact of large-scale and unexpected events, such as natural disasters, explosions and alike"

By reinsurance, different insurers are protected against the losses caused by the occurrence of high risks, which would jeopardize their very solvency.

By spreading larger losses over a longer period of time, a procedure analyzed by the conclusion of contracts for protection against catastrophic events, a certain degree of stability of the rate of possible damages can be ensured.

The French doctrine[9] also indicates the fact that reinsurance helps increasing the financial capacity of the insurer, giving him the possibility to receive more risks. In this way, the spread of the contract occurs, i.e., its splitting up to several insurers.

At the same time, the reinsurance increases the insurer's flexibility, as well as its ability to underwrite more risks. Therefore, by ceding all the risks, a ceding company may withdraw itself from a business category or geographical area, for a certain period of time[10].

The reinsurance can also cover risks faced by the reinsured which do not arise under insurance contracts but under, for example, bonds.

Catastrophe bonds[11] are bond issued to the capital market by a body established for purpose (a Special Puspose Entity- SPE) whos affairs are managed by a trustee

In recent years, concerns over capacity, the impact of catastrophic losses, and the short term nature of most reinsurance contracts have led to the adoption of other mechanisms. New form of reinsurance contracts have been developed. The earliest class was "financial reinsurance", which in some of its forms is closer to a banking transaction than a reinsurance arrangement and amounts to little more than a loan of premium and its return of investment income exceeded losses[12].

3. The insurance and the reinsurance contract. Similarities and differences.

Despite some noticeable differences over time in the definition of the reinsurance operation by the doctrine, the elements of the reinsurance operation remain the same.

First of all, reinsurance is a contract distinct from the original insurance contract.

The reinsurance contract, as a separate agreement, will also take the form of an insurance contract.

The purpose of the reinsurance contract is not necessarily to cover the entire initial obligation. However, coverage by reinsurance may not be larger than the original, initial one.

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[8] John S. Butler, *"Reinsurance law"*, looseleaf (London: Thomson Reuters Ltd., 2009), p. 10003

[9] H. Louberege, "Economie et finance de l assurance et de la reassurance", Paris, Dalloz, 1981, p.188 et seq.

[10] L. Văcărel, Fl. Bercea, "*Asigurări şi reasigurări",* Editura Expert, Bucureşti, 2007, p. 455

[11] Discuseed in the presentation by David Greenwald to the Reinsurance Working Party of the International Association of Insurnace Law (AIDA) in Lisbon in May 2011, available at http://www.aida.org.uk/workpart_reinsurance_nextmeeting.asp.

[12] Rob Merkin, Jenny Steele, *"Insurance and the law of obligations",* Oxford University Press, 2013, p156

The reinsurance contract must cover the same risks as the original contract.

The initial insurance and the reinsurance contract must coexist[13].

Many of the principles and practices that apply to insurance generally also apply to reinsurance.

The rules that apply to the interpretation and application of the insurance contracts also apply to the reinsurance contracts.

However, from some perspectives, reinsurance contracts differ from the insurance ones.

First of all, an insurer contracts with individuals, corporations or organizations whose businesses are not generally that of insurance, while the reinsurance contracts are concluded between at least two insurance companies, the contracting parties being always legal persons[14], without involving the insured in the relation between them.

The reinsurance contract does not represent a transfer of the rights and liabilities already existing under the direct insurance contract of all or some of these rights/liabilities.

As distinct from the insurance contract, within the reinsurance contract, the insurer is involved in covering the claims only if there is a payment obligation, as specified in the contract.

Another aspect is that the insurer is indirectly interested in the losses suffered by the original insured person. He covers, in part, only the amounts paid by his insured.

Thus, in reinsurance practice, most of the contracts provide partial compensation, a fraction of these losses being borne by the insured himself.

Another difference is that, while not all insurance contracts are subject to the principle of compensation or indemnity (except for life, accident and sickness insurance policies), the reinsurance contracts are indemnity contracts, the former being limited to payments made by the reinsured, under the conditions it has underwritten.

Also, the insurance contract takes the form of a policy, while, depending on the type of reinsurance, the reinsurance contract takes different forms and very rarely the reinsurance appears in the form of a reinsurance policy (for example, facultative fire reinsurance).

Another distinction refers to the fact that, while direct insurance are, mainly, of an internal kind, with the exception of maritime and aviation insurance, reinsurance is, by its nature, an activity of international kind.

The insurance contract is an insurance contract for the situation of damages occurrence, unlike the reinsurance contract that isn't always of compensation, indemnity nature, it can cover risks faced by the reinsured which do not arise under insurance contracts but under bonds.

As the liability belongs to the insurer under the insurance contract, the reinsurance is a liability of civil, contractual nature and not of conflictual nature.

For the insured, the liability has no direct effect because it is not a third-party liability insurance. Therefore, between the initial insured and the reinsurer, the conclusion of the reinsurance contract does not generate legal relations. However, because the insurer is secured by the reinsurance contract in respect of its obligation towards the insured, this guarantee mechanism indirectly benefits the insured.

To the reinsurance contract, the capacity of third party is held by the insured, the person who is responsible for the damage, but also the beneficiary of the initial insurance.

4. Retroceding or retrocession.

The reinsurer, in his turn, in order to keep his covering capacity, proceeds to the conclusion of other ceding contracts of a part of the reinsurance accepted by him.

This operation is called retroceding or retrocession. The parties of this contract are the retrocedent (the ceding company) and the retrocessionaire (the reinsurer).

In Romanian law, within art. 2241 of the Civil Code of 2009 it is indicated that "by the retrocession operation, the reinsurer may, in its turn, cede a part of the accepted risk."

5. Reinsurance characteristics

Reinsurance may be *unilateral* or *reciprocal*.

Reinsurance is unilateral in the event that one of the contracting parties takes over a part of the risks assumed by the other party under the reinsurance contract.

When by the same contract or by different contracts, each party cedes or takes over a part of the risks assumed under insurance and reinsurance contracts, the reinsurance is reciprocal[15].

The reinsurance contract has the following characteristics: it is a consensual, synallagmatic, onerous, random, with successive execution and pre-formulated standard contract. As the parties of the reinsurance contract are from different countries, a peculiarity of this contract is the element of extraneity[16].

[13] John S. Butler, op. cit., p. 10138

[14] See Fr. Deak, *"Tratat de drept civil. Contracte speciale",* Editura Universul Juridic, București, 2007, p 471 et seq.

[15] Fr. Deak, *Tratat de drept civil. Contracte speciale,* Ediția a III a, actualizată și comentată, Editura Universul juridic, București, 2001, p.472

[16] I. Sferdian. op. cit., 2013, p.22

The reinsurance contract exists concurrently with the insurance contract, it is conditional on it, but it also has a distinct character[17].

Since reinsurance contracts are concluded at international level, the principles of good faith/fair presentation of the risk have a very important role.

The reinsured is under the duty to disclose material facts to the reinsurers before the contract is concluded.

Two of such jurisprudence examples are revealed in doctrine[18]: In *Wise Underwriting Agency Ltd v Grupo Nacional Provincial SA*, the original insurance policy was in Spanish and when the reinsurance risk was presented, the Spanish word ”watc” was translated as ”clock” into English. The Rolex watches were to be carried from Miami to Cancun. The loss occurred when a quantity of goods was stolen from a container parked outside the assured s warehouse premises in Cancun. The reinsurers rejected the claim on the score of material misrepresentation of the subject matter insured, which was accepted by the court. The presentation of the subject matter insured as clock was a material fact, given that watches and in particular brands such Rolex are regarded by underwriters as attractive targets for thieves, being portable, high value and easily disposable. The reinsurers nevertheless had to pay to the reinsured in this case as they were held to have breach the duty of good faith/.

In *Aneco Reinsurnace Underwriting LTD (In Liquidation) v Johnson & Higgings Ltd*, the reinsurnace agreement was in the facultative obligatory form. When obtaining the retrocession cover for the reinsurance contract, the broker did not disclose the true nature of the reinsurnace. This was a material fact in a retrocession contrcat which was in the excess of loss form.”

Most often, reinsurance contracts are concluded in written form.

The terms of the reinsurance contract refer to the following elements: the name of the parties of the reinsurance contract, their office and exact address, the type of the contract, the risks covered, the extent of the liability as value and per territory, omissions and errors, the date of entry into force of the contract, the duration of the contract, the cases of force majeure, the level and the payment method of the insurance premium and premium reserves, the damages due to interruption, the retention of the ceding company, the fee, the brokerage, the accounting reconciliation, the reserve fund, the payment method of compensations, the excluded risks, the settlement of disputes between the parties of the contract[19].

If disputes arise between the parties of the reinsurance contract, they may be settled amicably (agreement, conciliation or arbitration), and if this is not possible, there shall be used the litigation procedure in court.

6. Reinsurance methods

6.1. Preliminary specifications.

An insurer may transfer the risk to another insurer proportionally or non-proportionally.

Proportionally and non-proportionally reinsurance contracts may be in form of facultative, obligatory or facultative obligatory.

Mainly, two basic methods are used in international reinsurance operations: the facultative method and the obligatory or contractual method (treaty reinsurance).

The facultative-obligatory method is also identified in the doctrine, a method also called the insurance pool method.

Reinsurance involes international transactions. For instance, a Romanian insurer may insure a local risk and reinsure the risk in London. It may be the case that the insurer insures 100% of the risk and then transfers the whole risk to the reinsurers in London. This arrangement is named as ”fronting”, as the insurer is acting as a front for the reinsurers.

6.2. Forms of reinsurance

Reinsurance may take two forms[20]: (i) proportional reinsurance and (ii) non-proportional reinsurance.

Proportional reinsurance

In the case of proportional reinsurance, the liability of the contracting parties is determined in proportion to the insured amount.

It is the first form of reinsurance, but which continues to be used, due to the low volume of work carried out for its management, while being simple and convenient.

In their turn, proportional reinsurance contracts have two versions, namely: the “quota share-treaty” and the “surplus treaty”.

The “quota-share” reinsurance consists in the fact that, of the maximum limit of the insured amount provided by the contract, the participation of the reinsured is established at a fixed percentage share, and the reinsurer takes over a part of this amount, also as a fixed percentage share.

It is mentionable the fact that the reinsurer will be able to take over a fixed share of all liabilities assumed by the insured, under an obligatory reinsurance contract.

This fixed share refers both to the amount of the premiums received and to the amount of the claims registered by the reinsured.

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[17] I. Dogaru (coord), *”Drept civil. Contracte speciale”,* Editura all Beck, p.896

[18] Ozlem Gurses, *”Marine Insurance Law”*, sec edition, Routledge Taylor & Francis Group, 2017, p. 328

[19] I. Sferdian, op.cit.,2007, p.27

[20] I. Sferdian, ”Asigurări, Privire specială asupra contractului de asigurare din perspectiva Codului civil”, Editura C.h. Beck, București, 2013, p. 24

The reinsured and the reinsurer may participate with fixed shares of the insured amount for the risks that they expressly accept, in case of facultative reinsurance.

The main disadvantage of the quota-share insurance is that, even if the reinsured could bear all the risks on his own, he has the obligation to cede them all.

"Surplus" reinsurance is the most common form of reinsurance.

Thereby, the reinsurer takes over a part of the risk, for a certain limit of the insured amount for which the reinsured is liable for. The part taken over is called "retention" or 'line".

The reinsurer will pay the premiums and will bear the losses in proportion to the surplus of the insured amount.

It should also be specified the fact that there can be subject to reinsurance only those contracts where the insured sums exceed the level of "retention"

"Surplus" reinsurance is in the detriment of the insurers who have to take over high values risks, therefore less profitable.

Also, both for the reinsurers and the ceding company, the management of the contract is complex and the expenses are higher.

Non-proportional reinsurance

Unlike proportional reinsurance, the non-proportional reinsurance shares results[21].

According to this form of reinsurance, the reinsurer is bound to cover only some damages that exceed a certain value limit established by the reinsured.

In non-proportional reinsurance, the premium is much lower, not proportionate to the commitments taken over by the parties of the contract.

This fact means that the probability of occurrence of large claims (which are borne by the reinsurer) is much lower than the probability of occurrence of small claims, which are totally borne by the reinsured.

There are two forms of non-proportional reinsurance contracts: "excess of loss" reinsurance contracts, and "loss ratio" or "stop loss" reinsurance contracts.

In case of "*excess of loss*" reinsurance, the liability of the insured is limited to a certain ceiling for each individual loss, but the reinsurers are liable only for the part of the loss that exceeds this ceiling.

As it avoids the negative consequences of the plurality of risks, this form of reinsurance is frequently used in international practice.

6.3. Methods of reinsurance

The facultative method. The facultative method is the oldest form of reinsurance to be used[22].

This method allows the companies to reinsure themselves for a specific risk, a specific contract or a group of contracts.

If facultative reinsurance is proportional, the contract transfers a single risk to the reinsurer. For instance, if the mobile offshore drilling unit is worth £ 1 m and if the policy is valued, upon total loss of the subject matter insured the insurer indemnifies the assured for £ 1 m. Assuming that the reinsurer took over 50% of the risk insured, the reinsured may then claim half of the loss form the reinsurer[23].

Facultative insurance is the reinsurance of an individual risk or an individual contract, where the reinsurer has the right or the faculty to accept or reject the risk[24].

Therefore, in the case of the facultative method, the reinsurer does not have the obligation to conclude the contract under the conditions proposed by the reinsured. The ceding insurer and the reinsurer agree to the terms and conditions of each individual contract.

Consequently, a reinsurer has the opportunity to exercise its own underwriting and analysis in relation to each individual risk offered for reinsurance.

The method is facultative for both the reinsured and the reinsurer.

The former is free to select the risk categories, and the latter may accept them or not.

Facultative reinsurance contracts have the greatest effect on the cost of covering some unusual or low incidence risks[25]. Thus, although the administrative costs of facultative reinsurance are high, this type of reinsurance is indicated in some cases, such as low incidence risks or high loss risk, situations when the risk is considered inappropriate for a treaty reinsurance[26].

Contractual (obligatory) method or treaty reinsurance.

If the risk transferred is not a single risk but the insurance and the reinsurance cover a large number of risks, reinsurance appears in the form of a treaty.

Treaty reinsurance is that form of the reinsurance contract involving the conclusion of a reinsurance agreement with a foreign insurer, regarding the reinsurance of multiple insurance contracts, including even contracts that have not yet been underwritten by the insurer.

This form of reinsurance may be regarded as a master agreement form, a continuous relationship between the cedent and the reinsurer covering the portions or (insurance) classes of business of the original insurer for a long period of time[27], a framework facility under which risks falling within its scope may be ceded to the reinsurers.

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[21] I. Sferdian, op.cit., 2013, p 26
[22] John S. Butler, op. cit., p. 10017
[23] Ozlem Gurses, *"Marine Insurance Law"*, sec. edition, Routledge Taylor & Francis Group, 2017, p. 326
[24] Richard C. Manson & James E. Pfeifer II, *"A Closer Look at Facultative Reinsurance*", 31 *Tort & Ins. L.J*. 641 1995-1996, p. 641
[25] Robert Carter, Leslie Lucas & Nigel Ralph, op. cit, p. 88.
[26] Aviva Abramovsky, op. cit., p. 358; Robert Carter, Leslie Lucas & Nigel Ralph, op.cit., p. 90
[27] John S. Butler, op. cit., p. 10031

Treaty reinsurance allows an insurer to reinsure its risks on a collective basis.

A treaty may cover specific accounts (for example marine or motor), specific forms of loss (for example earthquakes), or even the insurer s whole account[28].

Treaty may be proportional or non-proportional.

In a proportional treaty the reinsured cedes to the reinsurers an agreed proportion of all risks accepted. Surplus or quota share treaties are proportional types of treaty.

The most common type of non-proportional treaty is an excess of loss treaty which the reinsurers become liable when reinsured s aggregate losses reach a stated sum.

If the treaty is facultative, the reinsured has discretion to cede a risk and the reinsured has to accept, those risks cover by the treaty.

Therefore, the reinsurer has to accept all the risks (globally) that the reinsured wants to cede.

Thus, neither the ceding company nor the reinsurer can cancel only certain risks (groups of risks) that they can cover.

Moreover, reinsurance treaties are usually renewable on an automatic basis, unless one of the parties wants new renewal terms. This characteristic ("automatic renewal") of the treaties makes them relatively easy to implement and cheaper to operate.

However, certain disadvantages may be found, as the reinsurer actually loses the right to select the individual risks subject to the reinsurance operation.

For this reason, before entering into a treaty reinsurance contract, a prudent reinsurer will want to know as much as possible about the ceding company, including information about its owners, history, financial position, company's experience in management and claims management[29].

The contractual method is the obligatory form of reinsurance.

Facultative-obligatory method. The facultative-obligatory method is defined by the fact that it is facultative for the reinsured, but it is obligatory for the reinsurer.

The choice of reinsurance ceding risks and the establishment of the conditions of the contract are made by the ceding company, the proposed version being obligatory for the reinsurer.

The insurance associations who all contribute to the capital in order to reinsure a part of the risks underwritten by these companies form the insurance pools[30].

Although the reinsurance activity, mainly, takes place on international markets, due to the development of trade, there have not been created conditions for insurances to be also concluded internally in economically developed countries[31].

6.4. The aggregation mechanism of insurance claims

In general terms, aggregation is a term used to describe the mechanism in which several losses are put together for the purpose of analyzing them as a single claim.

The aggregation clause was implemented, first of all, for the protection of the cedent from the financial impact caused by a series of relatively modest losses which, individually, do not exceed the retention in the insurance, but which, as a result of the aggregation, could become sufficiently significant as financial amount.

Secondly, it was intended to avoid the conceptual difficulties with regard to the decision of what is an "event" or an "occurrence".

The amount representing the indemnity is often affected by the aggregation clauses, whose purpose is to group the claims arisen, consequence of several occurrences coming from the same cause (they have the same causality).

Even if this seems to be easy to say, it is not always easy to determine "when" or "if" an occurrence, or a series of occurrences, come from the same cause or not.

The answer will depend on the circumstances of the case as well as on the specific contractual language that has been used.

Often, aggregation clauses provide the definition of what will be considered an event or occurrence.

The concept of "aggregation" is simple when the terms of the contract allow two or more separate losses covered by the contract to be treated as a single loss for deductibility or other purposes, when they are bonded by a single unifying factor of any kind.

By its nature, the so-called unifying factor determines the biggest debate.

In each case, the test depends on how well it is stated the clause defining it.

Where the act or event described in the aggregation clause is widely defined, an insured with thousands of linked claims may be able to make an insurance claim, whereas a narrow aggregation clause would mean that every individual claim fell within the deductible and the insurer or reinsurer pays nothing.

Aggregation applies for the benefit of both parties to the contract[32]:

It is advantageous to the insured or reinsured that he can aggregate in order to show that his loss has exceeded the limit of the retention or excess in the policy.

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[28] Rob Merkin, Jenny Steele, *"Insurance and the law of obligations",* Oxford University Press, 2013, p 148

[29] Robert Carter, Leslie Lucas & Nigel Ralph, op.cit., p. 91

[30] I. Sferdian,op.cit., 2013, p.28

[31] V. Ciurel, "Asigurări şi reasigurări. Abordări teoretice şi practici internaţionale", Editura, Bucureşti, 2000, p.28

[32] http://www.devereuxchambers.co.uk/resources/articles/view/watch-your-words-aggregation-clauses

Conversely, the aggregation clause is advantageous to the insurer or reinsurer bacause he can reply upon the relevant limit of his liability in relation to the aggregation of the various losses. For this reason it will not often be a clause that has to be construed against the insurer (contra proferentum), but will generally be construed neutrally.

Aggregation clauses often provide the definition for what will be considered an event or occurrence for the purposes of the policy. Accordingly, the starting point for any determination of the purpose of the liability should be with reference to the aggregation clause and the definitions contained therein.

Event and occurrence are generally used as interchangeable terms, and there are a number of general principles which govern the meaning of those terms.

These principles include[33]: ”

I. An event or occurrence is a unifying factor that allows a number of individual losses to be aggregated and, therefore, to be treated as arising from single happening;
II. What has occurred must be capable of being described as an event or occurrence. Thus, something specific must have happened that is distinguishable from a general state of affairs. An event of occurrence is also to be distinguished from the cause of an event, as a result even through the cause of an occurrence may be present, until that cause rise to the event there is no occurrence;
III. An event or occurrence is somtheing which has happened and which has given rise to one or more losses;
IV. Where a number of individual loses have been sufferd, it is necessary for those losses to be sufficiently closely connected with each other to be regarded as having resulted from a single event or occurrence. The relevant ”unities” are time, locality, cause and motive;
V. There must be a sufficient causal connection between the individual losses and the event or occurrence from which they are said to result;
VI. (vi) The losses must not be too remote from the aggregating event;
VII. In assessing whether the individual losses can be aggregated as a single event or occurrence, the matter must be approached from the perspective of an informed observer and the assessment is to be made both analytically and as a matter of common sense”.

Conclusions

Reinsurance is a separate and unique industry with many of its own rules, traditions and practices.

Reinsurance permits the insurer to give cover which, because of the magnitude of the possible liability involved, could, might otherwise, be uninsurable by a single insurer without significant threat to both balance and solvency and to maintain a certain stability in financial results from year to year, giving the insurer the possibility to receive more risks, to increase it’s flexibility, as well as its ability to underwrite more risks.

Reinsurance is unilateral in the event that one of the contracting parties takes over a part of the risks assumed by the other party under the reinsurance contract.

When by the same contract or by different contracts, each party cedes or takes over a part of the risks assumed under insurance and reinsurance contracts, the reinsurance is reciprocal.

Reinsurance may take two forms: (i) proportional reinsurance and (ii) non-proportional reinsurance.

Proportionally and non-proportionally reinsurance contracts may be in form of facultative, obligatory or facultative obligatory.

The facultative-obligatory method is also identified in the doctrine, a method also called the insurance pool method.

The amount representing the indemnity is often affected by the aggregation clauses, whose purpose is to group the claims arisen, consequence of several occurrences coming from the same cause (they have the same causality).

When dealing with reinsurance policies, one must be aware and alive to the differences and the special features of reinsurance agreements and the potential for conflict of law issues that may arise in the reinsurance context.

References

- Graydon S. Staring, ”Law of Reinsurance” (New York:Clark Boardman Callaghan, 1993)
- Robert Carter Leslie Lucas & Nigel Rlph, ”Reinsurance 4 th Ed”. (Great Britain: Reactions Publishing Group, 2000)
- Aviva Abramovsky, ”Reinsurance: The Silent Regulator?” (2008-9) 15 Conn. Ins. L.J.
- I. Sferdian, ”Dreptul asigurărilor”, Editura C.H. Beck, București, 2007
- John S. Butler, ”Reinsurance law”, looseleaf (London: Thomson Reuters Ltd., 2009)
- H. Louberege, ”Economie et finance de l assurance et de la reassurance”, Paris, Dalloz, 1981
- L. Văcărel, Fl. Bercea, ”Asigurări și reasigurări”, Editura Expert, București, 2007,
- Rob Merkin, Jenny Steele, ”Insurance and the law of obligations”, Oxford University Press, 2013

[33] John S. Butler, *”Reinsurance law”*, looseleaf (London: Thomson Reuters Ltd., 2009), 30220-30221

- Fr. Deak, ”Tratat de drept civil. Contracte speciale”, Editura Universul Juridic, București, 2007
- I. Dogaru (coord), ”Drept civil. Contracte speciale”, Editura all Beck
- Ozlem Gurses, ”Marine Insurance Law”, sec edition, Routledge Taylor & Francis Group, 2017
- I. Sferdian, ”Asigurări, Privire specială asupra contractului de asigurare din perspectiva Codului civil”, Editura C.h. Beck, București, 2013
- Richard C. Manson & James E. Pfeifer II, ”A Closer Look at Facultative Reinsurance”, 31 Tort & Ins. L.J. 641 1995-1996
- V. Ciurel, ”Asigurări și reasigurări. Abordări teoretice și practici internaționale”, Editura, București, 2000
- http://www.devereuxchambers.co.uk/resources/articles/view/watch-your-words-aggregation-clauses
- http://www.aida.org.uk/workpart_reinsurance_nextmeeting.asp.

BRIEF COMMENTS ON ISSUES CONCERNING THE FORFEITURE OF RIGHT TO SUBMIT EVIDENCE IN THE CIVIL TRIAL

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Abstract

The Code of Civil Procedure lays down a series of timeframes in which the parties may propose the evidence under the sanction of the forfeiture of this right and, on the other hand, at the written stage regulated by art. 200 Civ. Proc. Code the application may also be annulled because the applicant has not proposed evidence within the 10-day time limit set by the court to fill the claim. We propose to analyze both the interferences between the sanction of the cancellation of the application and the forfeiture of right at the regularization stage, but also the scope of art. 254 par. (2) Civ. Proc. Code, respectively the cases in which the evidence may be submitted beyond the term stipulated by the law. In the paper we will propose solutions to the applicable sanction for not showing evidence in the civil action, analyzing the arguments proposed by the doctrine both for nullity and for forfeiture of right. In this respect, we will discuss the particular cases of art. 194 lit. e) Civ. Proc. Code on witness identification data and interrogators of the legal entity. In the last part, we will address the question of the removal of the sanction of forfeiture in cases where the administration of the evidence does not lead to the adjournment of the trial, more precisely the situations in which this law is to be applied.

Keywords: *nullity, forfeiture of right, art. 254 Civ. Proc. Code, evidence.*

1. Introduction

First of all, the analysis of the institution of forfeiture of right in civil procedural law is a complex issue that we do not intend to do on this occasion. In the present study, we aim only to present solutions for some issues that are not solved by both doctrine and judicial practice. In our opinion, these issues of interpretation and others which are not subject to our analysis, have arisen due to insufficient regulation of the forfeiture of right in the Civil Procedure Code, which led to the interpretation of the rules by using the guiding principles of the civil procedure regulated in the articles 5-23 Civ. Proc. Code, including the right of the parties, the role of the judge in finding out the truth, the legality, the obligations of the parties in the civil trial.

The correlation of these principles by giving greater weight to some or other of them has resulted in different solutions precisely because they are often antagonistic, although they have complementary roles, together forming a unitary one designed to govern the conduct of the civil process. n interpreting the rules on decoupling but also in other cases, divergences of solutions also arise from the difficulty in determining whether that rule primarily protects a private interest or, on the contrary, primarily protects public order.

In interpreting the rules on forfeiture of right but also in other cases, divergences of solutions also arise from the difficulty in determining whether that rule primarily protects a private interest or, on the contrary, primarily protects public order.

2. The applicable sanction for non-indicating evidence in the civil action.

This first point that we propose to consider in the course of this study has several components, and we will gradually consider the answer to several questions to provide a solution to the main problem. The first of these questions is to determine what the sanction is if the claimant does not request evidence in the civil action.

From the regulation of the written stage, respectively, art. 194 - 201 Civ. Proc. Code, it results that for non-fulfillment of the requirements stipulated by art. 194 - 197 Civ. Proc. Code the sanction is the anullment of the demand. The doctrine also expressed the view that in the case of non-evidence, the sanction should be the forfeiture of right to submit evidence[1]. Also, part of the judicial practice adopted this solution, considering that for failing to show evidence, the applicant could be sanctioned on the occasion of their approval.

To begin with, we can not fail to notice that the divergence of solutions in practice arises in this matter because there is a problem in determining which of the two sanctions is to be applied with priority, forfeiture of right or nullity. It seems useful to observe that the very premise of antithesis of the two sanctions is not a natural one, because the procedural act accomplished over the term is null due to the effects of the forfeiture of right, according to art. 185 par. (1) C. pr.civ. Therefore, it is in the logic of the Civil Procedure Code that the forfeiture of right to effect a procedural act leads to the annulment of that act. The distinction

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[1] *G.C. Frenţiu. D.-L. Băldean,* Noul Cod de procedură civilă comentat şi adnotat, Ed. Hamangiu, 2013, p. 396;

between the nullity and the forfeiture of right in the particular issue that we are analyzing is only of a temporal nature, as nullity operates during the regularization, and forfeiture of right occurs at the time of proposing the evidence beyond the statutory deadline. However, in addition to the above, the evidence submited after the legal term has passed will be penalized in essence also with nullity. In practice, the court establishes the forfeiture of right to propose evidence and rejects the request for evidence because it was submited overdue[2], but behind the solution is also a nullity of the procedural act represented by the proposal of evidence beyond the legal deadline.

The answer we will give to this is based on the principle that the application of the sanction of forfeiture of right with regard to the proposition of evidence or, more precisely, the postponement of the imposition of a sanction in this respect until the moment of the admission of the evidence, defeats the purpose of the writen phase in the civil trial, that the parties declare in this stage the weapons they will later use.

If the sanction for failure to substantiate evidence in the request to sue would be the applicant's forfeiture of right to propose evidence, the defendant would find it difficult at the time of the complaint, since he could only rely on the evidence he considered useful from his point of view and not from the evidence proposed by the applicant in action. Subsequently, at the time of proposing the evidence, the court would have to find the forfeitor of right for the applicant to propose evidence, except for the incidence of one of the cases provided by art. 254 par. 2 pt. 1-5 Civ. Proc. Code. This would lead to a situation that should be prevented, and for which the legislator foresaw the solution at an earlier stage. In particular, the regularization procedure has the purpose of bringing the application in a position to be judged, including in terms of evidence. An application in which the applicant does not refer to any evidence should be annulled in so far as the applicant does not provide evidence[3] within the 10-day time limit set by the court for that purpose (art. 200 par. (3) and (4) Civ. Proc. Code). Not to apply this sanction in the regularization phase and to postpone it for a later moment of the trial means the non-application of the sanction of the anullment of the request set by the legislator for the regularization stage, and the effect is the elimination of regularization from the point of view of evidence request. It could not be a reason for the request not to be canceled, nor for the potential future agreement of the defendant at the time of the endorsement of the evidence doubled by the proposal by the applicant for further evidence. This reasoning is also not justified by the principle of availability, since in such situations priority is given to the principle of legality. Civil proceedings must be conducted in accordance with the law, even if the court is required to settle the dispute in accordance with the limits set by the parties. Forfeiture of right is therefore a sanction distinct from that of the cancellation of the application and applies later to the regularization stage. In the context of regularization, the only applicable sanction is the cancellation of demand. Subsequently, to the extent that the request for suing survives the regularization procedure, the sanction of the forfeiture may be applied for the evidence that the parties will propose beyond the deadline under art. 254 Civ. Proc. Code

3. The sanction applicable for non-compliance with the provisions of art. 194 lit. e) Civ. Proc. Code on witness identification data and interrogatories of the legal entity.

At the previous point, we concluded that the application would be canceled if the applicant did not show any evidence in support of his action. We believe that the same solution is also necessary if the applicant asks for the witness evidence, but does not indicate the name, surname or address. The absence and only of one of these elements of identification may mean that the witness can not be identified and the defendant will not be able to prepare his defense properly and the court will not be able to summon the witness for the first term[4]. Also, the request should be canceled if the interrogation of the defendant legal person is requested, but at the request of the court, the applicant does not submit the written questioning for communication.

The rule should apply regardless of the number of witnesses proposed and the fact that some are missing identification data only. There is no justification for a waiver in the sense that since for example three witnesses were proposed, out of which for two were given the name, surname and address, for the

[2] The procedural exception used by the case law for submittng a request overdue is called in romanian *excepția tardivității* and comes from the french word *tardiveté,* wich means *latenss/ tardiness.*

[3] A possible exception identified in the doctrine is the fact that the plaintiff expressly states in the application that he seeks to cause the defendant to be recognized and has no other evidence at hand; We also believe that this support is in fact a request for evidence by which the applicant seeks the interrogation of the defendant, it is not possible to specify by way of action only that the applicant is awaiting the respondent's reaction, the only hope of admitting the action is that the defendant will meet the claims formulated; the actual adherence to certain claims must be based on certain evidence that is usually exhibited by the applicant. For example, if a loan is to be paid and the claimant fails to submit a document or request further evidence, the plaintiff's passive position can not be considered as an attitude, and the submission of written notes or statements in a public hearing recognizing the existence of the loan will be a confession; normally by way of an application by the court, the plaintiff will have to indicate this if his only evidence could constitute the defendant's confession. However, this hypothesis has an extremely limited applicability field, so it should not be a ground for solving the problem under analysis.

[4] Although we do not propose an in-depth analysis of the Article 203 of the Code of Civil Procedure, we only specify that the court may order a series of preparatory measures for the first term, and among them it is possible to summon the witnesses proposed. We appreciate that this measure should be used with caution of this right only when it is anticipated that the hearing of the cited witnesses will take place at the first term.

unidentified witness the sanction forfeiture of right will be applied in the phase of evidence proposal. This denial is based on the same misapplication of **t**he sanction of forfeiture of right at the regularization stage, or more correctly, the non-application of any sanction and the transfer of the sanction at the procedural moment of the approval of the evidence.

It has also been argued that the provisions of art. 254 par. (1) according to which, under the sanction of the forfeiture of right, the applicant may propose the evidence by means of a request for a summons, to be a special rule in relation to the provisions of art. 200 Civ. Proc. Code, so the forfeiture of right should be applied with priority. This statement is wrong first of all because art. 254 is, as its marginal name suggests, the text that generally governs the proposition of evidence. Its general nature in proposing evidence is conferred by its placement in ”Paragraph 1. General Provisions" of ”Subsection 3. Evidence”, of ”Section 2. Process Investigation". Far from being a special norm, art. 254 is the framework norm in the matter of proposing evidence in the judicial investigation phase, and in its first paragraph only sets out the general rule as to the time of proposing the evidence. The purpose of the first paragraph of the text of the law is to establish the temporal scope of the sanction of forfeiture of right and is in fact the premise for paragraphs 2 to 6, in which the legislator has understood to detail the sanction of forfeiture of right regime. Another argument for which we find that between art. 254 and art. 200 Civ. Proc. Code there is no special to the general relation is that the two rules are located in the regulations of different stages of the civil process. While art. 200 Civ. Proc. Code governs the regularization procedure within the written stage, the provisions of art. 254 Civ. Proc. Code are intended, as we have indicated above, to lay down the rules applicable to the proposal of evidence in the judicial investigation phase. So the legislator's intention was that each of these rules should be applicable at different times in the civil process, and saying that one of them has priority in a particular case is a disregard for the scope of law provided for by each of the two rules of law.

4. The scope of art. 254 par. (2) point 4. Civ. Proc. Code on the removal of the sanction of forfeiture in cases where "the administration of the evidence does not lead to the adjournment of the trial"

The main problem that comes with the interpretation of this rule is to know whether it should be understood restrictively in the sense that the evidence can be administered at that term, that is, the administration of the evidence itself does not lead to postponement or we can interpret this text in the sense that the administration of the evidence does not lead to the postponement because there are other reasons for postponement for which a new term of trial will be granted.

The first solution, according to which the meaning of the text is that the evidence itself does not lead to the postponement of the judgment, is not only a strict interpretation of the text that maintains within the literal meaning of the syntagm, but also an abstract, purely formal approach which can also produce undesirable consequences. For example, if we look at the hypothesis of proposing the evidence with witnesses, interpreting strictly the point number 4 of art. 254 par. (2) Civ. Proc. Code it would result that this evidence should only be admissible when witnesses are present at the time of their proposal. Only this interpretation would be in accordance with the principle that the evidence itself does not have a dilatory effect on the judgment. But most of the time, witnesses will not be heard at the same time as they were proposed, but at a later date, so the court will approve the evidence because it does not postpone the trial, but will also establich another date for the hearing of the witness .

Of course, this hypothesis is just the starting point, it can undergo changes, so the solution will also be nuanced for each of the various hypotheses. Before moving on to the analysis of various scenarios and possible solutions, we believe it is important to identify the purpose for which the rule in question was edited in order to be able to use the teleological interpretation. We firmly believe that teleological interpretation should always prevail, even though grammatical and logical-juridical interpretation is often sufficient to clarify the scope of a text. However, if the text is presented in a form in which these methods can not determine exactly what the meaning of the norm is, the balance should be leaning against the purpose for which the provision subject to the exegesis has been edited. In the case provided by art. 254 par. (2) point 4. Civ. Proc. Code is that the party enjoys the right to a defense even if he has not proposed the overdue evidence due to negligence, but the administration of the evidence does not cause the process to be prejudiced in order to harm the adversary and the speed with which the courts are required to settle a dispute. In other words, this rule is intended to give the negligent right to the defense, but without disregarding the right of the adverse party to benefit from the speed of the settlement process, in other words the settlement of the case within an optimal and predictable timeframe.

For example, if the defendant puts forward the documentary evidence over the term and puts them in the file, the question arises whether the court may find the forfeit on the ground that the indirect administration of the evidence with these documents leads to the adjournment of the trial because the applicant requests a time limit for the examination of the submitted documents. We believe that the answer should be negative because such an interpretation would excessively restrict the scope of the text and only documents with such limited content would be admissible than any court would find it unnecessary to grant a term for their study.

Starting from the previous example, in practice it was cconsidered that the request of contrary revidence

by the opposing party is also a reason why the evidence would not meet the requirement not to delay the trial. But this solution violates art. 254 par. (3) Civ. Proc. Code that establishes the right of the other party to propose the contrary evidence as a natural consequence of the admission of a later probation. urning to the purpose of the rule, if it contains both the right of defense of the party and the principle of celerity by granting the opponent the right to put forward the opposite proof, the legislator has once again set the priority of the right of defense over celerity, but this time it is conferred to the other party who was surprised with a new trial weapon. A simpler expression would be that the lawmaker accepts that the party breaks the deadline for proposing evidence, but only in certain cases and with respect for the other party's right to defend themselves. We appreciate that celerity has been left behind in the editing of these exceptions from the sanction of forfeiture of right, precisely so that the parties can support each thesis with the help of evidence, so that the right to defense and the finding of truth are prevalent principles within these rules. This is precisely why we believe that this conclusion should also be applied in altered assumptions in which a test is proposed over time, and the judge must determine whether or not this leads to the adjournment of the trial.

At the beginning we gave the example of the evidence, which should not always lead to the postponement of judgment itself. If, according to art. 254 par. (3) the opposing party has the right to the contrary, and we have indicated that his exercise could not be regarded as a ground for postponing the trial, we considere that *a fortiori* the right to study the written documents should not have this effect, because the study of some writings is also an exercise of the right to defense, in a less energetic form than the submission of evidence to the contrary.

Next, it is likely that the party proposing the evidence with overdue documents shows that it is not in a position to submit it to this deadline for certain reasons. If the court finds that it will retain the case for settlement of this term, then it will undoubtedly notice the decline of the right to propose the documentary evidence because it leads to the adjournment of the trial. But even in this case the legislator, by art. 254 par. (5) Civ. Proc. Code, provides the possibility to administer the evidence with the *ex officio* documents insofar as the evidence already administered is not capable of leading itself to complete the process.

But if the court has other grounds for postponing, the question arises whether the overdue proposed evidence leads to the adjournment of the trial or not. The easiest interpretation is to notice the decline because the administration of the sample by itself leads to postponement. Turning to the balance between the right of defense and celerity, we consider that, since celerity is not affected, the right to defense should be respected by administering the document to be filed at the next term, and the evidence should be granted because it does not cause delays in concrete, but only in abstract. This reasoning should also apply when the party proposes to the late first term the evidence with a witness but does not bring it to the moment of the proposal, knowing that the most predictable, the trial will have a postponement for the hearing of all the witnesses, thus as is usually the case. Also in this case, although the evidence will be rejected as late because it leads to the adjournment of the trial, the court will allow the hearing of the witnesses proposed in due time. We believe that the evidence should be admitted regardless of the presence in the room of late-proposed witnesses if the judgment is postponed for any reason. Of course, as we have shown, there is no art incident. 254 par. (2) point 4. Civ. Proc. Code if the court is to retain the case for settlement even at the time the witness evidence is proposed.

5. Conclusions

The analyzed issues concern the interpretation of the application of the sanction of decay either independently or in relation to the sanction of nullity in the regularization. It follows from the foregoing analysis that in practice there are difficulties in determining the scope of the sanction of deferral in relation to other sanctions that occur during the civil process. On the other hand, the different jurisprudential interpretations given to rules on decoupling lead to the conclusion that this institution is interpreted in a non-uniform manner in judicial practice.

The solutions we have provided above are our vision of an interpretation of norms in the matter of decay in spirit rather than in their letter.

References

- *G. Boroi, M. Stancu*, Drept procesual civil, Ed. Hamangiu, 2017
- 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. I, Ed. Hamangiu, 2016
- *V. M. Ciobanu și M. Nicolae* (*coordonatori*), Noul Cod de procedură civilă comentat și adnotat, vol. I, Ed. Universul Juridic, 2016
- *G.C. Frențiu. D.-L. Băldean,* Noul Cod de procedură civilă comentat și adnotat, Ed. Hamangiu, 2013
- *M. Tăbârcă*, Drept procesual civil, vol. II, Ed. Universul juridic, 2013
- L. Zidaru, Unele aspecte privind regularizarea cererii de chemare în judecată și noua reglementare a taxelor judiciare de timbru, disponibil la https://www.juridice.ro/293074/unele-aspecte-privind-regularizarea-cererii-de-chemare-in-judecata-si-noua-reglementare-a-taxelor-judiciare-de-timbru-2.html

RESOLUTION ON INSURANCE

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Abstract

The insurance activity as a whole is of interest and concern for the state power which, by virtue of the principle of market economy organization, must, on the one hand, intervene in order to provide a favorable framework for the insurance activity to be exercised by insurers and, on the other hand , to adopt prudential rules to protect insured and potential insured.

In order to implement the prudential rules in the insurance field, the Supervisory Authority controls the patrimonial situation of the insurance companies and steps in when it finds financial difficulties such as the decrease of the solvency margin, the decrease of the minimum safety fund, the imbalance between the tangible assets and the liabilities of the company, of the patrimonial situation.

Under the main measures to maintain and, where appropriate, restore the financial situation of insurance companies, the most important are the financial recovery procedure regulated by Law No. 503/2004 on financial recovery, bankruptcy, dissolution and voluntary liquidation in the insurance business and the resolution procedure, regulated by Law no. 246/2015 regarding the recovery and resolution of insurers.

Keywords: *insurers, financial difficulty, financial recovery, resolution, bankruptcy.*

Preliminary specifications

The insurance activity[1] is carried out by the insurance companies, which, according to our legislation, are divided into two categories: insurers of insurance companies and insurers of mutual insurance companies. The phenomenon of insurance, as a whole, interests and concerns the state power which, by virtue of the principle of market economy organization, must, on the one hand, intervene in order to provide a favorable framework for carrying out the insurance activity by the insurers and, on the other hand, to adopt prudential rules in order to protect the insured persons or the potential insured persons/policyholders. The intervention of the state is required to protect the policyholders. The intervention and protection of the state are justified / based on the particularly technical and complex character of the insurance operations, the professionalism of the insurers and, from the point of view of the insurance consumers, on the grounds that the policyholders are unfamiliar in this matter, may be subject to abuses by the insurance traders. Therefore, the states have set up administrative authorities to control, supervise and sanction, as the case may be, the abusive practices of the insurers[2]. In Romania, such authority is the Financial Supervisory Authority[3], which, as the name itself suggests, ensures the legality of the insurance phenomenon in our country. As the insurance operations are of particular importance for the economic and social activity[4], the legislator has set up a special legal regime which also covers the

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[1] The main insurance regulations are: the Law no. 237/2015 for the authorization and supervision of insurance and reinsurance activity, the Official Gazette no. 800 of 28.10.2015; the Law no. 132/2017 on compulsory insurance against traffic civil liability for the damages caused to third parties by motor vehicle and trams accidents, the Official Gazette no. 431 of 12.07.2017; the Law no. 32/2000 on the activity and supervision of the intermediaries in the insurance and reinsurance activity, the Official Gazette no. 148 of 10.04.2000; the Law no. 503/2004 on financial recovery, bankruptcy, dissolution and voluntary liquidation in the insurance activity, the Official Gazette no. 1193 of 14.12.2004; the Law no. 246/2015 on the recovery and resolution of insurers, the Official Gazette no. 813 of 02.11.2015.; the Law no. 213/2015 on the policyholders' Guarantee Fund; the Official Gazette no. 550 of 24.07.2015; the Law no. 86/2014 on insolvency and insolvency prevention procedures, the Official Gazette no. 466 of 25.06.2014.

[2] For example, in France, the prudential control and supervision are exercised by the Prudential and Resolution Supervisory Authority to address scientific issues, see L. Grynbaun (collectively), Assurances, Acteur. Contract. Risques desconsommateurs. Risques des entreprises, L'Argus editions de l'assurance, 2018, page 103 and the next ones; in the Italian system, the administrative authority is called IVASS (*Instituto per la vigilanza sulle assicurazioni*) and it is governed by the Private Insurance Code, see, G. Cassano, R. Razzante, N. Tilli, M. Distasi, M. Iaselli, A. Macrillo, V. Aragona, A. Catricala, Diritto delle assicurazioni. Questioni risarcitorie e liquidazione danni, Giuffre editione, Milano, 2017, page 3 and the next ones; in Denmark, the entity responsible for the supervision and control in the insurance field is the Financial Supervisory Authority (for details, see R. Blanpain, P. Lyngs, *International Encyclopedia of Laws*, Kluwer International Publishing House, Boston, 1992, pages 19-20). In the Belgian law, the control is exercised by the Banking, Financial and Insurance Commission (B.F.I.A.), set up in 2004 under the subordination of the Ministry of Economic Affairs (see M. Fontaine, *Droit des assurances*, 3[e] ed., Larcier Publishing House, Bruxelles, 2006, page 41 and the next ones).

[3] The Financial Supervisory Authority was set up by the G.E.O. no. 93/2012 on the setting up, organization and operation of the Financial Supervisory Authority, the Official Gazette no. 874 of 21.12.2012.

[4] We take into account the many forms of insurance regulated by the legislation in force, such as: the compulsory insurance of civil liability for the owners of motor vehicles, the insurance specific to different professions (lawyers, experts, insolvency practitioners, physicians etc.), the insurance for people, the property insurance, the credit insurance etc.

situations of financial difficulty that the insurance providers go through during their existence.

1. The legal treatment applied to insurance companies in financial difficulty

1.1.Introductory considerations

As has been seen, the legislator expresses a particular concern over the patrimony of the insurance companies in order to create a sound financial situation thereof, a sound and prudent management of the patrimony and the protection of the policyholders and injured persons, as a result of the occurrence of risks that were the subject of an insurance report. In this respect, the insurers are required to provide a minimum safety fund, a solvency margin and to contribute money to the Guarantee Fund, the Road Traffic Victims Protection Fund etc.

The Financial Supervisory Authority is authorized by law to control the patrimonial situation of insurance companies and, when it finds financial difficulties, such as the decrease in the solvency margin, the decrease of the minimum safety fund, an imbalance between the assets and liabilities of the company etc., establishes certain measures to restore the patrimonial situation[5].

Among such measures, the most important are those that make up the financial recovery procedure and the insurers' resolution procedure. These measures are designed to prevent the financial collapse of insurers and, implicitly, to initiate the bankruptcy proceeding against them.

1.2. The financial recovery procedure for the insurance companies

Brief presentation

According to the provisions of article 3, paragraph (1) letter b) of the Law no. 503/2004, the financial recovery procedure means all the methods and administrative measures carried out by the Financial Supervisory Authority, as a competent authority, designed to preserve or to restore the financial situation of an insurance/reinsurance company. It follows that the financial recovery is a special administrative procedure conducted under the supervision of the Supervisory Authority[6].

The measures specific to the financial recovery procedure are carried out in two distinct ways[7]:

a) the recovery of the insurance company on the basis of a financial recovery plan;
b) the recovery of the insurance company by a special administration.

Each of the two methods of recovery is subject to a special regime, and the actual method of recovery is determined by a motivated decision, by the Financial Supervisory Authority[8].

1.3. The resolution in the insurance field

A special category of measures available to the Financial Supervisory Authority, aiming to prevent, identify and address the situations of financial difficulty of the operators in the insurance market, are those that make up the resolution in the insurance field.

The resolution in the insurance field means the legal regime made up of a set of instruments available to the Financial Supervisory Authority, necessary to intervene promptly, at an early stage, in the activity of a non-viable insurer or of an insurer liable to go into difficulty, so as to ensure continuity of the critical financial and economic functions thereof, at the same time minimizing the impact of the insurer's difficulty on the economy and financial system (article 2, point 39 of the Law no. 246/2015).

According to the law, the main objectives of the resolution in the insurance field are as follows:

a) protecting the insurance creditors;
b) minimizing the impact on the protection funds, protecting the public funds by minimizing the dependence on public financial support;
c) avoiding the significant adverse effects on the financial stability of the insurance market, in particular by preventing the contagion, including the market infrastructures, and by maintaining the discipline in the market (article 40).

It is easy to see that the main purpose of the resolution in the insurance field is the same with the purpose of the financial recovery regulated by the Law no. 503/2004, namely the identification in optimal time of the insurance operators with financial difficulties and the establishment of measures and procedures designed to contribute for recovering the patrimonial situation and avoiding the bankruptcy of the insurer who is found in such a situation.

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[5] See St. D. Cărpenaru, M-A Hotca, V. Nemeş, the commented Insolvency Code, 2nd Edition, revised and supplemented, Universul Juridic / Legal Universe Publishing House, Bucharest, 2017, page 642.

[6] There were law systems, such as the Italian one, where the financial recovery procedure for the debtors in the common law is carried out under the direction and control of an administrative authority in this field, called the Controlled Administration Institute (A. Fiale, *cited works*, page 935 and the next ones). This procedure was abrogated by the decree of January 9, 2006.

[7] The Italian legislation regulates the institution of the provisional management commissioner who is a specialist appointed by the administrative authority (I.S.V.A.P.), authorized to manage the company found in difficulty. While exercising the mandate of the provisional management commissioner, the other institutions are suspended, but this procedure cannot last more than two months (S. Lanna, *cited works*, page 118).

[8] For more details concerning the recovery of the financial situation of the insurance companies on the basis of a recovery plan and by a special administration, see, V. Nemeş, Insurance Law, 4th Edition, Hamangiu Publishing House, Bucharest, 2012, page 120 and the next ones.

3.1. The recovery plan within the resolution of insurers

According to the law, the insurance companies with a significant influence in the national insurance system[9] have the obligation to draw up a recovery plan.

The recovery plan should include, in particular, the measures to be taken by the insurer for the recovery of the financial situation in case of significant deterioration of the financial indicators and must contain the following elements:

- a summary of the main elements of the plan;
- the information provided in the annex to the law [10];
- the measures which may be taken by the insurer if the conditions for early intervention provided by law are met;
- the appropriate conditions and procedures to ensure the implementation of the recovery measures in due time, as well as the recovery options;
- additional information and scenarios provided in the regulations issued by the Financial Supervisory Authority;
- a summary of the important changes made in relation to the insurer, according to the most recent information relevant for resolution purposes;
- a presentation of the method in which the critical functions and core business lines could be separated from other functions, legally and economically, to ensure the continuity thereof in case of major difficulty of the insurer;
- an estimate of the timing of the implementation of each important aspect of the plan;
- a description of the procedure for determining the value and the possibility of sale of the critical functions, core business lines and insurer's assets;
- a detailed description of the measures designed to ensure that the required information is updated and made available to the FSA, at any time;
- a presentation of the method in which FSA considers that the resolution measures could be funded;
- a detailed description of the different resolution strategies which could be applied according to the possible scenarios and applicable deadlines;
- an analysis of the impact of the plan on the insurer's employees, including an assessment of any associated costs and a description of the consultation procedures during the resolution process of the staff, of the employers' organization and of the trade union or of the employees' representatives, as appropriate;
- a communication plan with the media and the audience;
- the solvency capital requirements and the minimum capital, as well as the qualitative and quantitative requirements of own funds and the deadline for reaching this level, if applicable;
- a description of the essential operations and systems in order to maintain the continuous operation of the insurer's business process;
- as the case may be, any opinion expressed by the insurer regarding the resolution plan;
- a detailed description of the assessment of the possibilities for implementing the resolution plan;
- a description of all the measures necessary to remove the obstacles to the implementation of the resolution plan[11].

The law forbids insurers to base the recovery plan relying on the access to the public financial support.

The recovery plan is approved by the insurer's management bodies and then it is submitted for evaluation to the Financial Supervisory Authority. The Supervisory Authority examines the recovery plan and assesses to what extent it contains the information and meets the requirements provided by law, as well as whether the plan provides the measures to preserve or to recover the viability and financial position of the insurer in a short time and efficiently, avoiding to the maximum the significant adverse effects on the financial or insurance system. If the Financial Supervisory Authority considers that the recovery plan has major deficiencies or significant obstacles to the implementation of the plan, it shall communicate to the insurer the outcome of the evaluation and shall request him/her to make a presentation, within two months, of a revised plan containing solutions to remedy the deficiencies or to overcome the obstacles (article 15). If the insurer fails to comply with the requirements of the Financial Supervisory Authority, it may require the insurer to take the following measures:

- the decrease in the risk profile of the insurer, including the decrease in the solvency and/or liquidity risk;
- applying recapitalization measures;
- reviewing the insurer's business strategy and structure;
- the change in the management structure and leadership of the insurer;
- to check the adequacy of the technical reserves and covering them with admissible assets (article 16).

In order to achieve the purpose of the resolution, the Financial Supervisory Authority shall reassess and, where appropriate, shall update, annually and after any significant change in the organizational structure, the resolution plans of the activity or financial situation of the insurer, which could have a significant impact on

[9] For the purposes of the law, an insurer has a significant influence in the national insurance system, if meets any of the following conditions: a) the value of the insurer's gross technical reserves exceeds 5% of the total value of the gross technical reserves at market level; b) he/she has a market share of at least 5%.

[10] The Law no. 246/2015 contains the annex on the information to be included by the insurer in the recovery plan within the resolution.

[11] The main measures to be provided by the resolution plan are set out in the article 8 and article 23 of the law; as regards the procedure and the measures which can be taken within the bank resolution, see the provisions of the Law no. 312/2015 on the recovery and resolution of credit institutions and investment companies, as well as for amending and supplementing some legislative acts in the financial field, the Official Gazette no. 920 of 11.12.2015, and for a thorough study in this field, we recommend J.S. Capdeville, M. Storkp, R. Routier, M. Mignot, J.-Ph. Kovar, N. Ereseo, Droit bancaire, Daloz, 2017, page 273 and the next ones.

the effectiveness of the resolution plans or which would require a modification thereof (article 22 of the Law no. 246/2015).

3.2. Early intervention

As we pointed out above, the FSA must monitor the financial situation of the supervised insurers in order to identify their financial crisis situations. The leverages by which the FSA can intervene to identify and prevent the financial difficulties are called "*early intervention measures*".

Under the terms of the law, the early intervention measures are those measures provided by the Financial Supervisory Authority in order to recover the financial situation of the insurer and to avoid the deterioration of the solvency capital, as well as the own funds covering the solvency capital requirement (article 2, point 29 of the Law).

In particular, the law regulates that if an insurer breaches or is likely to breach the requirements for maintaining the authorization provided by law, in the near future, as a result of a sudden deterioration of the financial situation which includes a deterioration of the solvency capital situation and of the own funds covering the solvency capital requirement, the Financial Supervisory Authority, besides the corrective or punitive measures, may take, as appropriate, the following measures:

- to request the management body of the insurer to implement one or more measures established in the recovery plan or to update such a recovery plan if the circumstances which led to the early intervention are different from the assumptions foreseen in the initial recovery plan and to implement one or more of the measures foreseen in the updated plan, in a certain period of time;
- to request the management body of the insurer to examine the situation, to identify the measures addressing to any identified problems and to develop an action program for solving such problems and a timetable for the implementation thereof;
- to request the management body of the insurer to convene a general meeting of the shareholders of the company or, if the management body fails to comply with this requirement, to directly convene that meeting and, in both cases, to establish the agenda and to require certain decisions to be taken into account in order to be adopted by the shareholders;
- to require the replacement of one or more members of the management body or senior management of the insurer, if these persons prove to be inappropriate for exercising their duties;
- to request the management body of the insurer to develop a plan to negotiate the restructuring of the debts of the insurer's creditors, in accordance with the recovery plan, as appropriate[12];
- to request changes in the business strategy of the insurer;
- to request changes in the business/operational structure of the insurer;
- to request the insurer to provide all the necessary information in order to update the resolution plan and to prepare a possible resolution of the insurer, as well as to perform an assessment of the assets and liabilities.

If the aforementioned measures do not achieve their purpose or if there is a significant deterioration of the insurer's financial situation or there are serious violations of the legislation, the Financial Supervisory Authority may require the replacement of the senior management or the management body of the insurer, as a whole, or the replacement of some of his/her members (article 29 of the Law).

3.3. The appointment of the temporary administrator

According to the law, if the Financial Supervisory Authority considers that the replacement of the senior management or of the management body is insufficient to remedy the situation, it may appoint one or more temporary administrators of the insurer, also establishing their role, duties and powers.

For the purposes of the Law no. 246/2015, the temporary administrator is any natural person or legal entity, including the policyholders' Guarantee Fund, appointed by the Financial Supervisory Authority for the supervision or temporary replacement of the insurer's management body, in order to maintain or to recover his/her financial situation and to ensure a sound and prudent management of the insurer's activity.

The appointment of the temporary administrator is public, except when he/she is not authorized to represent the insurer. The temporary administrator may be entrusted with all the powers of the insurer's management body, in accordance with the articles of association of the insurer and the applicable national legislation, including the power to exercise any and all the administrative duties of the insurer's management body.

The actions of the temporary administrator, excepting those relating to the current activity of the insurer, are subject to the prior approval of the Financial Supervisory Authority.

With the approval of the FSA, the temporary administrator may exercise, in any case, the power to convene the general meeting of shareholders of the insurer and to establish the agenda of that meeting (article 34).

The period for which a temporary administrator may be appointed cannot exceed one year, but, in special circumstances, this period may be extended by the FSA.

[12] This measure is very similar to the institution of the preventive arrangement with the creditors regulated by the Law no. 85/2016, for details on preventive arrangement with the creditors, see St. D. Cărpenaru, M-A Hotca, V. Nemeş, cited works, page 67 and the next ones; R. Bufan, A. D. Diaconescu, F. Moțiu (collectively) Practical Insolvency Treaty, Hamangiu Publishing House, Bucharest, 2014, page 107; N. Țăndăreanu, Commented Insolvency Code, Universul Juridic / Legal Universe Publishing House, Bucharest, 2017, page 99 and the next ones.

According to the law, the Financial Supervisory Authority is responsible for determining to what extent the conditions for keeping a temporary administrator are met and to justify such a decision in front of the shareholders.

3.4. The conditions for triggering the resolution in the insurance field

The law provides that the Financial Supervisory Authority may take a resolution measure on an insurer if the following conditions are cumulatively met:

a) if it determines that the insurer is or may be in a major difficulty;
b) the resolution measure is necessary from the public interest point of view.

An insurer is or may be in a major difficulty if any of the following conditions is met:

- the insurer violates the requirements for holding the authorization or is likely to violate them in the near future, due to a sudden deterioration of the financial situation which includes a deterioration of the solvency capital situation and own funds covering the solvency capital requirement to an extent that would justify the withdrawal of the operating license, inclusively, if the insurer has incurred or is likely to incur losses which will deplete all or a significant part of his own funds;
- the assets of the insurer are inferior to the obligations or, according to objective elements, it can be concluded that this will happen in the near future;
- the insurer is unable to pay the damages/indemnities due to the insurance creditors or, according to objective elements, it can be concluded that this will happen in the near future (article 43).

3.5. General principles of the resolution in the insurance field

In the procedure for implementing the resolution, the Financial Supervisory Authority should ensure that the resolution measures are taken in accordance with the following principles:

a) the shareholders of the insurer subject to the resolution are the first to bear the losses;
b) the creditors of the insurer subject to the resolution shall bear the losses after the shareholders, in accordance with the order of priority of their debts in the ordinary insolvency procedure, unless expressly provided otherwise in the law;
c) the management body and the senior management of the insurer subject to the resolution are replaced, excepting the cases when the full or partial keeping of the management body or of the senior management, according to circumstances, is considered necessary to achieve the objectives of the resolution;
d) the management body and the senior management of the insurer subject to the resolution provides all the support necessary to achieve the objectives of the resolution;
e) the natural persons and legal entities who have contributed to the major difficulty of the insurer subject to the resolution are held liable, according to the civil or criminal law;
f) the creditors in the same category are equally treated;
g) no creditor shall bear losses higher than those which would have been borne if the insurer had been liquidated by ordinary insolvency procedure;
h) the assets admitted to cover the technical reserves are fully protected; and
i) the resolution measures are taken in compliance with the safety mechanisms (article 44).[13]

3.6. The administrator of the resolution

In order to carry out the measures set out in the resolution, the Financial Supervisory Authority, in its capacity of resolution authority, in compliance with the state aid legal framework, may appoint an administrator of the resolution in order to replace the management body of the institution subject to the resolution, in which case the appointment is made public.

According to the law, the administrator of the resolution is any natural person or legal entity, including the policyholders' Guarantee Fund, appointed by the Financial Supervisory Authority in order to implement the resolution measures (article 2, point 2).

The administrator of the resolution has all powers of the shareholders and of the insurer's management body. However, the administrator of the resolution may exercise such powers only under the control of the Financial Supervisory Authority (article 50).

According to the law, the administrator of the resolution has the obligation to take all the necessary measures to achieve the objectives of the resolution and to implement the resolution measures, in accordance with the decision of the Financial Supervisory Authority. The resolution measures may include a capital increase, the change of the shareholders structure of that insurer or the taking over of the control by the insurers with an adequate financial strength.

The administrator of the resolution has the obligation to draw up and submit to the Financial Supervisory Authority, on a regular basis established by it, as well as at the beginning and at the end of his mandate, reports on the economic and financial situation of the insurer to whom he/she has been appointed as administrator of the resolution and the actions undertaken during the exercise of his/her duties.

The mandate of an administrator of the resolution cannot exceed one year. It may be renewed, in exceptional cases, if the Financial Supervisory Authority considers that the conditions for the appointment of an administrator of the resolution are still met (article 54).

[13] The principles of the resolution are partly different from the principles of the insolvency procedure provided by the Law no. 85/2016, for details, see St. D. Cărpenaru, M-A Hotca, V. Nemeș, cited works, page 67, page 30 and the next ones; R. Bufan, Cărpenaru, R. Bufan, A. D. Diaconescu, F. Moțiu (collectively), cited works, page 61 and the next ones; N. Țăndăreanu, cited works, page 20 and the next ones.

It is noted that the duties of the administrator of the resolution are similar to those of the temporary administrator[14].

In the absence of explicit and detailed provisions regarding the situations and the conditions for the appointment of the two categories of bodies, FSA will be the only one who will choose one of the two options. The cause is common, namely the insufficiency or lack of competence of the administrative and management bodies of the insurer found in a financial difficulty.

3.7. The assessment of the insurer subject to the resolution

Before undertaking any resolution measure, is required a fair, prudent and realistic assessment of the insurer's assets, liabilities and equity, which will be performed by a financial auditor - a legal entity.

The objective of the assessment is to determine the value of the assets and liabilities of the insurer who fulfills the conditions for triggering the resolution (article 57).

The purposes of the assessment are:

- to support the assessment of the manner in which the conditions for triggering the resolution or the conditions for the decrease or conversion of the debts into relevant capital instruments are met;
- if the conditions for triggering the resolution are met, to contribute to the decision on the appropriate resolution action to be undertaken in relation to the insurer;
- upon exercising the power to decrease the value or to convert the debts into relevant capital instruments, to contribute to the decision on the extent to which the shares or other proprietary tools are canceled or reduced, as well as the extent to which the decrease or conversion of the debts into relevant capital instruments occur;
- upon applying the bridge institution tool or the asset separation tool, to contribute to the decision on the assets, rights, liabilities, shares or other proprietary tools to be transferred and the decision on the value of any consideration to be paid to the insurer subject to the resolution or, as the case may be, to the owners of the shares or other proprietary tools;
- upon applying the sales tool for the business and portfolio, to contribute to the decision on the assets, rights, liabilities, shares or other proprietary tools to be transferred and to provide information enabling the Financial Supervisory Authority to determine what measures are necessary for a transfer, according to the law;
- in all the cases, to ensure that any losses concerning the insurer's assets are fully assumed when applying the resolution tools (article 58).

The law provides that the assessment is an integral part of the decision to apply a resolution tool or to exercise a resolution power or of the decision to exercise the power to decrease the amount or to convert the debts into relevant capital instruments.

3.8. The resolution tools in the insurance field

The resolution procedure in the insurance field is carried out by various legal means bearing the specific name of "*resolution tools*".

According to the Law no. 246/2015, the resolution tools in the insurance field are:

1. the sale of business and portfolio;
2. the bridge institution;
3. the asset separation[15].

The resolution tools may be established by the FSA, individually or in any combination, in compliance with the law, but the asset separation tool can be applied only together with another resolution tool (article 70).

3.8.1. The sale of business and portfolio

In accordance with the provisions of the Law no. 246/2015, the sales tool of business and insurance portfolio is the mechanism by which a resolution authority transfers shares or other proprietary tools, issued by an insurer subject to the resolution, or assets, rights or liabilities of an insurer subject to the resolution, in whole or in part, to an asset management vehicle or to an insurer who fulfills the solvency requirements.

According to the Law no. 246/2015 (article 2, point 42), the asset management vehicle in the insurance field is the legal entity controlled by the Financial Supervisory Authority and created to receive, in whole or in part, the assets, rights and liabilities of one or more insurers subject to the resolution or of a bridge institution.

For the implementation of the sales tool of the activity and portfolio of an insurer, the Law (article 73) provides that the Financial Supervisory Authority may transfer to a buyer who is not a bridge institution:

- shares or other proprietary tools issued by an insurer subject to the resolution;
- any categories of assets, rights or liabilities of an insurer found in resolution or all of them, including the transfer of portfolio in the insurance field.

For carrying out the transfer is not required the agreement of the shareholders of the insurer subject to the resolution or of any third party, other than the buyer, or the compliance of any procedural requirement provided by the civil law or by the legislation specific to the insurance market, except as provided in articles 89 and 90 of the Law. However, the transfer must be carried out in compliance with the provisions of the

[14] It is easy to see that the prerogatives of the administrator of the resolution are almost identical to those specific to the judicial administrator in the judicial reorganization procedure within the insolvency chapter of the common law, see St. D. Cărpenaru, M-A Hotca, V. Nemeș, cited works, page 177 and the next ones; R. Bufan, Cărpenaru, R. Bufan, A. D. Diaconescu, F. Moțiu (collectively), cited works, page 154 and the next ones; N. Țăndăreanu, cited works, page 204 and the next ones.

[15] As can be seen, the resolution of insurers lacks the internal recapitalization tool provided by article 281 and the next ones of the Law no. 312/2015.

Law no. 32/2000 and in accordance with the legal framework on the state aid.

The price of the transferred assets is paid, as the case may be, to the owners of the shares or of other proprietary tools or to the insurer subject to the resolution if the transfer aims the assets or liabilities of the insurer found in resolution.

An extremely important effect caused by the transfer of shares/tools/assets is that the shareholders or creditors of the insurer subject to the resolution and other third parties whose assets, rights or liabilities are not transferred have no right over the transferred assets, rights or liabilities or in connection therewith.

The law provides that, after applying the sales tool of the activity and portfolio, FSA may exercise, with the buyer's approval, the transfer powers in respect of the transferred assets, rights or liabilities for the transfer of the assets, rights or liabilities back to the insurer subject to the resolution or of the shares or other proprietary tools back to their original owners, and the insurer subject to the resolution or the original owners have the obligation to take back any such assets, rights or liabilities, shares or other proprietary tools (article 78).

If we consider that we are found in the presence of a transfer of assets, we can think that the transfer of a business or enterprise could also have some implications in the insurance field.[16] Although it is not legally enshrined under this terminology, the transfer of an enterprise is required by current economic evolutions, materialized in many operations of merger, conversion, division or outsourcing of certain types of services[17]. The transfer of assets is also regulated by the Tax Code, but unlike the provisions of the legislation in the insurance field where the price of the transferred assets is paid, as the case may be, to the owners of the shares or of other proprietary tools or to the insurer subject to the resolution, the article 32, paragraph 1, letter (d) of the Tax Code provides that, by the transfer of assets, a company transfers, without being dissolved, all or one or more branches of its business to another company in exchange for the transfer of the shareholdings representing the share capital of the beneficiary company.

3.8.2. The bridge institution

The bridge institution tool in the insurance field is defined as the mechanism by which a resolution authority transfers the shares or other proprietary tools, issued by an institution subject to the resolution, or the assets, rights or liabilities of an insurer subject to the resolution, to a bridge institution (article 2, point 25).

As can be seen, by the bridge institution tool, only shares and other proprietary tools may be transferred, and not the assets, rights or liabilities of an insurer subject to the resolution, as in the case of the sale of business and portfolio. In other words, the ability to acquire of the bridge institution is narrower than the ability of the management vehicle.

From the economy of the provisions of the Law no. 246/2015, the legal status of a bridge institution in the insurance field has the following features:

- is a legal entity set up as a joint stock company and it can be set up with only one shareholder;
- upon the setting up, the share capital cannot be less than the equivalent in RON of EUR two million;
- is controlled by the Financial Supervisory Authority;
- is designed to receive and to hold some or all the shares or other proprietary tools issued by an insurer subject to the resolution or some or all the assets, rights and liabilities of one or more insurers subject to the resolution in order to maintain the access to the critical functions and to the sale thereof;
- the persons who provide the management of the departments responsible for the risk management activities, internal audit, compliance, as well as any other activities which may expose that bridge institution to significant risks, are appointed by the FSA[18]. The bridge institution may acquire shares or other proprietary tools issued by an insurer subject to the resolution, as well as any assets, rights and liabilities of one or more insurers subject to the resolution. The transfer to the bridge institution shall be performed without the consent of the shareholders of the insurer subject to the resolution or of any third party and without complying with the procedural requirements provided by the Law no. 237/2015 for the authorization and supervision of the insurance and reinsurance activity.

The price of the shares and other proprietary tools shall be paid to their owners and the price of the assets or liabilities shall be paid directly to the insurer subject to the resolution.

Like the other resolution tools, the FSA may transfer:

- shares or other proprietary tools or assets, rights and liabilities from the bridge institution to a third party;
- rights, assets or liabilities from the bridge institution back to the insurer subject to the resolution or shares and other proprietary tools back to their original owners, and the insurer subject to the resolution or the original owners have the obligation to take them back, provided that this aspect is expressly stipulated in the tool by which the transfer was made or if the transfer conditions are not met (article 93).

The loss of the legal status of a bridge institution in the insurance field occurs in accordance with the

[16] See L.Tuleașcă, Transfer of business, Romanian Journal of Business Law no. 7/2016, pages 53-71

[17] Transfer of enterprise. Categories of employees, Court of Appeal, Bucharest, the 7th Civil Department and for labor disputes, the civil decision no. 3951 of June 12, 2012, sent, in the summary and with an approving comment, by the Judge Dr. Romeo Glodeanu, Romanian Journal of Jurisprudence no. 5 dated May 31, 2012, https://idrept.ro

[18] See St. D. Cărpenaru, M-A Hotca, V. Nemeș, cited works, page 663

provisions of article 95 of the Law no. 246/2015 in the following situations:

- the merger of the bridge institution with another entity;
- the bridge institution no longer complies with the requirements provided by law;
- the transfer of all or part of the assets, rights or liabilities of the bridge institution to a third party takes place;
- a period of two years elapsed from the date of the last transfer from an insurer subject to the resolution or at the end of the extension period;
- the assets of the bridge institution are completely liquidated, and its liabilities are fully paid.

It is noted that the occurrence of any of the above mentioned situations entails the cessation of the existence of the bridge institution in the insurance field.

3.8.3. The asset separation

The asset separation tool in the insurance field is the mechanism by which a resolution authority transfers an insurance portfolio of an insurer subject to the resolution to an asset management vehicle.

Upon applying the asset separation tool, the Financial Supervisory Authority may order the transfer of the assets, rights or liabilities of an insurer subject to the resolution or of a bridge institution to one or more asset management vehicles. Like the other resolution tools, the asset separation tool does not require the consent of the shareholders of the insurers subject to the resolution or of any third party, other than the bridge institution and does not require the compliance of any procedural requirement provided by law.

As shown above, the asset management vehicle in the insurance field is the legal entity controlled by the Financial Supervisory Authority and created in order to receive, in whole or in part, the assets, rights and liabilities of one or more insurers subject to the resolution or of a bridge institution.

In the process of setting up and operating an asset management vehicle, the Financial Supervisory Authority has the following powers:

- approves the content of the documents regarding the setting up of the asset management vehicle;
- appoints or approves the management body of the asset management vehicle;
- approves the remunerations of the members of the management body and establishes their responsibilities;
- approves the strategy and the risk profile of the asset management vehicle (article 115).

According to the law, the Financial Supervisory Authority may order the application of the asset separation tool only if one of the following conditions is met:

- the situation on the specific market of those assets is such that their liquidation under the normal insolvency procedure could have a negative effect on one or more financial markets;
- such a transfer is necessary to ensure the proper operation of the insurer subject to the resolution or of the bridge institution; or
- such a transfer is necessary to maximize the proceeds from the liquidation.

The Financial Supervisory Authority shall also determine the consideration in exchange for which the assets, rights and liabilities are transferred to the asset management vehicle, in accordance with the principles provided by law and with the legal framework on the state aid.

The Financial Supervisory Authority can also transfer assets, rights and liabilities from the insurer subject to the resolution to one or more asset management vehicles, several times, and can transfer back assets, rights and liabilities of one or more asset management vehicles of the assets to the insurer subject to the resolution, and the insurer subject to the resolution has the obligation to take back any such assets, rights and liabilities (article 120).

4. The reduction in the value of the capital instruments

The Financial Supervisory Authority may order the reduction or conversion, as applicable, of the debts of the insurer subject to the resolution, regardless of the actual method, in relevant capital instruments (article 126).

The reduction or conversion of the debts in relevant capital instruments operates if one of the following conditions is met:

a) if the Financial Supervisory Authority has determined that all the conditions for triggering the resolution provided by law have been met before the implementation of a resolution measure;
b) the Financial Supervisory Authority establishes that, if the power is not exercised in respect of the relevant capital instruments, the insurer will cease to be viable.

The law provides that an insurer is no longer viable if the following conditions are cumulatively met:

- the insurer is or is likely to be in a difficult situation;
- the alternative measures in the private sector, the supervisory measures, including early intervention measures, excepting the measure of reduction of value or conversion into capital, taken individually or combined with another resolution measure, are not likely to eliminate the difficult situation of the insurer;
- there is no reasonable perspective according to which an insurer's difficulty could be hindered in due time by a measure, either an alternative measure in the private sector or a supervisory measure, including an early intervention measure, a measure of reduction of value or conversion of the debts in relevant capital instruments, taken individually or combined with a resolution action (article 128).

5. Security and funding mechanisms

During the implementation of the resolution instruments, the Financial Supervisory Authority has the obligation to comply with the security and funding mechanisms specifically regulated by law.

Specifically, the article 133 of the Law no. 246/2015 provides that the Financial Supervisory Authority shall ensure that, in cases where one or more resolution tools have been applied and only certain parts of the rights, assets and liabilities of the insurer found in resolution are transferred, the shareholders and those creditors whose debts have not been transferred shall receive, as a settlement of their debts, an amount at least equal to the amount which would have been received if the insurer found in resolution had been liquidated by the insolvency procedure when taking the decisions regarding the implementation of the resolution measures.

As regards the funding mechanisms, shall be set up, pursuant to the law, the Resolution Fund for the insurers whose resources are used according to the objectives and principles of the resolution and it will be managed by the policyholders' Guarantee Fund.

Conclusions

From the analysis of the above mentioned regulations, it is noted that the specific measures and the resolution tools are very different from the mechanisms and procedures applicable to the common law professionals, mainly regulated by the Law no. 85/2016.

Moreover, the resolution procedure with the specific implementation tools is a complex mechanism for identifying, preventing and recovering the patrimonial situations of the insurers having a poor financial situation.

In order to achieve the purpose of the resolution, the Financial Supervisory Authority is entitled to implement the measures provided by law which are thus mandatory both for the insurer subject to the resolution and for those persons holding shares in the share capital of that insurer.

Finally, the main purpose of the resolution is to protect the legitimate interests and the rights of the insurance creditors, by implementing all the measures provided by law, for recovering the financial situation, in order to prevent the insolvency and to avoid the bankruptcy procedure of the insurers in financial difficulty.

References

- St. D. Cărpenaru, M-A Hotca, V. Nemeș, the commented Insolvency Code, 2nd Edition, revised and supplemented, Universul Juridic / Legal Universe Publishing House, Bucharest, 2017
- V. Nemeș, Insurance Law, 4th Edition, Hamangiu Publishing House, Bucharest, 2012
- R. Bufan, A. D. Diaconescu, F. Moțiu (collectively) Practical Insolvency Treaty, Hamangiu Publishing House, Bucharest, 2014
- N. Țăndăreanu, Commented Insolvency Code, Universul Juridic / Legal Universe Publishing House, Bucharest, 2017
- L. Grynbaun (collectively), Assurances, Acteur. Contract. Risques desconsommateurs. Risques des entreprises, L'Argus editions de l'assurance, 2018
- G. Cassano, R. Razzante, N. Tilli, M. Distasi, M. Iaselli, A. Macrillo, V. Aragona, A. Catricala, Diritto delle assicurazioni. Questioni risarcitorie e liquidazione danni, Giuffre editione, Milano, 2017
- R. Blanpain, P. Lyngs, *International Encyclopedia of Laws*, Kluwer International Publishing House, Boston, 1992
- *Droit des assurances*, 3e ed., Larcier Publishing House, Bruxelles, 2006
- J.S. Capdeville, M. Storkp, R. Routier, M. Mignot, J.-Ph. Kovar, N. Ereseo, Droit bancaire, Daloz, 2017
- L.Tuleaşcă, Transfer of business, Romanian Journal of Business Law no. 7/2016
- Transfer of enterprise. Categories of employees, Court of Appeal, Bucharest, the 7th Civil Department and for labor disputes, the civil decision no. 3951 of June 12, 2012, sent, in the summary and with an approving comment, by the Judge Dr. Romeo Glodeanu, Romanian Journal of Jurisprudence no. 5 dated May 31, 2012, https://idrept.ro

THEORETICAL AND PRACTICAL ASPECTS REGARDING LIMITED LIABILITY COMPANIES

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Abstract

Limited liability companies represent an important category of companies within the Romanian legislative system. Being on the border between partnerships and the capital companies in terms of legal regime, these categories of companies offer several advantages to their members by taking over the favorable features from partnerships and the capital companies. In this study, we will analyse the essential aspects relating to the legal regime of limited liability companies. LLC was first regulated in 1990, Law no. 31/1990 (of companies) offering a new category of company that takes over the main characteristics of the major categories of companies. While retaining a closed nature in terms of the maximum number of associates, 50, as well as in the matter of social parts, that can not be transmitted except under the strict exceptions provided by law, LLC presents a real advantage over the minimum amount of the share capital , respectively 200 lei, but also in the matter of the liability of the associates, who answer only in the limit of the contribution brought to society. Here are two nuances that place this societal category in a more favorable situation than other forms of doing business. These considerations have led to a significant increase in the number of LLCs in the national economy, moreover, at present, this societal category is the most encountered. In this study, will be mentioned the categories of contribution that can be brought to society as well as the attributions of the representative bodies. The analysis will also cover aspects regarding the facilities offered by the legislator for the young people who open their LLC for the first time. The ability of professionals to conduct a single member LLC business will be analyzed from the point of view of practical considerations, respectively relative to the status of authorized natural person or a sole proprietorship. The advantages of single member LLC will be balanced against the benefits of authorized natural person and sole proprietorship to provide a clear picture between these categories of professionals. In the matter of the practical aspects of the subject, a case will also be examined regarding the dissolution of LLC.

Keywords: *limited liability companies, legal regime, first-time LLC, single-member LLC, registration, operation.*

1. Introduction

The Law no. 31/1990 on companies[1] regulates the company categories such as partnerships characterized by their limited character, e.g. general partnerships and limited partnerships[2], the capital companies and joint-stock companies, the partnerships limited by shares and the limited liability companies which combine characteristics from the two large categories of companies mentioned above.

The limited liability company was regulated for the first time in the internal legislative frame through the Law no. 31/1990.

This form of society was initially regulated in Germany, and subsequently the limited liability company was taken over in the French law as well[3].

The advantages of the limited liability company consist in the reduced capital at the time of set up, namely 200 lei, partners' liability which is limited to their contributions to the share capital, a relatively large number of partners that may set up the company (50 at most) and the possibility to have a vast object of activity.

The legal regime in terms of shares, which usually cannot be alienated, makes the LLC be quite similar to partnerships.

The Romanian legislator openly regulates the limited liability company by instituting the legal framework both for LLC with a sole partner, and provisions to encourage the young entrepreneurs to initiate a business within this form of company through a first-time LLC.

2. Limited liability companies. Legal regime[4]

2.1. General aspects

The articles of incorporation of the limited liability company are made up of the memorandum of association and the articles of association.

Just like the other company forms, the LLC acquires legal personality from the moment of its registration to the Trade Registry[5].

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[1] Republished in O.J., Part I, no. 1066 of November 17, 2004.

[2] The categories of companies have been defined in the doctrine as archaic forms of companies that are more and more rarely used nowadays. See C. Păun, *Dreptul afacerilor. Teoria. Profesioniștii. Impozitarea.* Universul Juridic Publishing House, Bucharest, 2015, pp. 99 – 101.

[3] For more details see C. Lefter, *Societatea cu răspundere limitată în dreptul comparat*, Ed. Didactică și Pedagogică, Bucharest, 1993.

[4] See S. Cărpenaru, *Tratat de drept comercial, Ediția a V a actualizată*, Universul Juridic Publishing House, Bucharest, 2016, pp. 373 – 398.

[5] As for the legal regime of LLC see G. T. Nicolescu, *Drept societar, Curs universitar*, Universul Juridic Publishing House, Bucharest, 2018, pp. 91 – 124.

Pursuant to article 7 of the Law no. 31/1990, the articles of incorporation contain the following information: partners' identification data, the form, name and headquarters, company's object of activity mentioning the main activity, the share capital, the contribution in cash or in kind of each partner, the value of in kind contribution and the manner of evaluation. The number of nominal value of shares and the number of shares attributed to each partner for their contribution, the partners who represent and manage the company or the non-partner administrators, their identification data, the powers they have been given and if they are going to exercise them together or separately, the censors or the financial auditor, the identification data of the first censors, and of the first financial auditor, each partner's share of benefits and losses, the secondary headquarters – braches, agencies, representation offices or other similar units without legal personality - if they are set up simultaneously with the company or the conditions for their subsequent set up, if such a set up is envisaged, company's duration, the manner of company's dissolution and liquidation shall be specified for the limited liability companies.

The general assembly of partners represents company's management body as is the case with other companies provided under the law.

The General Meeting of Associates has the following main obligations: a) to approve the annual financial statement and to determine the distribution of the net profit; b) to designate the administrators and censors, to revoke them and to dismiss them, and to decide the contracting of the financial audit, if it is not binding, according to the law; c) to decide the prosecution of the administrators and the censors for the damages caused to the company, also designating the person who has the duty to exercise it; d) amend the constitutive act.

The administrators are obliged to convene the assembly of the associates at the registered office, at least once a year or whenever necessary.

An associate or a number of associates, representing at least one fourth of the share capital, may request the convening of the general meeting, indicating the purpose of the convocation.

The convocation of the meeting shall be in the form provided for in the constitutive act, and in the absence of a special provision, by registered letter, at least 10 days before the day set for its maintenance, the agenda shall be presented (Article 195 law).

In the case of limited liability companies with a single associate, it will exercise the attributions of the general meeting of the associates of the company.

The sole member shall immediately notify in writing any decision. The sole associate may be the employee of the limited liability company whose sole counterpart is.

Company's management is carried out by one or several administrators, natural or legal persons designated under the conditions of the articles of incorporation[6].

The Law no. 31/1990 institutes administrators' civil liability for the damages produced to the company. It is obvious that partners' liability may be cumulated with misdemeanor or even criminal liability according to the committed deeds.

In what concern the management audit within the limited liability company, this is carried out by one or several censors (in the latter case the number of censor shall be uneven)[7].

As for the work relationships within a LLC, administrators act on the basis of a mandate legal relationship as they cannot have the quality of company's employees.

If administrators are elected among employees, they shall suspend their employment contracts until the end of the administrator mandate.

Apart from the administrator, employees that carry out their activity in accordance with the work legislation may be hired in a LLC.

As for the contributions brought to this form of company, the legislator has established the contribution in cash as being mandatory, the partners having the opportunity to bring a contribution in kind. The contribution in receivables is not possible for this form of company[8].

The legislator has broadly established the following rights for the LLC partners[9]: the right of information, the right to vote, the right to ask for the carrying out of surveys, the right to resort to law courts, the right to withdraw from the company, and the right to profit.

As for profit, the share capital is divided into shares having an equal value, the minimum value of a share being 10 lei.

Shares have the following features: they are indivisible, non-transferable and non-negotiable.

The legislator stipulates certain situations in which shares may be transferred, namely:

- between the LLC partners if the General assembly allowed it;
- to third parties with the approval of the general assembly through the vote of partners holding at least ¾ of the share capital;
- to the heirs of the deceased partner but only if a clause of continuation with heirs has been provided in the articles of incorporation.

[6] For company management see L. Tuleașcă, *Drept comercial. Comercianții. Ediție revăzută și adăugită,* Universul Juridic Publishing House, Bucharest, 2018, pp. 280 – 324.

[7] See St. D. Cărpenaru, Gh. Piperea, S. David**,** *Legea societăților. Comentariu pe articole, Ediția 5,* C.H.Beck Publishing House, Bucharest, 2014, pp. 648 and next.

[8] As for contributions see F. C. Stoica, *Dreptul societar. Note de curs, Ediția a II a revăzută și adăugită*, ASE Publishing House, Bucharest, 2017, pp. 66 – 69.

[9] C. Păun, *op. cit.* pp. 119 – 120.

The cases of dissolution of the limited liability company are the common law situations applicable to other legal persons as well.

As a practical matter regarding the dissolution of LLC, we present the following case: By request to the Constanta Court of Appeal, the applicant SC A & N I. SRL requested that the court decision to declare the lawfulness of the decision on the division of SC A & N I. SRL, 238 par. (3) of the Law no. 31/1990, by detaching part of its patrimony and sending it to other 6 companies, as well as the modifying act and having their registration in the Trade Register.

The action was addressed to the Constanţa Court of Appeals because the Constanţa Tribunal rejected the application for division of the company as unfounded because one of the six companies involved in the division did not submit the decision on the approval of the division, thus the provisions stipulated in art. 246 par. (1) and art. 243 par. (2) of the Law no. 31/1990 (of companies).

The applicant company based its claim on the provisions of Art. art. 283 par. (3) of the Law no. 31/1990 and art. 304, point 9 of the Civil Proceedings Code, arguing that, for reasons unrelated to the applicant, the summons did not arrive in time, so that they were unable to comply with the court's demands and, on the other hand, all the six companies signed the decision of the General Assembly of the Associations on the division, which is apparent from the above-mentioned document attached to the file.

Moreover, the divestment procedure was of fundamental importance for the companies concerned because of the specificity of the company (taxi services), the extension of the transport licenses was necessary, which also justified the division.

The Constanta Court of Appeal accepted the application filed by the company concerned under Art. 238 par. (3) of the Law no. 31/1990 which states that "the merger or division of companies may also take place between companies of different forms".

Division is a particularly important event in the life of a society that is based on the exclusive will of associates manifested in accordance with legal requirements.

The Court's judgment was also based on the following points [10]:

- the provisions of art. 246 of Law no. 31/1990 stipulating that: (1) Within 3 months from the date of publication of the draft merger or division in one of the ways provided by art. 242, the general meeting of each participating company shall decide on the merger or division, subject to the conditions for its convocation. 2. In the event of a merger by the establishment of a new company or division by the formation of new companies, the draft terms of merger or division and, if contained in a separate document, the instrument of incorporation or the draft constitutive act of the new companies will be approved by the general meeting of each of the companies that are about to cease to exist;
- another important aspect was the increased interest of the associates in achieving the division of the company (financial issues and the extension of the transport authorizations);
- from the corroboration of art. 246 par. (2) with art. 238 par. (1) lit. a) which provides that one or more companies are dissolved without going into liquidation and transfer all their assets to another company in exchange for the distribution to the shareholders of the company or companies absorbed by the shares in the acquiring company and possibly a cash payment of maximum 10% of the nominal value of the shares thus distributed, the court concluded that the approval of the draft of merger or division by the general meeting of each company that ceases its existence would no longer be necessary, only the report and the arrangements for informing the general meeting by art. 243 index 2 LSC.

Moreover, the administrative evidence resulted from the fact that the decision of the General Assembly of the Associates of the company that had separated from the mother company was later filed, so that in this context the decision of the court of first instance appears to be erroneous.

In view of the above, we believe that the solution of the Constanţa Court of Appeal is judicious, because the court of first instance erroneously rejected SC A & N I. SRL's request for division.

2.2. Practical aspects: single-member LLC, NAP (natural authorized person) or Sole proprietorship (SP).

The practical realities impose a series of decisions to professionals that will influence the proper functioning of their business.

Such an aspect is the choice of business form, especially when the natural person professional can choose among several quite similar organization forms.

The single-member LLC gives the holder a series of advantages such as the liability limited only to the share capital, holder’s possibility to be the employee of such company, and a vast range of options in terms of the object of activity.

The disadvantages of this form of organization are the relatively high registration fees and the double entry accounting system, therefore each single-member LLC must resort to the services of an accountant.

As for the natural authorized person, they have the opportunity to select among 5 NACE fields of activity and to hire 3 employees at most.

An advantage in relation to the LLC is the simple-entry accounting system that may be carried out by the NAP without resorting to the services of an accountant.

The main disadvantage for a NAP in relation to single-member LLC is the liability, thus the NAP shall answer with their entire fortune as a supplement to the patrimony by appropriation, a fact that represents an important disadvantage.

[10] Ibidem.

As for the sole proprietorships, the situation is similar to that of NAP, with the only difference that the holder of a sole proprietorship has the possibility to hire 8 employees and to select among 10 NACE domains.

The aspects shown above lead to the conclusion that, in principle, the single-member LLC is an optimal solution for the business carried out by natural persons in conditions more advantageous than those offered by G.E.O. 44/2008 on the performance of economic activities by self-employed persons, sole proprietorships and family businesses[11].

Despite all that, the carrying out of business as a NAP or SP may be a good solution according to the specificity or the selected type of business.

2.3. First-time LLC

G.E.O. no. 6/2011 on the stimulation of set up and development of microenterprises by the first-time entrepreneurs[12] regulates the possibility for the young entrepreneurs to carry out businesses as a first-time LLC since they enjoy certain benefits from the state.

The beneficiaries, who are natural persons having their full capacity of exercise, shall meet the following conditions (article 2 from G.E.O. no. 6/2011):

- not to have held or not to hold the quality of shareholder or partner of an enterprise set up in the European economic area;
- to set up for the first time a limited liability company under the conditions of the Company law no. 31/1990, as republished;
- to declare by taking their own responsibility that they meet the condition mentioned above;

The company set up shall meet the following conditions (article 3 of G.E.O. no. 6/2011):

- to be a limited liability company (LLC),
- to fall into the category of microenterprises under the conditions of the Law no. 346/2004, as subsequently amended and supplemented, on the 2011 on the stimulation of set up and development of small and medium enterprises, and of GEO no. 6/2011;
- to be set up by a first-time entrepreneur as sole partner or by 5 (five) first-time entrepreneurs at most. The conditions for the first-time entrepreneur must be met by each partner separately;
- to be managed by the sole partner or by one or more administrators selected among partners;
- to have in the object of activity 5 (five) groups of activity at most among the ones provided in the classification of activities in the national economy in force (NACE Rev 2). The following activities cannot be included in the 5 (five) groups of activity as company's object of activity: financial brokerage and insurances, real estate transactions, gambling and betting activities, production and sale of armament, ammunitions, explosives, tobacco, alcohol, substances under national control, narcotic and psychotropic plants, substances and preparations, as well as the activities excluded by the European standards for which no state aid can be granted.

3. Conclusions

The limited liability company is a representative category of companies among the ones provided in the Law no. 31/1990 (on companies).

Borrowing characteristics from partnerships and capital companies and improving certain aspects in the legal regime thereof, the LLC is an advantageous choice both for the jointly carrying out of a business by several partners and in case of a single-member LLC.

Regarding the way of organizing LLC as we have shown, these categories of societies have a way of organization similar to the others, so the leadership is carried out by the General Assembly of the Associates, the administration by an administrator or several in an odd number, not excluding the presence of a board within this category of society.

Management control can be achieved, as we have submitted by the associates themselves, and if the number of associates is greater than 15, the presence of censors is mandatory.

The advantages of a LLC mainly consist in the reasonable value of the share capital and partners' limited liability.

The advantages to the capital companies are mainly reflected in the minimum amount of the share capital - 200 lei and in the way of administration of the company, without the unitary or dualist system as in the joint-stock companies. The main advantage over the partnership societies is the responsibility of the associates limited to the social contribution brought to the firm.

To facilitate the set up of LLC by young entrepreneurs, the legislator has, through first-time LLC programme, offered certain advantages to the young entrepreneurs mainly through their exemption from certain taxes and fees.

References

- S. Cărpenaru, Tratat de Drept comercial, Universul Juridic Publishing House, Bucharest, 2016
- F. C. Stoica, Drept societar - Note de curs, ASE Publishing House, Bucharest, 2017
- C. Păun, Dreptul afacerilor. Teoria. Profesioniștii. Impozitarea. Curs universitar, Universul Juridic Publishing House, Bucharest, 2015
- L. Tuleașcă, Drept comercial. Comercianții. Ediție revăzută și adăugită, Universul Juridic Publishing House, Bucharest, 2018

[11] Published in the O.J. no. 328/April 25, 2008.
[12] Published in the O.J. Part I, no. 103 of February 9, 2011.

- G. T. Nicolescu, Drept societar, Curs universitar, Universul Juridic Publishing House, Bucharest, 2018.
- C. Lefter, Societatea cu răspundere limitată în dreptul comparat, Ed. Didactică și Pedagogică, Bucharest, 1993
- St. D. Cărpenaru, Gh. Piperea, S. David, Legea societăţilor. Comentariu pe articole, Ediţia 5, C.H.Beck Publishing House, Bucharest, 2014
- Law no. 31/1990 (on companies)
- G.E.O. no. 6/2011 on the stimulation of se up and development of microenterprises by first-tie entrepreneurs
- G.E.O. no. 44/2008 on the performance of economic activities by self-employed persons, sole proprietorships and family businesses
- www.portal-just.ro

CONSIDERATIONS REGARDING THE LEGAL REGIME OF JOINT – STOCK COMPANIES SET UP BY PUBLIC SUBSCRIPTION

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Abstract

Capital companies (joint stock companies and partnerships limited by shares) may be set up under the Law no. 31/1990 (on companies)[1] by instantaneous subscription or by public subscription. The companies set up by public subscription have certain features that make them stand out within the system of companies regulated by the national law. We mention that these categories of societies have the same legal regime as the societies that are constituted by instantaneous subscription, there are only a few different aspect which makes them more particular. An essential aspect that specifies these categories of companies is the prospectus. It is an official document drawn up in authentic form, having essentially the same content as the constitutive document, less the data on administrators and censors. The prospectus, which necessarily includes the subscription end date, must be signed by the founding members and submitted for validation to the trade registry. This document is very important since the subscription of the shares is on the back of the prospectus. A particularly important aspect within these categories of companies is the legal status of the founding members who enjoy certain additional prerogatives in relation to the shareholders who subsequently enter the company by filling in the prospectus. However, the legislator limited the advantages that the founding members have, so that their influence in the firm is not discretionary, and there is a balance imposed by the legislator on the relations between the shareholders. Regarding the categories of contribution, as we shall present in the text, the legislator has, in principle, established the possibility of bringing the same contributions in these categories of companies as in joint stock companies constituted by instantaneous subscription, except for receivables. A particular peculiarity of this typology of society is the legal regime of the constituent Assembly of Shareholders that takes place after the fulfillment of the general legal conditions and of the publicity stipulated by the law. In this text we will analyse the aspects related to the main characteristics of this category of companies mentioned above.

Keywords: *capital companies, joint stock companies, public subscription, prospectus.*

1. Introduction

Capital companies are regulated by the legislator under two forms, namely joint stock companies and partnerships limited by shares.

The main characteristic of the capital companies is their *intuitu pecuniae* character. If the partnerships are set up by taking into consideration the personal qualities of their members and they have a close character of *intuitu personae* type, the capital companies are set up according to strictly financial criteria, the personal relation among its members being irrelevant.

This fact results from the minimum value of the share capital required by law for the legal setting up of these categories of companies, namely 90000 lei or the equivalent of 30000 Euros.

Capital companies may be set up by instantaneous subscription or public subscription.

The instantaneous subscription takes place through the full and simultaneous subscription of the share capital by the founders under legal conditions and the articles of incorporation.

The public subscription consists in the invitation of the public to become a shareholder in the capital company set up by the founding members.

The joint – stock companies set up by public subscription are termed open company or public owned company[1].

Subscription is made by means of a prospectus that must meet the substantive and formal conditions established by law for the validity thereof.

In the following lines we will present the main aspects relating to the legal regime applicable to the joint-stock companies set up by public subscription.

2. Capital companies set up by public subscription. Legal regime[2]

2.1. The prospectus[3]

The central document for the authorization of these companies is the prospectus.

The prospectus is the document drawn up in written form under the sanction of absolute nullity by the founding members of a company which, similarly to the provisions of the articles of incorporation, contains the essential aspects relating to the operation

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[1] Republished in O.J. no. 1066/November 17, 2004.

[1] See F. C. Stoica, C. Ene, *Business Law, Business Organisations,* ASE Publishing House, Bucharest, 2016, p. 55.

[2] For the set up of companies, see S. Cărpenaru, *Tratat de Drept comercial*, Universul Juridic Publishing House, Bucharest, 2016, pp. 314 – 323.

[3] For prospectus see F. C. Stoica, *Drept societar - Note de curs,* ASE Publishing House, Bucharest, 2017, pp. 55 – 58.

of the company to which the date of subscription closure is added.

Unlike a company's articles of incorporation, the prospectus does not contain provisions regarding the administrators or censors. The prospectus is mandatorily signed by the founding members.

In the doctrine there is a dispute regarding the legal regime of the founding members in terms of the difference of legal regime between them and the founding members of a capital company set up by instantaneous subscription.

We support the opinion according to which the founding members of a joint-stock company set up by public subscription have the same legal regime and status as the members of a company set up by instantaneous subscription[4].

The particular aspect of this company typology is the fact that the founding members represent the central nucleus manifesting an active role in attracting other members into the company.

As for the content of the prospectus, the Law no. 297/2004 on the capital market[5] stipulates as follows in article 84: the offer prospectus shall contain the information which, according to issuer's characteristics and the securities offered to the public, is necessary to the investors in order to make an informed evaluation regarding the situation of assets and liabilities, the financial situation, profit and loss, the perspectives of the issuer and of the entity guaranteeing the fulfillment of the obligations assumed by the issuer, if necessary, as well as of the rights afferent to such securities[6].

(2) The offer prospectus shall be valid for 12 months after the approval thereof by C.N.V.M., and it may be used in many issues of securities in this interval, provided that it is updated under article 179.

(3) The prospectus also contains a summary presenting in a concise and non-technical language the essential information in the language in which the prospectus was initially elaborated. The form and content of the prospectus summary provide together with the prospectus adequate information about the essential elements of the securities in question to help investors to decide whether they want to invest in such securities.

(4) The summary is drawn up in a common form to facilitate comparison with the summaries afferent to some similar securities and contains essential information relating to the securities in question to help investors to decide whether they want to invest in such securities. The summary must also contain a warning for the potential investors regarding the fact that:

a) it must be read as an introduction to the prospectus;
b) any investment decision must rely on the information contained in the prospectus considered in its entirety;
c) before the initiation of the judiciary procedure having as object the information contained in a prospectus, the plaintiff shall bear the costs relating to the translation of the prospectus into Romanian;
d) if the summary is misleading, is inconsistent or imprecise or it is contradictory in relation to other parts of the prospectus, the civil liability shall be incumbent on the persons who drew up the summary, including those who did the translation and the persons who notify about cross-border public offers.

As for the content of prospectus, the legislative instrument mentioned above also provides the following in article 85:

The prospectus may be drawn up in a unique form or a form with several components such as:

a) issuer's presentation sheet containing the information relating to them;
b) the note regarding the characteristics of securities offered or proposed to be accepted for trade in a regulated market
c) prospectus summary.

The judge delegated in the trade registry at company's headquarters shall rule on the legality of the prospectus and endorse the publication of the prospectus, if the validity conditions are met.

We wish to underline that the prospectus must be mandatorily endorsed by the National Securities Commission.

The delegated judge shall verify the following aspects relating to the prospectus:

a) if the prospectus contains the same information as that in the article of incorporation,
b) if the date of subscription closure is mentioned,
c) the authentic form and the signature of the prospectus by the founding members.

If the prospectus is concluded according to the legal conditions, the delegated judge shall authorize the publication of the prospectus in the trade registry and implicitly allow the opening of subscription.

The lack of any of the elements mentioned above shall result in the nullity of the prospectus if the founding members fail to remake the prospectus within the specified period of time.

As for the publicity formalities, the Law no. 297/2004 on the capital market stipulates in article 175 that the prospectus/offer document is considered to be available to the public in one of the following situations:

a) it is published in at least one printed or online newspaper, according to the European regulations in force regarding the content and publication of prospectuses as well as the broadcast of communiqués having an advertising character;
b) it may be obtained for free, on paper, by a potential investor at last at the headquarters of the offerer or

[4] See C. Păun, *Dreptul afacerilor. Teoria. Profesioniștii. Impozitarea. Curs universitar*, Universul Juridic Publishing House, Bucharest, 2015, p. 107.

[5] Published in the O.J. Part I, no. 571 of June 29, 2004.

[6] See S. Bodu, *Tratat de Drept Societar, Volumul I,* Rosetti Educational Publishing House, Bucharest, 2014, pp. 372 – 405.

the intermediate of such offer, or at the headquarters of the regulated market operator in which the respective securities are accepted for trading;

c) it is published in electronic format on the website of the offerer or the offer intermediate;
d) it is published in electronic format on the website of the market operator where the trading of such securities is envisaged;
e) it is published in electronic format on the website of the National Securities Commission if the latter has decided to provide this service.

From the manner of formulation of the text it results that the legislator established the publicity sources for the prospectus alternatively and not cumulatively, therefore if the members publish the prospectus in any of the presented forms, the legal obligation is deemed as met.

2.2. Public subscription of shares

The public subscription of shares is made on the prospectus copies and represents the juridical operation by which a person called subscriber agrees to become a member of the company by completing the prospectus and implicitly through the submission of the capital contribution and receiving shares in exchange proportionally to the contribution submitted[7].

Pursuant to article 19 of the Law no. 31/1990, share subscriptions shall be made on one or several prospectus copies of founders endorsed by the delegated judge.

Subscription shall contain subscriber's last name and first name or name or headquarters, the number in letters of subscribed shares, the subscription date and the express declaration by which the subscriber knows of and accepts the prospectus.

Mention must be made of the fact that the contribution in receivables is not allowed for this type of company. As article 21 of the Law no. 31/1990 stipulates, the company may be set up only if the entire share capital has been subscribed and each acceptor has paid in cash half of the value of shares subscribed at Casa de Economii si Consemnatiuni - C.E.C. - S.A. or at a bank or one of the units thereof. The remainder of subscribed share capital shall be paid within 12 months since registration.

If public subscriptions exceed the share capital provided in the prospectus or are less than this, the founders shall ask for the approval of the constitutive assembly in terms of the increase or reduction, as the case may be, of the share capital at the level of subscription (article 22 of the Law no. 31/1990).

2.3. The constitutive assembly[8]

Founding members shall summon the Constitutive assembly under the law.

The Law no. 31/1990 stipulates as follows in article 20: within 15 days at the latest since the closure of subscription, the founders shall summon the constitutive assembly through a notice published in the Official Journal of Romania, Part IV, and in two widely distributed newspapers, 15 days before the date of the assembly.

The notice shall contain the place and time of assembly, which shall be within two months since the date of closure of subscription, and the issues that shall make the object of debates.

Founders shall draw up a list of those who, once they accepted the subscription, are entitled to participate to the constitutive assembly with the mention of the number of shares of each of them, under the law. This list shall be posted at the venue for the assembly at least 5 days before the assembly.

The assembly shall elect a chairperson and two or more secretaries. The participation of acceptors shall be recorded by attendance lists signed by each of them and endorsed by the chairperson and one of the secretaries.

Pursuant to article 28 of the Law no. 31/1990, the Constitutive assembly shall have the following obligations:

a) to check the existence of payments;
b) to analyse and validate the report of the experts who evaluate the contributions in cash;
c) to approve founders' contributions to profit and the operations concluded on company's behalf;
d) to discuss and approve company's articles of incorporation, the present members also representing the absent members for this purpose, and to designate those who will come for the authentication of the document and to fulfill the formalities required for the company set up;
e) to appoint the members of the management board, and of the supervisory board and the first censors or, as the case may be, the firs financial auditor.

2.4. Legal status of the founding members

The Law no. 31/1990 stipulates in articles 32-34 the rights held by the founding members in a company set up by public subscription.

The person whose quality of founding member has been recognized in the company's articles of incorporation shall have the quality of founding member under the law.

The constitutive assembly shall decide on the net profit share incumbent on the founders of a company set up by public subscription.

The share provided for founders cannot exceed 6% of the net profit and cannot be granted for a time period longer than 5 years since the date when the company was set up.

In case of increase of the share capital, founders' rights shall be exercised only over the profit corresponding to the initial share capital.

[7] For the set up of companies by public subscription see L. Tuleașcă, *Drept comercial. Comercianții. Ediție revăzută și adăugită*, Universul Juridic Publishing House, Bucharest, 2018, pp. 216 – 218.

[8] See also G. T. Nicolescu, *Drept societar, Curs universitar,* Universul Juridic Publishing House, Bucharest, 2018, 130 – 133.

The legislator did not give the founding members a discretionary right over company's profit thus limiting the share to maximum 6%.

In case of early dissolution of the company, founders shall be entitled to claim for damages from the company, if the dissolution took place to the detriment of their rights.

The right to the claim for damages shall be prescribed after 6 months have passed since the date of publication of the decision of the general meeting of shareholders who decided the early dissolution in the Official Journal of Romania, Part IV.

Founders' main obligation is to bear the costs relating to the set up of the company.

After the company has been set up, the founders shall, in the Constitutive assembly, deliver the entire documentation to the administrators who shall take over the prerogative of administration from founders.

3. Conclusions

The capital companies setup by public subscription represent a category of companies that have a different manner of setting up in relation to the capital companies that are set up by instantaneous subscription by involving certain special set up formalities.

We mention the fact that operation of these companies is identical in terms of the legal regime to the operation of the companies set up by instantaneous subscription with the following particularities that we highlight synthetically:

- to validly set up these companies it is necessary to fill in a document in authentic form called prospectus;
- the prospectus shall be validated by the delegated judge at the Trade Registry in the county where the company has its headquarters;
- shares shall be subscribed on the very copies of the prospectus;
- the National Securities Commission shall mandatorily endorse the prospectus;
- the contribution in receivables is forbidden for this category of companies;
- the Constitutive assembly summoned under the law shall approve company's articles of incorporation and fulfill the formalities necessary for company's operation;

The companies set up by public subscription are the expression of *intuitu pecuniae* character of the capital companies and are characteristic both to large businesses such as banking or leasing companies and smaller businesses where the founding members do not have sufficient share capital to start the business.

References

- S. Cărpenaru, Tratat de Drept comercial, Universul Juridic Publishing House, Bucharest, 2016
- F. C. Stoica, Drept societar - Note de curs, ASE Publishing House, Bucharest, 2017
- C. Păun, Dreptul afacerilor. Teoria. Profesioniștii. Impozitarea. Curs universitar, Universul Juridic Publishing House, Bucharest 2015
- L. Tulească, Drept comercial. Comercianții. Ediție revăzută și adăugită, Universul Juridic Publishing House, Bucharest, 2018
- G. T. Nicolescu, Drept societar, Curs universitar, Universul Juridic Publishing House, Bucharest, 2018
- S. Bodu, Tratat de Drept Societar, Volumul I, Rosetti Educational Publishing House, Bucharest, 2014
- F. C. Stoica, C. Ene, Business Law, Business Organisations, ASE Publishing House, Bucharest, 2016
- Law no. 31/1990 (on companies)
- Law no. 297/2004 on the capital market

THE PRINCIPLE OF RELATIVE EFFECT OF CONTRACTS - A HISTORICAL VIEW AND ASPECTS OF COMPARATIVE LAW

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Abstract

The contract shall take effect only between the Contracting Parties; it does not in any way affect third parties, unless the law otherwise provides. This is the principle of the relativity of the effects of the contract, a rule established since Roman law.

In Romans, the principle developed in close connection with the formalism of the contracts, but also with the personalist concept and the individualistic spirit of law, with exceptions to the rule being admitted initially.

Over time, the relative effect that the contract has produced has become a basic principle in the law of many countries, some legislations devoting it express text (such as French law, Spanish law), others recognizing its existence from the interpretation of legal texts for example, German and Swiss law).

The article aims to deal briefly with the origins and the emergence of the principle of relativity, its development and exceptions to the rule, starting from the Roman law and passing through the French, Swiss, German and, of course, the Romanian civil code.

In this latter approach, the material proposes a brief review of the relative effect, as regulated in the previous civil code, in art. 973, with references to the exceptions established by the literature, so-called real exceptions (the stipulation for another) and the apparent exceptions (port-fort convention, representation, direct actions, etc.).

Keywords: *relativity of contract, comparative law, roman law, res inter alios acta.*

The principle of *res inter alios acta* has its roots in Roman law, when the legal relations were characterized by extreme personalization.

According to the definition we find in Justinian's Institutes, obligation[1] was seen as a chain of law (*vinculum juris*) under which we are necessarily compelled to make a certain supply in accordance with the legal prescriptions of the fortress[2].

In the Roman primitive conception, obligation was conceived in the image and resemblance of the property right, in the sense that the holder of the right of claim can dispose of the person of his debtor in the same way as the owner of the good that forms the object of his property. In this conception, obligation could not but produce relative effects, thus creating a personal bond between the creditor and the debtor, the claim giving the former a direct power over the latter's physics[3].

This close relationship between the subjects of the judicial report can be explained if we consider, on the one hand, the way of concluding the contracts, and, on the other hand, the different types of contracts.

Thus, in the old Roman law, in order for a contract to produce legal effects, it had to respect certain forms, it was necessary for the parties to use certain gestures or certain words, and the presence of the parties at the moment of the will expression was mandatory [4].

Obligations, once born, produced two effects, a normal effect, on the one hand, and an accidental effect, on the other, in the event that the normal effect did not occur first[5].

The normal effect of the obligations lies in the debtor's act of executing the obligation assumed by the contract so that the creditor can use its debt rights. The obligation was enforced according to the principles of the civil procedure, at the place specified in the contract or in absentia, at the place where the creditor can bring the action.

From the point of view of those who could bind, we speak of aliens iuris or sui iuris persons, meeting three cases: when pater familias, as a sui iuris person, took part in the contract; when a slave or a person under the power of pater familias took part in the contract, and finally, when another family pater took part in the conclusion of a contract[6].

The principle of relativity, expressed by the rule of *res inter alios acta, aliis neque nocere, neque prodesse potest*, used to find application when pater familias participated in the contract. That principle essentially implied that the effects of the contract were made only in respect of the persons who participated in

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[1] For a brief overview of the origins of the obligation, see, E. Molcuț, *Drept roman*, Edit Press Mihaela SRL, București, 1999, p. 155-158, nd the authors cited in the footnote.

[2] V. Hanga, M.D.Bocșan, *Curs de drept privat roman*, ed. Rosetti, București, 2005, p. 161; M.V.Jakotă, Dreptul roman II, Editura Fundației Chemarea, Iași, 1993, p. 378.

[3] See in this respect, C. Firică, *Excepții de la principiul relativității efectelor contractului*, ed. CH Beck, București, 2013, p.12.

[4] For a classification of contracts, see Valerius M. Ciucă, *Lecții de drept roman*, vol. III, ed. Polirom, Iași, 2000, p. 789 și urm.

[5] Ș. Cocoș, *Drept roman*, ed. ALL BECK, Bucureşti, 2000, p. 183.

[6] Idem, p. 184.

the conclusion of the contract, to their heirs and their creditors who are not holders of a real right[7].

From the strict personal character of the object of the contract[8], from which also derives the principle of relativity of the effects of the contract, there were developed other basic principles of the Roman law, namely the principle of nullity of stipulation for another, the principle of nullity of promise for another and of non-representation in legal acts, which, over time, have lost their original character, the latter being even removed[9].

The rule according to which the validly concluded contracts take effect only on the parties, not affecting parties foreign of the contract, namely third parties, has been taken over and is recognized today by all European laws.

The Napoleonic Civil Code assigns to this principle art. 1165, in the following terms: Les conventions n'ont d'effet qu'entre les parties contractantes; elles ne nuisent point au tiers, et elles ne lui profitent que dans le cas prevu par l'article 1121.

Therefore, contracts only have effect between parties whose wills have been expressed for the purpose of concluding the convention, by the parties being understood both those present at the time of the consent of wills and those who have been represented legally or conventionally. As a result, third parties will not be able to take advantage of, or suffer from the conclusion of the contract between the parties. However, alongside the parties, the contract will also influence the inheritors, including the chirographic creditors, the universal and private successors.

From the principle of relativity, the French law, doctrine and jurisprudence see as true exceptions the stipulation for another, as it is mentioned in art. 1165, which refers to the provisions of art. 1121 French Civil Code, the promise of another's deed, the transfer of contracts concluded in relation to a good (in the matter of the lease agreements - Article 1743 of the Civil Code, insurance and labor contract), and direct actions.

French law recognizes direct actions in favor of the lessor against the Sublessee (Article 1753 French civil code) in favor of the principal against the sub-agent (Article 1944 French civil code) in favor of the victim against the insurer of the person responsible for the insured event[10].

The Swiss Code of Obligations does not contain a provision similar to that in Art. 1165 French Civil Code, however, in Part I, Title II, Chap. III, under the title *Effects of obligations on third parties*, we find legal figures such as the stipulation for another, the subrogation and the porte-fort convention (articles 110-113).

The Italian Civil Code took over, in art. 1372, the rule on the relative effect of conventions, providing that *Il contratto non produce effetto rispetto ai terzi che nei casi previsti dalla legge.*

The Italian doctrine has argued that the foundation of the principle of *res inter alios acta* must be sought in the "protection that law must accord to contractors who, as a rule, do not consent that others may benefit from legal relationships at the formation of which they were wholly foreign and were not targeted[11]".

In principle, the contract is considered to be ineffective to third parties, but at the same time it is recognized that a contract may have direct effects on them in the circumstances where the contract is the necessary instrument to prevent the performance of another contract. These situations, defined in the past as *contracts to the detriment of third parties*, are now legal figures that recognize the possibility of an "aquile tutelage" of the contract or non-contractual liability derived from the contract[12].

The civil code of the province of Quebec recognizes, in Art. 1440, the same principle of relativity of the contract, without, however, indicating, as an exception, the stipulation for another, but showing that a valid contract concluded takes effect only between the parties, except in the cases provided by the law.

The aforementioned principle is no longer an absolute principle after the reform of the civil code of the province of Quebec, but has become a temperate rule of the requirement of good faith, which applies to both parties and third parties.

In reality, although it is acknowledged that a contract is effective only between the parties, it is impossible, in the context of the present law, to allow third parties to ignore this legal fact and behave in a manner contrary to the requirements of good faith[13].

Like other systems of law, thecivil law of the province of Quebec also knows exceptions to relativity; the direct action of the sub-lessee against the lessor is such an exception[14], the liability of the manufacturer for the defects of the good sold, to the buyer, the sale of an enterprise, the direct recourse of the victim against the insurer, the collective labor contract, all represent recognized derogations from *res inter alios acta*.

The German Civil Code (BGB) does not contain any provision similar to Art. 1165 French Civil Code,

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[7] Ibidem.

[8] For developments see, V.M. Ciucă, *op.cit.*, p. 740 et seq.

[9] For the evolution of these legal figures in Roman law, seeV.M.Ciucă, *op.cit., 742 și urm.,* , Ș.Cocoș, *op.cit*, p. 184-185, E. Molcuț, *op.cit.*, p. 172-174.

[10] P.Malaurie, L.Aynes, P.Stoffel-Munck, *Les Obligations*, Defrenois, 2007, Paris, p. 447.

[11] Tartufari, *Dei contratti a favore di terzi,* p.304, apud A.Circa, Relativitatea efectelor convențiilor, Editura Universul Juridic, București, 2009, p. 44-45.

[12] M. Franzoni, La Rilevanza del Contratto Verso i Terzi, pe http://www.ildirittodegliaffari.it/upload/articoli/20130531012521_Inserito-Franzoni.pdf , site consultat la data de 01.03.2018.

[13] K. Vincent, *Les obligations*, vol. I, Wilson et Lafleur, Montreal, 2015, p. 882.

[14] For an overview of this exception and its evolution, see K. Vincent, *op.cit.*, p. 899-909.

but it has been judiciously argued that there is a principle relating to the relativity of the judicial report that can be deduced from the interpretation of two articles relating to the content of the judicial report, 241 and 311 BGB[15].

A special situation is encountered in English law, where the relativity of the effects of the contract (called the privity of contract) is very limited. Most of the time, this principle is expressed in a procedural manner: the third party has no action based on a contract to which he is not a party[16]. It may be in favor of a third party, but the court can not oblige the promisor to respect his promise. His engagement is devoid of what is called *consideration* because the beneficiary generally does not bring anything in consideration.

Privity of contract implies that a contract can not, as a general rule, confer rights or impose obligations on a person outside that act.

The principle has been interpreted in common law in close connection with two rules: *only a promisee may enforce the promise*, that is if a third party is not also a promisor, then he can not be related to the contract and *consideration must move from the promisee*, that is a third party that does not offer *consideration* can not claim anything to the parties.

It has been argued in the doctrine that the rule according to which only parts of a contract can be held liable under that contract is fair and equitable. However, the rule that no one except the parties can enforce the contract can cause inconvenience in the sense that it prevents the person concerned in concludind the contract from doing this. The many exceptions to the privity doctrine make this rule tolerable in practice, but have raised the question of whether it is more useful to modify it or even wholly abolish it[17] .

Among the exceptions to this doctrine are the collateral contracts; thus the contract concluded between two parties may be accompanied by a collateral contract concluded between one party and a third person in close connection with the original contract. For example, in *Shanklin Pier v Detel Products (1951),* the applicants contracted a number of people to paint a pontoon, forcing them to buy the paint from the defendant. He assured them that the purchased paint has a lifetime of 7 years, but it has lost its property after just three months. The court ruled that the applicants could bring an action against the defendant on the basis of the collateral contract concluded, considering that there was also a *consideration* on their part.

Another exception is the agency contract. Through this contract, the agent contracts on behalf of the principal with a third person and forms a binding relationship between the principal and the third person.

Other exceptions include trust contracts, servitudes closely linked to land, and so-called *statutes*, respectively legal provisions expressly setting exceptions to privity[18].

Romanian law embraced the principle of relativity of the effects of the contract, expressly acknowledging it in art. 973 Civ. Code 1865, the following: *Conventions shall have effect only between the Contracting Parties.*

As has been consistently stated in the Romanian doctrine, the effects of contracts and, consequently, of the obligations arising from the contract do not regulate and concern only the relations between the contracting parties, as well as between persons who, although they have not personally participated in the conclusion of the contract, however, will be considered to be represented and bound by the act of will concluded, in such a way that the act is regarded as theirs and that the rights and obligations recognized or transmitted by act are also acknowledged and transmitted to them also[19].

Thus, the scope of this principle has been outlined, to the parties, to their universal or private successors (subject to certain conditions) and to the chirographic creditors of the parties, considered to be in an intermediate situation between the universal successors and the parties[20].

It has also been argued that the relative effect of the mandatory force of legal acts is explained and grounded in the nature of the legal act. Being essentially volunteer, it is only natural for the legal act to be binding on those who have given their consent at its conclusion, and not for third parties who have not expressed their will to acquire any right or to assume obligation through it[21]. However, it is only the internal, binding effect of the contract, in that it only gives rise to, amends or extinguishes legal ties or relationships between the Contracting Parties, which become creditors and debtors to each other; the other persons, by whom are understood the third parties, can not become debtors and, as a rule, no creditors by contract to which they are foreign[22], but are bound to observe the legal reality born of the valid contract concluded between the parties.

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[15] A. Circa, *op.cit.*, p. 29.

[16] M.Oudin, Un droit européen ... pour quel contrat ? Recherches sur les frontières du contrat en droit comparé, în Revue internationale de droit comparé. Vol. 59 N°3, 2007. p. 488.

[17] GH Treitel, *The Law of Contract*, Sweet & Maxwell/Stevens & Sons, London, 1995, p.588, pe https://www.lawteacher.net/PDF/contract-law/Privity%20Lecture%20&%20Cases.pdf .

[18] Pentru dezvoltări, a se vedea https://www.lawteacher.net/PDF/contract-law/Privity%20Lecture%20&%20Cases.pdf ., M.Oudin, *op. cit.,* p. 488 și urm.

[19] M.B.Cantacuzino, *Elementele dreptului civil*, Editura ALL , București, 1998, p. 450.

[20] C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Tratat de drept civil român*, vol.II, Editura All, București, 1998, p. 522.

[21] D.Cosma, *Teoria generală a actului juridic civil*, Editura Ştiinţifică, Bucureşti, 1969, p. 381.

[22] L. Pop, *Tratat de drept civil. Obligaţiile. Volumul II: Contractul,* Editura Universul Juridic, Bucureşti, 2009, p. 560.

As regards the exceptions to this principle, the doctrine before 2011, was unanimous in recognizing this character only to the stipulation for another, although the Romanian legislator did not take over the legislative solution presented in art. 1119-1121 French Civil Code referring to this legal institution, while in the category of apparent exceptions several legal figures were included: the promise of the other's deed, the direct actions, the representation, the assignment of the debt.

The current civil code took over this principle in art. 1280 Civil Code, which states that the *Contract shall take effect only between the parties, unless otherwise provided by law.*

Conclusions

As can be seen from this brief incursion into the origins and evolution of the principle of relativity, the rule res inter alios acta has largely retained its essence, but the importance that Roman law has recognized, most of the European laws adopting this principle as law.

If in what regards the principle, its content and its scope, there are no major differences between the laws of the European States, as regards the exceptions to this principle, the opinions expressed differ even now, more than 200 years after the adoption of the Napoleonic Civil Code, the precursor of modern European civil codes. But this discussion goes beyond the scope of this material, whose purpose was merely a brief review of the principle of relativity, from a temporal and spatial point of view.

References

- E. Molcuț, *Drept roman*, Edit Press Mihaela SRL, București, 1999
- V. Hanga, M.D.Bocșan, *Curs de drept privat roman*, ed. Rosetti, București, 2005
- M.V.Jakotă, Dreptul roman II, Editura Fundației Chemarea, Iași, 1993
- C. Firică, Excepții de la principiul relativității efectelor contractului, ed. CH Beck, București, 2013
- Valerius M. Ciucă, *Lecții de drept roman*, vol. III, ed. Polirom, Iași, 2000
- L. Pop, Tratat de drept civil. Obligaţiile. Volumul II: Contractul, editura Universul Juridic, Bucureşti, 2009
- Ș. Cocoș, *Drept roman*, ed. ALL BECK, București, 2000
- M. Planiol, Traite elementaire de droit civil, tome deuxieme, Librairie Cotillion, Paris,1900
- M.B.Cantacuzino, *Elementele dreptului civil*, Editura ALL , București, 1998
- C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Tratat de drept civil român*, vol.II, Editura All, Bucureşti, 1998
- M.Oudin, Un droit européen ... pour quel contrat ? Recherches sur les frontières du contrat en droit comparé, în Revue internationale de droit comparé. Vol. 59 N°3, 2007
- D.Cosma, *Teoria generală a actului juridic civil*, Editura Ştiinţifică, Bucureşti, 1969
- K. Vincent, *Les obligations*, vol. I, Wilson et Lafleur, Montreal, 2015

INFORMATION REGARDING FIDUCIARY CONTRACTS AND THEIR LEGAL SPECIFICITIES

Ciprian Raul ROMIȚAN*

Abstract

The sources of the fiducia are the law and the contract concluded in authentic form. Fiducia must be express and its running by an unilateral act or by judicial way is excluded. The fiduciary contract is an act conveyancing the ownership title, it is onerous, synallagmatic, commutative, intuitu personae and solemn.

The fiduciary contract is the contract by which a party (the settlor), transmits as a trust to the other party (the trustee) goods and rights for the exploitation thereof for a determined purpose. Therefore, according to the provisions of the Civil Code in force, the parties to the fiduciary contract are the settlor (settlors) and the trustee (trustees). As one shall notice during out study, the beneficiary(-ies), the third party mentioned in the legal text defining the notion of fiducia, is not regarded as a party to the fiduciary contract.

According to the author, the object of the fiducia supposes three successive stages of the complex contractual procedure: the transfer of patrimony rights from the settlor to the trustee, the actual management of the patrimony mass in the beneficiary's favor, the transfer of the profit to the beneficiary, once or in successive stages.

From the point of view of its legal nature, fiducia is a legal operation having as object the transfer of the property, receivable, security or other patrimony rights, whether existing or future, or a combination of such rights, to one or several trustees, exerting them in order to fulfill a determined purpose, in the favor or one or several beneficiaries. All these rights set up an patrimony mass distinct from the trustees' other patrimony rights and obligations.

As one could notice during the study, the fiduciary contract must comprise, under the sanction of absolute nullity, the following elements: real rights, receivable rights, guarantees and any other patrimonial rights transferred. In this regard, the transferred rights must be described in the fiduciary contract, by clearly indicating all identification elements; the period of the transfer, which cannot exceed 33 years as of the date of its conclusion;

the identity of the settlor or settlors; the identity of the trustee or trustees; the identity of the beneficiary or beneficiaries or at least the rules allowing the determination thereof; the purpose of the fiducia and the scope of the powers of administration and disposition of the trustee or of the trustees.

Keywords: *trust, trust agreement, grantor, trustee, right of ownership.*

1. Introduction

The article presents in a complex manner all the elements of the fiduciary contracts, as regards the definition, legal nature, the parties, the contents and termination.

Fiducia, this new Romanian law institution, was first regulated in the Civil Code enforced as of 1 October 2011[1] where a whole title is dedicated to it (Title IV - *Fiducia*), in Book 3, "*On Assets*"[2]. A number of 19 articles are *expressis verbis* dedicated to fiducia (art.773-791), inspired by the similar provisions in the French Civil Code adopted pursuant to the Law no. 2007-211 of 19 February 2007.

2. Content

2.1. Fiducia. Definition and Subject

The institution of fiducia is continental to that of trust[3] in the common law system and it "represents the actual application of the patrimony divisibility, being included amongst the assigned patrimonial assets listed under art. 31(3) of the Civil Code"[4]. In other author's

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[1] Law no. 287/2009 regarding the New Civil Code, published with the Official Gazette of Romania, Part I, no. 511 of 24 July 2009. The Civil Code came into force on 1 October 2011, according to the Law no. 71/2011 regarding the enforcement of Law no. 287/2009 on the Civil Code, published with the Official Gazette of Romania, Part I, no. 409 of 10 June 2011 (hereinafter referred to as Official Gazette).

[2] Regulations regarding the choice of the material law regarding fiducia are also available in art.2659-2662 of Book VII (Private International Law Provisions), Title II (Conflicts of Laws), Chapter VIII (Fiducia).

[3] The trust is defined as "a legal entity established by a settlor, for designated beneficiaries, on the basis of the legal regulations and of a valid fiduciary instrument, the trustee holding the fiduciary duty to manage the assets and revenue representing the subject of the fiducia in the favor of the beneficiary" (Cătălin R. Tripon, Fiducia, result of the interference of the two large legal systems: the continental civil law and the Anglo-Saxon law. The concept, classification, evolution and validity prerequisites of fiducia, in "Romanian Private Law Magazine", issue 2/2010, p.168). For details, also see Luminița Tuleașcă, The concept of the trust in Romanian law, in "Romanian economic and business review", pp.150-160. For a review of the regulation of the trust in the other state's laws, also see Daniel Moreanu, Fiducia and Trust, "C.H.Beck" Printing House, Bucharest, 2017, pp.457-477.

[4] Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, Civil Law Course. Key Property Rights, 2nd issue, revisited and supplemented, "Hamangiu" Printing House, Bucharest, 2013, p.163.

opinion[5], the regulation of this legal institution by the Civil Code is dissatisfactory and it is characterized by excessive, counter-productive and unjustified formalism, even though, as already mentioned, the Romanian legislator took inspiration from the French Civil Code.

Art.773 of the Civil Code defines *fiducia* as "the legal operation through which one or several settlors transfer property rights, receivable rights, securities or other patrimony rights or a combination of such existing or future rights to one or several trustees exerting them with a determined purpose, in the favor of one or several beneficiaries. These rights set up an autonomous patrimony mass, distinct from the other rights and obligations in the trustees' patrimonies." This definition was not, however, exempt from criticism in the specialized literature[6] and attempt were actually made to propose a new definition[7].

With regards to the *subject of fiducia*, the reading of the definition above shows that, even though the law text only concerns the transfer of the property and receivable rights, without any reference to the assets these rights are related to, we appreciate, similarly to other authors[8], that "*upon the transfer of the rights, the transfer of the assets these rights concern should also be considered*"[9]. Pursuant to the review of the definition of fiducia as stipulated in art. 773 of the Civil Code, it further follows that fixed or any other, tangible or intangible, assets may be subjected to the transfer (receivables, intellectual property rights, goodwill, etc.), whether present or future. It should be mentioned that if fiducia concerns goodwill, it is in the interest of the parties to indicate the structure of the goodwill, to describe the assigned elements, including clients, a key element of goodwill[10].

Moreover, certain key property rights may represent the subject of fiducia, such as: the ownership title, the superficies rights, the beneficial right and the right of servitude. Concerning the beneficial right, we should mention that it can represent the subject of the fiducia since, according to art.714 of the Civil Code, the beneficial right may be assigned, and the right of servitude may only become the subject of the fiducia alongside the master fund. With regards to the right of use and habitation, whereas the provisions in art.752 of the Civil Code forbid their assignment, these rights may not be transferred through the fiduciary operation either[11].

Finally, pursuant to the review of the provisions in art.773 of the Civil Code, it may be stated that the securities listed under the category of the property rights in art.551 of the Civil Code, i.e., the security interests, which as ancillary property rights regulated by the Civil Code, i.e.: fidejussion [art.2480-2320 Civil Code], mortgage [art. 2343-2479 Civil Code] and pledge [art. 2480-2494 Civil Code][12].

We should further mention, as actually shown by other authors, as well[13], that "*regardless of its subject, fiducia may not represent the means through which indirect liberation is achieved in the beneficiaries' favor, the fiduciary contract being stricken by absolute nullity in the case of the failure to observe this provision*" (art. 775 Civil Code).

2.2. Legal Nature and Sources of Fiducia

Pursuant to the definition of fiducia, as mentioned din art.773 of the Civil Code, it follows that, from the point of view of its legal nature, fiducia is a legal operation having as object the transfer of the property, receivable, security or other patrimony rights, whether existing or future, or a combination of such rights, to one or several trustees, exerting them in order to fulfil a determined purpose, in the favor or one or several beneficiaries. These rights set up a patrimony mass distinct from the trustees' other patrimony rights and obligations[14].

According to art.774 (1) of the Civil Code, fiducia may be established by law or contract, which must take the authenticated form *ad validitatem*. *Per a contrario*, it follows that fiducia may not derive from testament or court order.

The aforementioned law text further orders that fiducia should be explicit, which means that the

[5] For details, see Gheorghe Buta Conflicts of Laws in the Field of Fiducia, in "Legal Studies and Researches", issue 4, October-December/2015, pp.501-524. Also see a summary of the article signed by Reinhart Dammann, Fiducia-guarantee and conflict of laws in France, translated by Alexandru F. Măgureanu, in "Romanian Pandects", issue 6/2013, pp.121-130.

[6] For details, see Bujorel Florea, Civil Law. Key Property Rights, "Universul Juridic" Printing House, Bucharest, 2011, pp.216-217; Bujorel Florea, Certain Considerations on the Fiduciary Contract as Regulated in the New Civil Code, in "Law" magazine, issue 8/2013, pp. 62-64; Cristian Jora, Civil Law. Property Rights in the New Civil Code, "Universul Juridic" Printing House, Bucharest, 2012, p.37.

[7] See Bujorel Florea, op.cit., (2013), p.64.

[8] Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, op.cit., p.163.

[9] For a review of the fiducia regulations, see Rodica Constantinovici, in "New Civil Code. Comments per articles" (coordinators Flavius Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei), "C.H.Beck" Printing House, Bucharest, 2012, pp.822-836; Cătălin R. Tripon, op.cit., pp.162-199; Nicoleta Diaconu, Law Applicable to the Fiducia with a Foreign Element According to the Civil Code, in "Dreptul", issue 9/2012, pp.85-95; Daniel Moreanu, Fiducia and Trust. Definition, Practical Uses and Main Differences, in "Legal Studies and Researches", issue 2, April-June/2014, pp.150-160; Luminița Gheorghe, Fiducia in the New Civil Code: An Example of the Activation of the Relation Between the Romanian Law and the Common Law by the International Business Law, in "Judiciary Courier", issue 3/20115, pp.129-133; Sergiu Golub, Fiducia. Legal Definition Review. Genus Proximum, in "Romanian Business Law Magazine", issue 11/2016, pp.31-58; David-Domițian Bolduț, Fiducia-Unusual Romanian Law Legal Operation (I), in "Romanian Business Law Magazine", issue 9/2014, pp.98-119.

[10] Ioan Popa, Fiduciary Contract Regulated by the New Civil Code, in "Romanian Private Law Magazine", issue 2/2011, p.225.

[11] Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, *op.cit.*, p.164.

[12] Sergiu Golub, *Fiducia. Legal Definition Review. Specific Difference,* in "Romanian Legal Science Magazine", issue 1/2016, pp.24-30.

[13] Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, *op.cit.*, p.164.

[14] For details, see Liviu Marius Harosa, *Brief Considerations on Fiducia as Regulated by the New Civil Code*, in "Romanian Business Law Magazine", issue 9/2013, pp.40-42.

intention to establish a fiducia may not be presumed and that it must be clearly and unequivocally expressed. If fiducia is established under the law, the provisions in the Civil Code are supplemented by the legal provisions, if not contrary to the same [art.774 (2) of the Civil Code][15]. Starting from the two sources of fiducia, the specialized literature[16] has appreciated that fiducia is of two types: *legal fiducia*, deriving from the law, and *conventional* or *contractual fiducia*, deriving from the consent of the parties to the fiduciary contract.

2.3. Fiduciary Contract

Specialized literature defines fiduciary contract as "the contract based on which one or several settlors transfer property, receivable, security or other patrimony rights or a combination of such rights, whether present or future, to one or several trustees who exert them for a determined purpose, in favor or one or several beneficiaries"[17] or "the contract pursuant to which, one of the parties, referred to as settlor, assigns rights and obligations, as fiducia, to the other party, referred to as trustee, in order to use them for a determined purpose"[18].

2.3.1. Parties to the Fiduciary Contract

According to art.776 in the Civil Code, the parties to the fiduciary contract are the *settlor*(s) and the *trustee*(s). As it may be noticed, the *beneficiary* (-ies), the third party mentioned in art.773 of the Civil Code defining the notion of fiducia, is not regarded as a party to the fiduciary agreement.

Settlor

Art.776 (1) of the Civil Code stipulates that any natural or legal entity may hold the capacity of settlor. However, in order for a natural or legal entity to hold the capacity as settlor under a fiduciary contract, it must be the holder of the rights representing the subject of the transfer[19].

With regards to the representation of the settlor's interest, as also stipulated in art.778 of the Civil Code, "Unless stipulated otherwise, the settlor may, at all times, appoint a third party to represent his interests in the enforcement of the contract and to exert his rights arising from the fiduciary contract"[20].

Under the fiduciary contract, the settlor undertakes two main obligations: the obligation to transfer the fiduciary patrimony mass to the trustee and the obligation to pay to the trustee the remuneration corresponding to the services it provided under the fiduciary contract[21].

Trustee

With regards to the trustee capacity, pursuant to the provisions in art. 776(2) of the Civil Code, this capacity may only be held by six exhaustively listed categories of persons, which the legislator regarded as holding the professional capacities to exert the rights acquired from the settlor, i.e.: credit institutions, investment and management companies, financial investment services companies, legally established insurance and reinsurance companies[22]. Considering these provisions that restrict the categories of persons that may hold the capacity of trustee, it may be stated that the trustee is a qualified lawful subject of the fiduciary contract[23].

In certain author's[24] opinion, such a limitative listing should be eliminated and other categories of persons should also be allowed to acquire the capacity as trustee, provided that they observe the requirements regarding solvency and trustworthiness.

According to art. 776(3) of the Civil Code, notaries public and lawyers may hold the capacity as trustees, regardless of the manner in which they exert their profession[25]. Concerning this right granted to lawyers under the law to act as trustees, it may be stated that it is not a novelty. In this regard, Law no. 51/1995 regarding the organization and practice of the lawyer profession[26] stipulated, prior to the amendments brought by Law no.71/2011 on the enforcement of Law no.287/2009 regarding the Civil Code, the possibility of this category of professionals to carry out "fiduciary activities"[27], but a review of art. 3(1) (g) of the Law no.51/1995 illustrates that the fiduciary activities the lawyer was entitled to perform were expressly and exhaustively listed.

Currently, pursuant to all amendments made, the Law no.51/1995 stipulates, in art.3 (1) (g), that "the attorney's activity is carried out through fiduciary activities carried out according to the Civil Code", provisions that were somewhat extended through the

[15] For details on the subject, we recommend that you see Daniel Moreanu, *op.cit.* pp. 180-187.

[16] Vasile Nemeș, *Fiduciary Contract, according to the New Civil Code*, in "Judiciary Courier", issue 10/2011, p.518.

[17] Iosif Robi Urs, Petruța Elena Ispas, *Civil Law. Theory of Property Rights*, 2nd issue, revisited and supplemented, "Hamangiu" Printing House, Bucharest, 2015, p. 272.

[18] Dan Adrian Doțiu, *Enforceability of the Fiduciary Contract*, in "Romanian Forced Execution Magazine", issue 4/2016, p.22.

[19] Mona Lisa Belu – Magdo & Co, *New Civil Code. Remarks, Doctrine and Case law*, vol. I-III, "Hamangiu" Printing House, Bucharest, 2012, p.1094.

[20] Also see Gheorghe Buta, *Fiducia and Management of Another Party's Assets*, "Universul Juridic" Printing House, Bucharest, 2017, p.49.

[21] For details, see Iosif Robi Urs, Petruța Elena Ispas, *op.cit*. pp. 283-284; Daniel Moreanu, *op.cit.* pp. 269-270; Vasile Nemeș, *op.cit.* p.521.

[22] For details regarding these categories of persons, see Iosif Robi Urs, Petruța Elena Ispas, *op.cit.* pp. 278-281.

[23] Similarly, see Vasile Nemeș, *op.cit*. p. 518.

[24] Cătălin R. Tripon, *op.cit.* p. 196.

[25] For details, please see Gheorghe Buta, *The Lawyer and the Notary Public as Trustees*, in "Romanian Case Law Magazine", issue 4/2016, pp.135-143; Rodica Constantinovici, in Flavius Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei (coordinators), *op.cit.*, p. 825.

[26] Published with the Official Gazette of Romania no. 116 of 9 June 1995.

[27] According to art. 3(1) (g), the lawyer's activity was carried out through "fiduciary activities consisting of the receipt in custody, in the name and on behalf of the client, of fiduciary funds and assets, resulting from the sale or implementation of enforceable titles, after the conclusion of the inheritance procedure or of the liquidation, as well as the placement and sale thereof, in the name and on behalf of the client, activities for the management of the funds or assets they were placed in".

provisions in the Status of the Lawyer Profession[28] [Chapter III (*Lawyer's Professional Activity*), Section I (*Content of the Professional Activity*), Sub-section 4 (*Fiduciary Activities*)].

In other author's opinion[29], the wording in art.3 (1) (g) is "very wide, but the reference to the Civil Code provisions limits and clarifies its scope".

With regards to the possibility of notaries public to hold the capacity as trustees, Law no.36/1995 of the notaries public and the notary activity[30] expressly stipulates, in art. 12(l) that the notary public carried out "fiduciary activities, according to the law"[31].

The Civil Code also regulates the trustee substitution institution. In case the trustee fails to fulfil its obligations or endangers the interests entrusted to it pursuant to art.788 (1) of the Civil Code, the settlor, its representative or the beneficiary may request the settlor's replacement in court[32]. As it also follows from art.788 of the Civil Code, the trustee has certain duties that it undertakes on the fiduciary contract conclusion date. One of the trustee's main obligations deriving from the very art.773 of the Civil Code is the patrimony mass management obligation, followed by other obligations, such as: the obligation to disclose the relation to third parties in the capacity in which it operates, the obligation to register the fiduciary contract for tax purposes, the obligation to be held accountable for the services and activities carried out for the fulfilment of the fiduciary contract, the obligation to remedy the prejudice cause pursuant to the fiduciary mass conservation management acts and, last but not least, the obligation to return the fiduciary patrimony mass[33].

Beneficiary

According to art.777 of the Civil Code, "the beneficiary of the fiducia may be the settlor, the trustee or a third party". Pursuant to the review of this text, we believe two different situations may be distinguished, i.e.: the first situation in which the beneficiary is the settlor and/or the trustee and the second one in which the beneficiary is another person. Hence, if in the first of the two situations, the beneficiary is a party to the fiduciary contract, in the second one, it does not hold the capacity as party to the fiduciary contract.

Even though in the beneficiary's case, the Civil Code does not impose any special conditions, art.779 (e), marginally entitled "*Content of the Fiduciary Contract*", does comprise a general remark: "The fiduciary contract must mention, under the sanction of complete nullity, the identity of the beneficiaries or, at least, the rules allowing for the determination thereof". Hence, the fiduciary contract where the beneficiary was not determined as on the conclusion date is valid only if the parties set sufficient elements to determine it upon the execution of the contract.

2.4. Contents of the Fiduciary Contract

According to art.779 of the Civil Code, the fiduciary contract must mention, under the sanction of complete nullity, the following elements:

- the property rights, the receivable rights, the securities and any other patrimony rights transferred. In this regard, the transferred rights must be described in the fiduciary contract, by clearly indicating all identification elements;
- the transfer term, which may not exceed 33 years as of its conclusion date. The legislator has not stipulated the possibility of extending this type of contract beyond the term stipulated in art.779(1)(b) of the Civil Code, but it should, however, be mentioned that the fiduciary term may also be subjected to early termination within the set term. For instance, the fiduciary contract may be terminated in case it is found that the purpose for which it was concluded was achieved;
- the settlor(s)' identity;
- the trustee(s)' identity;
- the identity of the beneficiary (-ies)' or, at least, the rules allowing for the determination thereof;
- the purpose of the fiducia and the extent of the trustee(s)' management powers. In this case, we appreciate that the provisions in art. 775 of the Civil Code should be taken into account. According to these provisions, the fiduciary contract is stricken by complete nullity if it provides for indirect liberation in the beneficiary's favor.

2.5. Legal Features of the Fiduciary Contract

The legal features of the fiduciary contract are: it is a designated, synallagmatic, official, commutative or random onerous or free-of-charge contract and *intuitu-personae.*

It is a *designate* contract because it is expressly included in the Civil Code (art.773-791).

The *synallagmatic* (*bilateral*) nature resides in the fact that it generates mutual rights and obligations between the parties to the contract[34]. In this regard, the trustee holds, *inter alia,* the obligation to assign him

[28] Adopted through the Decision no. 64/2011 of the Council of the Romanian National Bar Association, published with the Official Gazette no. 898 of 19 December 2011.

[29] Daniel Moreanu, *op.cit.* p. 204.

[30] Republished in the Official Gazette no. 72 of 4 February 2013.

[31] For details, see Gheorghe Buta, *op. cit*., (2016), pp.141-143.

[32] According to art.788 (2) of the Civil Code, "Up to the settlement of the replacement request, the settlor, and its representative or, in the absence thereof, the beneficiary, shall appoint a provisional fiduciary mass manager. In case the settlor, its representative or the beneficiary simultaneously appoint a provisional manager, the settlor's or its legal representative's appointment shall prevail".

[33] For details, see Roxana Mariana Popescu, Evelina Oprina, *Fiducia and its Legal Consequences on Forced Executions*, in "Romanian Forced Execution Magazine", issue 4/2011, pp.76-78; Iosif Robi Urs, Petruța Elena Ispas, *op.cit*., p. 284; Daniel Moreanu, *op.cit*., pp.271-274; Vasile Nemeș, *op.cit.,* p.521.

[34] According to art.1171 of the Civil Code, "The contract is synallagmatic if the obligations it generates are mutual and interdependent. If not, the contract is unilateral, even if its execution triggers obligations for both parties."

property rights, the receivable rights, the securities and any other patrimony rights agreed upon, and the fiduciary is bound to exert them according to the legal purpose agreed upon between the parties.

The fiduciary contract is an *official* contract because its enforcement requires the observance of a certain form, which is the authenticated and express one [art.774 (1) of the Civil Code].

It is a *commutative* contract because the parties are clearly aware of their rights and obligations, starting the very fiduciary contract conclusion date[35].

In certain situations, the fiduciary contract may be *random*. For instance, even though the duration of the fiduciary contract may not exceed 33 years as of its conclusion date [art.779(b) of the Civil Code], an undesirable event may occur, such as the beneficiary's decease.

It is an *onerous* contract because, in general, each party to the contract desires to obtain a patrimony interest, i.e. to receive a benefit in exchange for the service it undertakes to provide[36].

Finally, the *intuitu-personae* nature of the fiduciary contract follows from the fact that the conclusion thereof relies on the trustee's skills or professional training. In other words, the trustee's qualities in exerting the rights assigned as fiducia are of essence in the conclusion of the fiduciary contract.

2.6. Termination of the Fiduciary Contract

According to art. 790 of the Civil Code, the fiduciary contract may be terminated as follows:

- through the elapse of the term, which, according to art.779(b) of the Civil Code, may not exceed 33 years as of its conclusion;
- through the achievement of the envisaged purpose, in case it occurs prior to the elapse of the term;
- through the waiver of the fiducia by all beneficiaries, unless the contract stipulates how it is that the fiduciary relations are to be continued in such as situation. All beneficiaries must issue waivers and all such statements must be subjected to the same registration formalities as the fiduciary contract. The termination shall come into force as of the completion date of the registration forms for the last waiver;
- pursuant to the opening of the insolvency procedure against the fiduciary or in the case of the legal entity's reorganization.

3. Conclusions

Now that we have reached the end of our brief review, it may be stated, as it actually also follows from the reading of the definition of fiducia in art.773 of the Civil Code, that its subject supposes three successive stages of the complex contractual procedure: the transfer of patrimony rights from the settlor to the trustee, the actual management of the patrimony mass in the beneficiary's favor, the transfer of the profit to the beneficiary, once or in successive stages.

Moreover, it should be mentioned that, under the sanction of full nullity, the fiduciary contract and the amendments thereto must be registered, upon the trustee's request, within one month as of its conclusion date, with the tax body holding jurisdiction over the management of the amounts due by the trustee to the general consolidated state budget [art. 780(1) of the Civil Code]. At the same time, according to the provisions in art. 780(2) of the Civil Code, in case the fiduciary patrimony mass comprises real estate property rights, they are to be registered, under the same sanction, with the specialized department of the local public administration holding jurisdiction over the management of the amounts due to the local budgets of the administrative and territorial where the building is located.

Finally, it should also be retained that, according to art. 780(4) of the Civil Coe, if the assignment of other rights requires the fulfilment of other special form requirements, a separate document shall be concluded, in compliance with the legal requirements. In these cases, the failure to register the contract for tax purposes shall trigger the application of the administrative sanctions stipulated under the law.

References

- Mona Lisa Belu – Magdo & Co, New Civil Code. Remarks, Doctrine and Case law, vol. I-III, "Hamangiu" Printing House, Bucharest, 2012
- David-Domițian Bolduț, Fiducia-Unusual Romanian Law Legal Operation (I), in "Romanian Business Law Magazine", issue 9/2014
- Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, Civil Law Course. Key Property Rights, 2nd issue, revisited and supplemented, "Hamangiu" Printing House, Bucharest, 2013
- Gheorghe Buta, Fiducia and Management of Another Party's Assets, "Universul Juridic" Printing House, Bucharest, 2017

[35] According to art.1173 (1) of the Civil Code, "The commutative contract is the one where the existence of the rights and obligations of the parties is certain, and the extent thereof is determined or determinable, as on the conclusion date".

[36] See art. 784 of the Civil Code, according to which "the trustee shall be remunerated according to the agreement between the parties, and in the absence of such an agreement, according to the rules applicable to the management of another party's assets", and the provisions in art. 793(1) of the Civil Code, "unless, according to the law, the incorporation deed or the subsequent agreement between the parties or to the concrete circumstances, the management is provided free-of-charge, the manager shall be entitled to a remuneration established through the incorporation deed or the subsequent agreement between the parties, under the law or, in the absence of such provisions, through a court order. In this latter case, the common practice and, in the absence of such a criterion, the counter value of the services provided by the manager shall also be taken into account."

- Gheorghe Buta Conflicts of Laws in the Field of Fiducia, in "Legal Studies and Researches", issue 4, October-December/2015
- Gheorghe Buta, The Lawyer and the Notary Public as Trustee, in "Romanian Case Law Magazine", issue 4/2016
- Rodica Constantinovici, in "New Civil Code. Comments per Articles" (coordinators Flavius Antoniu Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei), "C.H.Beck" Printing House, Bucharest, 2012
- Reinhart Dammann, Fiducia-guarantee and conflict of laws in France, translated by Alexandru F. Măgureanu, in "Romanian Pandects", issue 6/2013
- Nicoleta Diaconu, Law Applicable to Foreign Element Fiducia According to the Civil Law, in "Law" magazine, issue 9/2012
- Dan Adrian Doțiu, Enforceability of the Fiduciary Contract, in "Romanian Forced Execution Magazine", issue 4/2016
- Bujorel Florea, Civil Law. Key Property Rights, "Universul Juridic" Printing House, Bucharest, 2011
- Bujorel Florea, Certain Considerations Regarding the Fiduciary Contract as Regulated under the New Civil Code, in "Law" magazine, issue 8/2013
- Luminița Gheorghe, Fiducia in the New Civil Code: Fiducia in the New Civil Code: An Example of the Activation of the Relation between the Romanian Law and the Common Law by the International Business Law, in "Judiciary Courier", issue 3/20115
- Sergiu Golub, Fiducia. Legal Definition Review. Genus Proximum, in "Romanian Law Magazine", issue 11/2016
- Sergiu Golub, Fiducia. Legal Definition Review. Specific Difference, in "Romanian Business Law Magazine", issue 12/2016.
- Liviu Marius Harosa, Brief Considerations on Fiducia as Regulated by the New Civil Code, in "Romanian Business Law Magazine", issue 9/2013
- Cristian Jora, Civil Law. Property Rights in the New Civil Code, "Universul Juridic" Printing House, Bucharest, 2012
- Daniel Moreanu, Fiducia and Trust, "C.H.Beck" Printing House, Bucharest, 2017
- Daniel Moreanu, Fiducia and Trust. Definitions, Practical Uses and Key Differences, in "Legal Studies and Researches", issue 2, April-June/2014
- Vasile Nemeș, Fiduciary Contract, according to the New Civil Code, in "Judiciary Courier", issue 10/2011
- Ioan Popa, Fiduciary Contract Regulated by the New Civil Code, in "Romanian Private Law Magazine", issue 2/2011
- Roxana Mariana Popescu, Evelina Oprina, Fiducia and its Legal Consequences on Forced Executions, in "Romanian Forced Execution Magazine", issue 4/2011
- Cătălin R. Tripon, Fiducia, Result of the Interference of the Two Large Law Systems: Continental Civil Law and Anglo-Saxon Law. The concept, classification, evolution and validity prerequisites of fiducia, in "Romanian Private Law Magazine", issue 2/2010
- Luminița Tuleașcă, The concept of the trust in Romanian law, in "Romanian economic and business review"
- Iosif Robi Urs, Petruța Elena Ispas, Civil Law. Theory of Property Rights, 2nd issue, revisited and supplemented, "Hamangiu" Printing House, Bucharest, 2015
- Romanian Civil Code
- Law no. 51/1995 on the organization and practice of the lawyer profession
- Law no.36/1995 on notaries public and notary activities
- Status of the Lawyer Profession

USUCAPTION AS A MEANS OF ACQUIRING THE OWNERSHIP TITLE

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Abstract

According to the Civil Code in force, the ownership title may be acquired, according to law, by convention, legal or testamentary inheritance, accession, usucaption, as effect of the good-faith possession in case of movable assets and fruits, by occupation, tradition, as well as by court decision, when it is not conveyancing by itself. Moreover, according to the law, the ownership title may also be acquired by to the effect of an administrative act, and the law may further regulate other means of acquiring the ownership title.

Therefore, the usucaption is that modality of acquiring the ownership title and other main real rights by exercising an uninterrupted possession over an asset, within the term and under the conditions provided for by the legislation in force.

In Romanian modern law, referred to as acquisitive prescription, usucaption was first regulated in the Civil Code adopted on 1864, which stipulated two types, i.e.: short-term usucaption, of 10 to 20 years and long-term usucaption, of 30 years.

The institution of usucaption is justified, in relation to the situation of the owner, as the need for stability of the situations and of the legal relations imposes, at a certain time and subject to compliance with certain conditions provided for by the law, the acknowledgment of certain legal effects to the long appearance of property, until transforming a situation de facto in a situation de jure. Concurrently, as the courts also considered, in justifying the institution of usucaption one cannot put aside the situation of the former owner, meaning that, indirectly, the usucaption is also a sanction against the former owner's passivity, who waived his own good and has not been interested in it for a long time, leaving it in the possession of another person who behaved as owner or as holder of another main real right.

Depending on the nature of the asset susceptible of usucaption, the usucaption may be of two main types: immovable usucaption and movable usucaption. In its turn, immovable usucaption may be extra-tabular immovable usucaption and immovable tabular usucaption.

As one will establish during the study, the extra-tabular usucaption operates in favor of the holder of the asset representing the subject of an ownership title over an immovable asset that was not registered with the land register, tabular immovable usucaption operates in the favor of a person who is registered in the land register as the rightful onwer of a key immovable property right, only if the registration was maded without "legitimate grounds".

Keywords: *usucapio, right of ownership, possession, real estate usucapio, movable assets usucapio.*

1. Introduction

The article presents the usucapio as a modality of acquiring the right of ownership and other main real rights by exercising an uninterrupted possession over an asset, within the term and under the conditions provided for by the legislation in force. It should be mentioned that were taken into consideration the relevant dispositions of the Civil Code and the most important jurisprudence in the field.

2. Content

2.1. Means of Acquiring the Ownership Title

If in the 1864 Civil Code[1], the listing of the means to acquire the ownership title was *imprecise* and *incomplete*[2], being often criticized for the conflict it generated to the rules and principles of law[3], in the Civil code in force[4], art.557 with the marginal title "*Acquiring the Ownership Title*" orders, under paragraph (1), in a more rigorous and clearer systematization, that "*The ownership title may be acquired according to the law, by convention, legal or testamentary inheritance, accession, **usucaption**, as an effect of the good-faith possession in the case of*

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[1] Published with the Official Gazette no.271 of 4 December 1864, no. 7 (suppl.) of 12 January 1865, no.8 (suppl.) of 13 January 1865, no. 8 (suppl.) of 13 January 1865, no. 8 (suppl.) of 14 January 1865, no. 11 (suppl.) of 16 January 1865, no. 13 (suppl.) of 19 January 1865.

[2] For details, see Corneliu Bîrsan, *Civil Law. Key Real Property Rights in the New Civil Code*, "Hamangiu" Printing House, Bucharest, 2013, p.353.

[3] Claudia Vișoiu, Usucaption Procedure. Regulated by the 1864 Civil Code, Law Decree no. 115/1938 and by the New Civil Code, "Hamangiu" Printing House, Bucharest, 2011, p.9.

[4] Law no. 287/2009 regarding the New Civil Code, published with the Official Gazette of Romania, Part I, no. 511 of 24 July 2009. The Civil Code came into force on 1 October 2011, according to the Law no. 71/2011 regarding the enforcement of Law no. 287/2009 on the Civil Code, published with the Official Gazette of Romania, Part I, no. 409 of 10 June 2011 (hereinafter referred to as Official Gazette).

movable assets and of the fruit thereof, through occupation, Traditio, as well as by court order, if it involves property transfer as such" (our emphasis). Moreover, according to the law, the ownership title may also be acquired by to the effect of an administrative act (paragraph 2), and the law may further regulate other means of acquiring the ownership title paragraph (3).

At the same time, according to art. 557(4), except for certain situations stipulated under the law, in the case of fixed assets, the ownership title is acquired by registration with the real estate register, in compliance with the provisions in art.888 of the Civil Code[5]. According to art. 56(1) of the Law no.71/2011 on the enforcement of the new Civil Code, the provisions in art. 557 (4) only apply after the completion of the of cadaster works for each administrative-territorial unit and the opening, upon request or *ex-officio*, of the real estate registers for the respective properties, according to the provisions in Law no. 7/1996 on cadaster and real estate publicity, republished, as amended and supplemented[6].

It should be mentioned that usucaption should not be mistaken for occupation[7], regulated by art.941 of the Civil Code, and which is another primary means of acquiring title, even though the two institutions are similar, since they both are effects of possession.

2.2. Acquiring the Onwership Title through Usucaption

2.2.1. Preliminary Remarks and Notion

Usucaption, "this benevolent tribute of the law before this status quo-possession"[8], was first mentioned in Romanian Laws of the XII Tables (lex duodecim tabularum) of 449 BC and it was defined as "usus autoritas fundi biennium, ceterarum rerum annuus est usus", which imposed an ownership period of two years in the case of fixed assets and of one year in the case of movable assets[9].

In Romanian modern law, referred to as *acquisitive prescription*[10], *usucaption* was first regulated in the Civil Code adopted on 1864, which stipulated two types, i.e.: *short-term usucaption*, of 10 to 20 years (art.1895) and *long-term usucaption* (*logissimi temporis*), of 30 years (art.1890).

In the Civil Code enforced on 1 October 2011, usucaption, which the editors of the 1804 French Civil Code described as "*the most necessary for social order of all civil law institutions*"[11], is legally regulated in Book III (*On Assets*), Title VIII (*Possession*), Chapter III (*Effects of Possession*), where a number of 8 articles are dedicated to it (art.928-934 and art.939).

Usucaption is defined as "the means of acquiring the onwership title and other key property rights by exerting uninterrupted possession over an asset, within the term and under the conditions stipulated in the laws in force"[12]. Other opinions describe usucaption as "a means of acquiring the key property rights through the possession of assets representing their subject throughout the period stipulated under the law and through the positive exertion of the right of option with regards to the usucaption, as a discretionary option"[13], or "a means of acquiring the ownership title or other property rights concerning a certain asset, through the uninterrupted possession of the respective asset for the period set under the law"[14].

Usucaption, as a means of acquiring key property rights[15], has a complex structure reuniting the stricto sensu legal fact of possession with all the determinations imposed under the law and a unilateral legal act, i.e., the manifect will of the person interested in acquiring a certain key material right[16]. It may be stated that usucaption, as a manner of acquiring key

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[5] Art.888 of the Civil Code stipulates that the entry of the acquisition of an ownership title with the real estate publicity register is carried out "*on the basis of the authenticated notary document, of the final court order, of the heir certificate or on the basis of any other document issued by the administrative bodies, if so stipulated under the law.*"

[6] Published with the Official Gazette of Romania, Part I no. 459 of 25 June 2015. For a detailed review of the usucaption regulation, see Adrian Stoică, Anthony Murphy, *Review of Usucaption as regulated under the New Civil Code*, in "Dreptul" Magazine no.7/2016, pp.66-76.

[7] According to art.941 of the Civil Code, "(1) The holders of an asset pertaining to no one becomes the owner of the respective asset, by occupation, as of the date on which they came into the possession of the same, but only if such coming into possession abides by the legal provisions. (2) Stray assets are abandoned movable and fixed assets, as well as assets that, through their very nature, do not have an owner, such as wild animals, fish and living aquatic resources in natural fish habitats, forest fruit, spontaneous flora edible mushrooms, medicinal and aromatic plants and other such. (3) Movable assets of very low value or extensively damaged that are left in a public area, including on a public road or on public transportation means, are regarded as abandoned assets".

[8] For details, see Philippe Jestaz, *Prescription et possession en droit français des biens*, Recueil Dalloz-Sirey, 1984, Chronique, 5e Cahier, p.27, *apud* Eugen Roșioru, *Usucaption in Romanian Civil Law*, "Hamangiu" Printing House, Bucharest, 2008, p.1.

[9] Eugen Roșioru, *op.cit*. p.7.

[10] The Calimach Code, compiled by Christian Flechtenmacher and Anania Cuzanos, with the contribution of Andronache Donici, Damaschin Bojincă and of other jurists of the time, passed in 1817, regulated "*usucaption*" (art.1907) distinctly from "*extinctive prescription*" – "*loss of a right*" (art.1906), even though the two phrases are equivalent. See Eugen Roșioru, *op.cit*., pp.5-6.

[11] See the Recitals to the title "*De la prescription*", in Marcel Planoil, Georges Ripert, *Droit civil français*, t. III: *Les Biens*, Librairie Générale de Droit et Jurisprudence, ed. II-a, Paris, 1952, p.697, *apud* Ana Boar, *Certain Aspects Regarding the New Regulation of Usucaption in the New Civil Code*, in "Studia Universitatis Babeș-Bolyai, Jurisprudentia", no.4/2013, p.9.

[12] Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, *Civil Law Course. Key Property Rights*, 2nd issue, revisited and supplemented, "Hamangiu" Printing House, Bucharest, 2013, p.272.

[13] Valeriu Stoica, *Civil Law. Key Property Rights*, 3rd issue, "C.H. Beck" Printing House, Bucharest, 2017, p.363.

[14] Corneliu Bîrsan, *op.cit*. (2013), p.385.

[15] The High Court of Cassation and Justice, 1st Civil Division, Decision no.123 of 19 January 2017 passed in closed session, available at www.csj.ro (accessed on 04.02.2018).

[16] For details, see Corneliu Bîrsan, *op.cit*., p.386 and the following, Valeriu Stoica, *op.cit*., p.361 and the following

property rights, encompasses possession. In other words, "possession is an element of usucaption"[17].

Usucaption also is a *primary* means of acquiring property, but, at the same time, as the law courts have also statuated, in justifying the usucaption institution, the former owner status cannot be disregarded, in that usucaption indirectly also is a sanction against the passive attitude of the former owner who relinquishe its asset and left it unattended for a long period of time, leaving it in the possession of another person who behaved as the owner or holder of a different key material right[18]. Moreover, as Professor Corneliu Bîrsan also appreciated, usucaption "*concerns a legitimate general interest purpose, meant to favor legal security, by paralyzing the possible action for recovery of possession lodged by the actual owner*"[19].

2.2.2. General Scope

Even though in everyday activity it is stated that assets are acquired through usucaption, in reality, usucaption allows for the acquiry of the ownership title and of other key property titles over the assets representing the subject of these rights, such as: usufruct, superficies, and servitudes. In so far as easements are concerned, according to art.763 of the Civil Code, tabular usucaption allows for the acquiring of all types of servitude, whereas extra-abular usucaption only allows for the acquiring of positive servitudes[20]. Moreover, according to art.928 of the Civil Code, the holder may acquire the ownership title over the possessed asset or, as applicable, the ownership title over its fruit. Receivables may not be the subject of usucaption[21].

Usucaption may not apply in the case of public property fixed assets because both the Constitution of Romania, in art.136 (4)[22], and other regulations, such as the provisions in art.120 (2) of the Local Public Administration Law no.215/2001, republished[23], in art.5 (2) of the Law no.18/1991 on the Land Fund[24], stipulate that the assets that belong to the public or administrative-territorial unit domain are "inalienable, imprescriptible and unattachable". It should be further mentioned that fixed assets belonging to the state or administrative-territorial unit public property are "*imprescriptible both extinctively and acquisitively*"[25].

2.3. Types of Usucaption in the Civil Code System in Force

Depending on the nature of the asset susceptible of usucaption, the usucaption may be of two main types: *immovable usucaption* (art.930-934) and *movable usucaption* (art.939). In its turn, immovable usucaption may be *extra-tabular immovable usucaption and immovable tabular usucaption.*

2.3.1. Extra-tabular Immovable Usucaption

According to art.930(1) of the Civil Code, with the marginal title "*extra-tabular usucaption*", the ownership title over an immovable asset and its dismemberments may be entered with the land register, on the grounds of the usucaption, in favor of the party holding possession over the same for 10 years, if:

a) the owner entered with the land register is deceased or if the owner was a legal entity that ceased to exist;
b) the ownership waiver was entered with the land register;
c) the property was not entered in any land register.

In all cases, according to the provisions in pargraph (2) of the same article, the usucapant may only acquire the right if the land register entry application was submitted before a third party entered its own application for the registration of the title in its favor, on the basis of legitimate grounds, during or even after the elapse of the usucaption term[26].

According to art. 932(1) of the Civil Code, in the cases stipulated under art. 930(1)(a) and (b), the usucaption term only starts lapsing after the decease or, as applicable, the cessation of the legal existence of the owner, respectively after the entry of the property waiver application, even if the entry into possession occurred at a prior date. In other words, in the case stipulated in art.930(1)(a) of the Civil Code, the 10-year term starts lapsing as follows: as of the possession commencement date, if the usucapant starts exerting the possession over the property prior to the decease of the physical person or, as applicable, the cessation of

[17] Valeriu Stoica, *The Right of Option Regarding Usucaption*, in "Dreptul", Magazine no. 4/2006, p.47.

[18] See the High Court of Cassation and Justice, Panel of Judges for the settlement of certain legal matters, Decision no.24 of 3 April 2017, published with the Official Gazette no. 474 of 23 June 2017; the High Court of Cassation and Justice, Civil and Intellectual Property Division, Decision no.2550 of 31 March 2005, apud Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, *op.cit*., p.272.

[19] ECHR, Grand Chamber, Decision of 30 August 2007, passed in the case of J.A. Pye (Oxford) Ltd. and J.A.Pye (Oxford) Land Ltd vs. United Kingdom, §74, unpublished, www.echr.coe.int, *apud* Corneliu Bîrsan, *Civil Law. Key Real Property Rights in the New Civil Code,* 3rd issue, revisited and updated, "Hamangiu" Printing House, Bucharest, 2017, p.385.

[20] For details, see Irina Sferdian, *Servitude Usucaption in the New Civil Code*, in "Revista română de științe juridice" no. 1/2015, pp.59-71.

[21] Also see Rodica Peptan, *Usucaption in the New Civil Code*, in "Dreptul" Magazine, pp.12-13. For information on the regulation of usucaption in other law systems, see Dan Teodorescu, *Scope of Usucaption in the Austrian Law System*, in "Studia Universitatis Babeș-Bolyai, Jurisprudentia", no. 4/2009, accessible at https://studia.law.ubbcluj.ro/articol/316 (accessed on 06.02.2018).

[22] According to art.136 (4) of the Constitution of Romania, "Public property assets are inalienable. According to the organic law, their administration may be assigned to the public companies or institutions or they may be granted under concession or leased; moreover, they may also be granted for free use to public utility units".

[23] Republished in the Official Gazette no. 621 of 18 July 2006 and rectified in the Official Gazette no. 776 of 13 September 2006, where the texts were renumbered.

[24] Republished in the Official Gazette no. 299 of 4 November 1997.

[25] Corneliu Bîrsan, *op.cit.* (2017), p.386.

[26] For further information, please see Valeriu Stoica, *The Discretionary Right of Extra-Tabular Immovable Usucaption*, in "Revista română de drept privat", no. 3/2013, pp. 9-23.

the existence of the legal person entered as owner in the land register; as of the decease or existence cessation date of the owner entered with the land register, if the usucapant started exerting possession prior to the decease or cessation of existence.

Moroever, in the case stipulated in art. 930(1)(b) of the Civil Code, the 10-year term shall start lapsing: as of th entry date of the property waiver, if the entry into possession occurred prior to or even on this date; as of the possession commencement date, if the usucapant started exerting possession subsequent to the entry of the property waiver.

With regards to the situation stipulated in art. 930(1) (c) of the Civil Code, the 10-year term starts lapsing as of the possession commencement date[27].

However, as it also follows from the review of art. 930(2) of the Civil Code, for the three cases of extra-tabular usucaption, it is not sufficient to only exert useful possession, but, instead, it is mandatory that the usucapant submits the land register application before a third party enters its own application for the registration of the title in its favor, on the basis of legitimate grounds, during or even after the elapse of the usucaption term[28].

Pursuant to the above, it may be stated that in order to acquire a key property title by extra-tabular usucaption, certain conditions must be fulfilled, i.e.: the possession over the asset must extent over 10 years; the possession must be useful, i.e., untainted, because, according to art.922(1) of the Civil Code, it is only the useful possession that is able to produce legal effects[29] and the last condition is that the usucapant enter is title registration application in its favor before a third party enters its own title registration application, on the basis of legal grounds, during or even after the lapse of the usucaption term[30].

Finally, the specialized literature defines extra-tabular usucaption as "*the means of acquiring the private property right or a dismemberment of this right over a fixed asset by exerting the property title over such asset for 10 years, according to the legal provisions*"[31].

2.3.2. Tabular Immovable Usucaption

According to art. 931(1) of the Civil Code, "The rights of the person who was registered, without due grounds, with the land register as owner of an asset or holder of a different property right, may no longer be challenged if the person registered in good-faith possessed the immovable asset for 5 years as of the entry of the registration application, if the possession was not tainted". Moreover, paragraph (2) of the same article stipulates that "it is sufficient that the good-faith exists upon the entry of the registration application and upon the entry into possession"[32].

Starting from these provisions, Professor Corneliu Bîrsan has defined tabular immovable usucaption as "*the means of acquiring a key property right over an immovable asset through the exertion, by the person registered in the land register without legitimate grounds as the holder of the right, of untainted and good-faith possession for 5 years*"[33].

A review of the legal text (art.931 of the Civil Code) reveals that in order for tabular usucaption to operate, the following preconditions must be observed[34]:

- a real estate property right must be registered with the land register, without any legitimate grounds;
- the registered individual must have exerted useful possession over the asset representing the subject of the immovable property, i.e., the property must be untainted and in good-faith;
- the possession must extend for at least 5 years.

Generally, the phrase "without legitimate grounds" used in art. 931(1) of the Civil Code, as shown by Professor Valeriu Stoica, designates "*an invalid acquisition title, because it is affected by a cause of absolute nullity and which, in most cases, emanates from the actual owner, and from a non dominus*"[35].

Good-faith means "*the mistaken belief of the holder that he acquired the asset from the actual owner*". Good-faith must exist, according to the provisions in art. 931(2) of the Civil Code, upon the entry of the registration application and upon the entry into possession. The fact that the holder subsequently

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[27] Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, *op.cit*., p.230.

[28] Also see Sergiu I. Stănilă, *Exceptions from the Constitutive Nature of the Land Register Entry. Inheritance. Usucaption,* in "Revista română de științe juridice", no.1/2013, pp.200-209.

[29] According to art.922 of the Civil Code, "(1) Except for the situations stipulated under the law, only useful possession may produce legal effects. (2) Discontinuous, disturbed or clandestine possession is not regarded as useful. Until proven differently, possession is presumed useful". Also see Bujorel Florea, Civil Law. Key Property Rights, "Universul Juridic" Printing House, Bucharest, 2011, p.173.

[30] See Eugen Chelaru, *Civil Law. Key Real Property Rights in the New Civil Code,* 4th issue, "C.H. Beck" Printing House, Bucharest, 2013, p.437.

[31] Corneliu Bîrsan, *op.cit*. (2017), p.403.

[32] The provisions in art. 931 of the Civil Code on immovable usucaption only apply if the possession started after the enforcement date thereof. For the cases in which the possession started prior to this date, the provisions regarding usucaption in force as on the posession start date shall apply. Concerning the properties for which, upon the possession start date, prior to the enforcement of the Civil Code, no land registers were open, the provisions regarding usucaption in the 1864 Civil Code shall continue to apply (see art. 82 of the Law no. 71/2011).

[33] Corneliu Bîrsan, *op.cit*. (2017), p.406. For a review of tabular usucaption, see Marian Nicolae, *Tabular Usucaption in the New Civil Code. Material and Transitory (Intertemporal*) *Law Aspects*, in "Dreptul" Magazine, no.3/2013, pp.13-48.

[34] Regarding these preconditions, please see Valeriu Stoica, *op.cit*., (2017), p.395; Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, *op.cit.*, p.232; Corneliu Bîrsan, op.cit., (2017); Eugen Chelaru, *op.cit*., pp.436-437; Iosif Robi Urs, Petruța Elena Ispas, *Civil Law. Theory of Property Rights*, 2nd issue, revisited and supplemented, "Hamangiu" Printing House, Bucharest, 2015, pp.165-166; Cristian Jora, *Civil Law. Property Rights in the New Civil Code*, "Universul Juridic" Printing House, Bucharest, 2012, p. 290.

[35] For details, see Valeriu Stoica, *op.cit*. (2017), pp.394-395.

realized the error is of no relevance (*mala fides superveniens non impedit usucapionem)*[36].

The ownership title is acquired on the basis of the title entered with the land register, the acquisition time being the date of the application for the entry of the right with the land register[37].

2.3.3. Movable Usucaption

The possibility to acquire a movable asset by usucaption is, for the first time, regulated in the Romanian civil law[38]. Thus, according to art.939 of the Civil Code, "The person possessing another person's asset for 10 years, under other conditions than the ones stipulated herein, may acquire the ownership title, on the grounds of usucaption. The provisions in art. 932(2), art. 933 and 934 shall duly apply". Pursuant to the review of the aforementioned text, it may be noted that this actually is a subsidiary means, applicable to the holder who cannot invoke good-faith possession as a means of acquiring the ownership title over the asset.

Hence, movable usucaption may be invoked only if the following conditions are observed:

- the possession exerted by the holder must be useful, i.e., untainted. All taints shall suspend the course of the usucaption, in which case the provisions in art. 932(2) of the Civil Code shall apply, according to which "The tainting of possession suspend the course of the usucaption";
- the holder must possess the asset for 10 years, whether it is in good- or ill-faith[39].

As professor Gabriel Boroi & Co have shown[40], in "*the absence of explicit legal provisions, we only have to admit that movable usucaption does not apply retroactively, hence, the holder becomes an owner as of the elapse of the 10-year term, and not as of the possession commencement date*".

3. Conclusions

At the end of this research, it may be concluded that usucaption is a means of acquiring key property rights, but not a primary one of acquiring the ownership, which is why it is appreciated that it is the most necessary civil law institution, useful for social order, seeking a legitimate, general interest purpose, meant to favor legal safety.

Moreover, it may be noted that while *extra-tabular usucaption* operates in favor of the holder of the asset representing the subject of an ownership title over an immovable asset that was not registered with the land register, *tabular immovable usucaption* operates in the favor of a person who is registered in the land register as the rightful onwer of a key immovable property right, only if the registration was maded without "legitimate grounds".

References

- Corneliu Bîrsan, Civil Law. Key Real Property Rights in the New Civil Code, 3rd issue, revisited and updated, "Hamangiu" Printing House, Bucharest, 2017
- Corneliu Bîrsan, Civil Law. Key Real Property Rights in the New Civil Code, "Hamangiu" Printing House, Bucharest, 2013
- Ana Boar, Certain Aspects Regarding the New Regulation of Usucaption in the New Civil Code, in "Studia Universitatis Babeș-Bolyai, Jurisprudentia", no.4/2013
- Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, Civil Law Course. Key Property Rights, 2nd issue, revisited and supplemented, "Hamangiu" Printing House, Bucharest, 2013
- Ion P. Filipescu, Andrei I. Filipescu, Civil Law. Ownership Title and Other Property Rights, "Universul Juridic" Printing House, Bucharest, 2006
- Bujorel Florea, Civil Law. Key Property Rights, "Universul Juridic" Printing House, Bucharest, 2011
- Eugen Chelaru, Civil Law. Key Real Property Rights in the New Civil Code, 4th issue, "C.H. Beck" Printing House, Bucharest, 2013
- Philippe Jestaz, Prescription et possession en droit français des biens, Recueil Dalloz-Sirey, 1984, Chronique, 5e Cahiei
- Cristian Jora, Civil Law. Property Rights in the New Civil Code, "Universul Juridic" Printing House, Bucharest, 2012
- Marian Nicolae, Tabular Usucaption in the New Civil Code. Material and Transitory (Intertemporal) Law Aspects, in "Dreptul" Magazine, no.3/2013
- Rodica Peptan, Usucaption in the New Civil Code, in "Dreptul" Magazine
- Marcel Planoil, Georges Ripert, Droit civil français, t. III: Les Biens, Librairie Générale de Droit et Jurisprudence, 2nd issue, Paris, 1952
- Eugen Roșioru, Usucaption in Romanian Civil Law, "Hamangiu" Printing House, Bucharest, 2008
- Irina Sferdian, Servitude Usucaption in the New Civil Code, in "Revista română de științe juridice" no. 1/2015

[36] Ion P. Filipescu, Andrei I. Filipescu, *Civil Law. Ownership Title and Other Property Rights*, "Universul Juridic" Printing House, Bucharest, 2006, p. 320.

[37] Valeriu Stoica, *op.cit.* (2017), p.395.

[38] Iosif Robi Urs, Petruța Elena Ispas, *op.cit.* p.166.

[39] See Corneliu Bîrsan, *op.cit.* (2017), Valeriu Stoica, *op.cit.*, (2017), p.396; Eugen Chelaru, *op.cit*., p.441; Iosif Robi Urs, Petruța Elena Ispas, *op.cit.*, p.166.

[40] Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, *op.cit.*, p.234.

- Sergiu I. Stănilă, Exceptions from the Constitutive Nature of the Land Register Entry. Inheritance. Usucaption, in "Revista română de științe juridice", no.1/2013
- Valeriu Stoica, Civil Law. Key Property Rights, 3rd issue, "C.H. Beck" Printing House, Bucharest, 2017
- Valeriu Stoica, The Discretionary Right of Extra-Tabular Immovable Usucaption, in "Revista română de drept privat", no. 3/2013, pp.9-23
- Valeriu Stoica, The Right of Option Regarding Usucaption, in "Dreptul", Magazine no. 4/2006
- Adrian Stoică, Anthony Murphy, Review of Usucaption as Regulated under the New Civil Code, in "Dreptul" Magazine no.7/2016
- Dan Teodorescu, Scope of Usucaption in the Austrian Law System, in "Studia Universitatis Babes-Balyai Jurisprudentia", nr.4/2009, accessible at https://studia.law.ubbcluj.ro/ articol/316
- Iosif Robi Urs, Petruța Elena Ispas, Civil Law. Theory of Property Rights, 2nd issue, revisited and supplemented, "Hamangiu" Printing House, Bucharest, 2015
- Claudia Vișoiu, Usucaption Procedure. Regulated by the 1864 Civil Code, Law Decree no. 115/1938 and by the New Civil Code, "Hamangiu" Printing House, Bucharest, 2011
- Civil Code

SCHOLASTIC LEGAL ENTITIES

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Abstract

The purpose of this paper is to bring into light a newly appeared type of legal person unknown until now, or at least until the Education Law in 2011. Since nothing concrete has been made to implement this new type of legal entity in the general picture, except for some small decisions of the Ministry for Education, nowadays the practice and the fiscal administration forces this intro the reality of things.

A scholastic entity has on purpose only and that is to allow education services to be provided in an organizes manner. This entity is similar to a company, association or foundation but differs from all these by the fact that it does not have a patrimony of its own and it is funded by a financing entity which registers it and supports it in order that throw it to make the activity of education.

Long has the idea of education been debated if education is a profit or non-profit orientated activity or a mixed one. By compiling different rules from different laws, we may wet get a picture of what a scholastic legal entity should be and how it works, because it must be implemented to provide this service any more.

Keywords: *Legal entity, scholastic, financing entity, education, activity.*

1. Introduction.

A legal entity is fiction of the law that has legal capacity to assume right and obligations, to own assets and have liabilities and who has there main characteristics: (i) has personal patrimony composed of goods given to it by the founding members, (ii) has its own governing bodies, independent from the shareholders, that give purpose and conduct the will of the legal entity, (iii) has an independent scope, different from that of its shareholders, that is given by the founding members and declared from the beginning within the constitutive act of the entity. The scope may be either commercial (profit orientated), civil (non-profit orientated) or administrative (public legal entity)[1].

All legal entities must have at least one main domain in which to operate. Whether it is for profit or not, upon drafting the constitutive acts of a legal entity the founding members must declare a purpose and at least one main activity as a condition for the legal entity to be legally registered. Depending on the scope of the legal entity, there is the Trade Office for registering a profit orientated company[2], there are the Courts of Justice for registering a non-profit orientated company[3] and there are special registration conditions for public legal entities.

Scholastic activities are specified as one the activities that may be chosen by the founding members as a legal entity's main activity. Education is a form of activity[4] that, until recently could have been either profit or non-profit orientated. Lately the legislation tends to consider education as non-profit orientated activity and to regulate it by giving birth to a new legal entity specially tailored for education, with its own registry and set of rules.

Until now, should a person desire to provide education services, it may register either a profit-oriented company such as a limited liability company or a non-profit orientated company such as association or a foundation. But the discussion by the practitioners of law is long regarding whether education can be catalogued as a profit orientated activity since all education providers, regardless if they are private or public schools, are part of the national education system and serve a public purpose.

2. Definitions

Most of the terminology used in the education domain is defined by the Education Law[5]. This states in art. 22 that the national system for education is composed by all the public, private, confessional seminars or professional schools that are licensed to operate in Romania.

According to this law, education may be public or private. Also, education is pre-university or university level. The present article only refers to the pre-university level of education, giving mention of all sub

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[1] See G. Boroi, Civil law. General part. Persons., edition 4, 2010, Hamangiu printing, page 83 and next.

[2] See Law no. 26/1990 regarding the trade office, published in Official Gazette, part I, no. 49/1998.

[3] See Ordinance no. 26/2000 regarding associations and foundation, published in the Official Gazette, part I, no. 39/2000.

[4] All activities permitted by the Romanian law are listed in the Classification of activities of the national economy, which has the rank of a law, published in the Official Gazette , Part I, no. 293/2007. Education is listed as activity no. 85 and has many species.

[5] See National Education Law, no. 1/2011, published in the Official Gazette, Part I, no. 18/2011.

levels such as pre-school, junior school, high school or professional schools.

Also, from art. 22 mentioned above, the conclusion derives that the national education system is composed of scholastic entities that have legal entity status. This entities function under the direct control of the local county or prefecture.

By explicitly augmenting the law, the Ministry for Education in Romania has issued a series of explanatory directives regarding the creation, registration, legal regime and functioning of the scholastic legal entities. The most important of all is Directive no. 33675/28.02.2013 regarding the registration and obtaining of legal entity status by private scholastic entities. This Directive is arguing for the necessity of scholastic legal entities and setting some guidelines for newly or already existing companies that provide education services. This all so that all those who already provide such services, or wish to do so, may enter into legality and a pattern and order be achieved.

A definition of the scholastic entity may be found in Order no. 5472/2017 of the Ministry for Education[6], which regulates also the methodology regarding the national educational network. In art. 20 pt. b) of the Order one may find that the scholastic legal entity is any education entity fully or provisory licensed to provide pre-university education services, having a specific set of elements that define it: a constitutive act or a Court order, fiscal identification no, stamp and bank account.

Separately, the same Order regulates, at pt. c) of the same article, that there are also assigned scholastic entities which represent scholastic entity without legal entity status, being subordinated to a scholastic legal entity, this representing a branch of it to provide services in another location.

By interpreting the same Order, another terminology arises, that of the financing entity that registers and supports the above mentioned scholastic legal entities[7]. The financing entity is either a profit-orientated or non-profit orientated company, being registered in compliance with the law that governs its statute, that sets up as one of its activities to provide education services. Such an entity may have education as its primary or secondary activity. It may expand any of those other activities in accordance to the specific provisions of the law, but should it desire to actually provide education services it has to separately register a scholastic legal entity, thus becoming the creator and the supporting body for that new entity.

In conclusion, a scholastic legal entity is a sui generis form of legal entity, created and financed by a company, an association or a foundation, having independent patrimony and decision capacity, that emits no shares, by which education services may be provided on behalf of the creating entity.

3. Characteristics and conditions for functioning

3.1. A scholastic legal entity is mandatory henceforward. This conclusion derives from the explanatory directive issued by the Ministry for Education, that puts into effect the before unclear articles of Education Law no. 1/2011. Art. 92 (6) and 2541 (3) of Law no. 1.2011 mentioned the separation between the scholastic legal entity and the financing entity but do not define or explained the relationship between the two. Directive no. 33675/28.02.2013 sets clear the separation between both entities and also makes mandatory that, for the future, all entities that provide educational services are t be separated and special scholastic legal entity be created that has independent patrimony and leadership, also have a different judicial statute.

The Directive explains that the separation between the two entities comes from the need to catalogue all education service providers, thus creating a special register different from those that already exist and catalogue companies in general and also from different practices that can be found in different regions that need to be standardized. Non-the less, a unified taxation was taken into consideration.

Specifically, Directive no. 33675/28.02.2013 argues that under the provisions of Law no. 87/2006[8], which sets the preliminary conditions needed to be fulfilled by an aspirant to provide education services, most of the current situation may be summed up as the full company is registered as an education provider although it has may other activities that are under performance. In most cases the separation between the two entities war not made, resulting in the fact that scholastic activities were a simple extension of the company, association or foundation, with no independent legal or fiscal status. From this, first of all results an unclear transfer of funds for the education providing activity and other activities; secondly, the education personnel are not separated and enters into work contract with the company, association or foundation, and not with the scholastic entity, which is in direct violation of Law no. 1/2011 regarding national education; thirdly, although the license for education service provider has been issued no government funds for education may be accessed due to a lack of separation between the scholastic entity which is solely entitled to such funds.

[6] Order no. 5472/2017 of the Ministry for Education, published in Official Gazette, part I, no. 914 from 22 November 2017, for the underlining the no of schools distribution of scholars within the pre-university system among the scholastic entities and for issuing the bill for the organization of the national pre-university education network for the 2018-2019 school year. The Order contains a Methodology for implementation of the pre-university educational system. The order is issued every year and is applied to that specific school year.

[7] See art. 23 or 27 (2) of the Methodology for Order no. 5472/2017.

[8] Law no. 87/2006 for the validation of Government Ordonnance no. 75/2005 regarding quality standards in education services, published in Official Gazette part I no. 334/2006.

3.2. A scholastic legal entity is separated from its creator and financing entity but bears strong connections with it. Therefor it is a legal entity, having some characteristics of a legal entity, namely it has a it has separate governing bodies and leadership and it has a separate sole scope to provide educational activity (in contrast to a company, association or foundation which may have multiple activities). But although it my have its own patrimony the ownership of the assets is the financing entity.

Unlike a company, it does not issue shares. The point of a scholastic entity is not to create dividends for the shareholders, its organization resembles more towards an enterprise, as regulated by the Civil Code in art. 3. But it would be a mistake to catalogue it as an enterprise because it is a legal person thus having rights and obligations of its own not of the entrepreneur or members it is composed of like and enterprise. The only similarities between an enterprise and a legal person are that they both have an activity and use capital to realize that activity.

Speaking of activity, a scholastic legal entity is solely allowed by law to provide education services. The point of the legislator is to set once and for all that education is a non-profit activity but with a special legal regime. This refers to the fact that not only non-profit organizations may create and finance a scholastic legal entity but also a profit orientated company regulated by Company Law no. 31/1990[9]. But in all cases, who finances the company must not have any impact upon the nature of the activity, education must remain a civil activity. The Fiscal Code already provides such a distinction by setting a separate set of rules for taxation of pre-university educational services provides by a private entity, then those of a profit orientated company[10].

3.3. As mentioned in the definition given by Order no. 5472/2017 of the Ministry for Education, a scholastic legal entity must have a set of defining elements. All these elements must be met all at once.

Firstly, it must be created and registered based on either a constitutive act, a Court order or a public authority issued order. These possibilities come from the fact that education services may be provided by a private entity, in which case a constitutive act must be drafted by the financing entity, or by a public entity, in which case the hierarchically superior public entity must draft a public bill laying out the statute and rules of caring out the activity. A by ruling a Court of Law may give legal status to a scholastic entity should the financing person be a non-profit association or foundation, or in the case were the creating or registration of a scholastic entity is challenged in court for any reason, and the courts rules in favor of constituting it.

Secondly, it must have a fiscal identification number, different from that of the financing entity. This allows it to be a separate taxation subsect, to receive special fiscal privileges and to be able to access government funs for education.

Thirdly, it must have a special stamp. This stamp differs from the regular stamps of the financing entity because it is allowed to bear the name of the ministry of education and the emblem which are public domains and otherwise forbidden from usage by private persons. This stamp stays with the specially appointed manager or director who has the authority to sign on behalf of the scholastic entity and apply the stamp to all issued documents.

Fourthly, it must have both a treasury account and a special bank account opened on the scholastic entity's name. The treasury account serves the purpose of receiving government funds for education and paying taxes. The bank account serves for the current daily activities, such as paying salaries and bills.

Last, it must have all the conditions for obtaining the license to provide education services. This is more of a future functioning condition than a registration condition but it is very important. Unless the license is obtained, at least the provisory license, no activity may begin.

3.4. In close relation with the last above mentioned defining element, art. 27 of the Methodology for Order no. 5472/2017 states that after registration and obtaining the license to provide education services, the financing entity must report to the local public authority all the specific required date regarding the scholastic entity (constitutive act, designation, address, levels of schooling, contact info etc.) for the purpose of being included in the local school network. This is also a condition for functioning by the law.

3.5. Finally, in accordance with art. 21 of the Methodology for Order no. 5472/2017, the scholastic legal entity shall have its own budget and will keep the books separately form the financing entity, in accordance with the Accountancy Law no. 82/1991[11] and other public finance laws. The designated accountant shall have all the responsibilities given to him by these laws and must organize a separate accounting compartment even if it also keeps the books for the financing entity as well, due to the fact that scholastic entities receive government funds for education, for which he is directly liable.

4. Management and the relation with the financing entity

4.1. According to Law no. 1/2011 management of the scholastic legal entity and the financing entity must be separate. The director of such an entity is also the manager of it. As long as the conditions for being a director of a scholastic entity are met, anybody may be

[9] Law no. 31/1990 regarding companies, republished in Official Gazette no. 1066/2004.
[10] See art. 15 (1) pt. b) of the Romanian Fiscal Code from 2015 republished.
[11] Accountancy Law no. 82/1991 published in Official Gazette part I no. 454/2008.

named because nowhere in the legislation can be found that it must be a completely different person than one in connection with the financing entity. But managing the two entities, in respect to the specializes activities, the management must be kept different.

The directors of the scholastic entities are appointed by the management of the financing entity. The director must have all the qualifications required by law to occupy this position within the education system, in terms of professional, managerial skills and morality[12]. The act of appointment must be communicated to the educational public committee immediately after it was implemented[13].

The main responsibilities of a director are, in accordance to the same law[14], as follows:

- it legally represents the scholastic entity and manages it;
- it manages funds and budget;
- it is responsible for the conduct of all personnel and the success of providing education services;
- it may sign or terminate labor contracts with the tutors or other staff;
- coordinates all activities and makes reports or other obligations towards the public authorities etc.

The financing entity is free to appoint one or more directors and to set a hierarchy, making also a set of internal rules or instructions for conduct. Also, to set a duration for the term of a director and add to the conditions to be met for occupying this position. In the end, management rules and any other special rules may be set by the constitutive act of the scholastic entity and the director shall conduct its affairs in strict compliance to the law, the decisions of the board of directors of the scholastic entity and the internal regulations.

4.2. The relation between the scholastic legal entity and the financing entity must be based on a contract. Directive no. 33675/28.02.2013 does not nominate a specific contract but it gives examples such as a contract for administration, for lending money or goods either free or by means of retribution or for managing.

From all this, upon careful examination and in respect to the fiscal authorities who might not recognize the independent statute of the scholastic entity, it is recommended that a trust or a transaction contract be made. By this solution, the financing entity may support the scholastic entity with all the capital or goods it needs. Since the latter entity cannot support itself, as I have mentioned before, all the capital belongs to the financing entity in terms of ownership. The only personal funds of the scholastic entity are the governments funds for education that it is entitled to once a year.

The financing entity may only give away the necessary funding for all the activities of the scholastic entity, especially salaries for tutors, directors and other personnel, rent, maintenance etc. Therefor it must be pointed out that labor contract and all other contracts shall be signed by the scholastic entity by its directors, appearing as subject of right, but with the funds provided by the financing entity. As for expenditures this will be billed and registered in the accountancy books as of the scholastic entities but will also be funded by the financing entity. However, payment shall not be made directly from the financing entity to the tertiary party, but will be budgeted a couple of times a year to the scholastic entities bank account and it will pay all third parties. This idea comes from labor law who regulates in matters of labor contract that salary must be paid directly from employer to employee. Also fiscal law regulates that once a payment may be subject to tax deduction should it concern that legal entity and not another person.

At the end of the fiscal year, there is no need for the surplus of funds to be returned to the financing entity, but this operation may be made. If the capital remains in the scholastic entities bank account it may only be used to finance next years activity in the same manner (like we mentioned before, there are no shares therefore are no dividends). Under no circumstances may the governmental funds for education appropriated to the scholastic entity be given back to the financing entity, this being sanctioned as a possible fraud scheme.

As an intermediary conclusion, a trust or transaction contract is the best solution taking into consideration the present-day context of the law. This contract must lay the rules for payment, refunding, conditions for transfer, independent right of the scholastic entity to use the funds as it see fits under the provisions of the law and in accordance with its internal rules and board of directors decisions and especially a clause regarding a calendar for payments.

5. Conclusions and de lege ferenda proposals

It is clear that this entity is new and forming a complete analysis at this point is seemingly impossible. But a couple of things are clear, like the fact that education should be a non-profit activity and that having a registry for scholastic entities is a must have.

There is a good factor coming out of this lack of legislation, and that it the fact that practice will bring to light probably the best solution for how this new entity must fit in. But, this does not compensate for the fact that in other areas there is no legislation at all. Very important areas must be regulated, such as relation between entities, conditions for capital transfers between entities, defining terminology, setting criteria for governing and management, harmonization with other laws etc.

Sure, if a special law is incomplete one must apply the general law. But general law is vague and you

[12] See art. 254[1] of Law no. 1/2011, republished.
[13] See art. 60 of Law no. 1/2011, republished.
[14] See art. 97 of Law no. 1/2011, republished

have to cicle throw a lot of institutions in order to have an answer to a simple wet delicate question such as what is a the taxation of such an entity or can a scholastic entity be created and financed by both a profit or non-profit orientated company. This latter idea comes from the fact that education should be only non-profit but professional schools may not be. Again, there is no distinction and this is counterproductive for the demands of a modern economy, education being the fuel of this economy.

Non-the less, a start has been made and we expect in the next years to have a continuation either by means of regulations and laws or by practice which will force an alignment.

References

- Text G. Boroi, Civil law. General part. Persons., edition 4, 2010, Hamangiu printing
- Law no. 26/1990 regarding the trade office
- Ordinance no. 26/2000 regarding associations and foundation
- Classification of activities of the national economy
- National Education Law, no. 1/2011
- Order no. 5472/2017 of the Ministry for Education
- Methodology for Order no. 5472/2017
- Law no. 31/1990 regarding companies
- Romanian Fiscal Code from 2015
- Accountancy Law no. 82/1991
- Civil Code of Romania

SUCCESSORAL CAPACITY PECULIARITIES OF THE ROMANIAN ECLESIASTICAL STAFF – A CASE OF ANOMALOUS INHERITANCE

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Abstract

The present study aims at radiographing the condition of the legal capacity to inherit, situated at the confluence of two domains, the legal and the theological one, with convergence points, but also with some distinct consequences. Thus, the basic benchmark of the study focuses on one of the fundamental conditions of the individual to be able to exploit mortis causa of their cujus patrimony, the ability to inherit. From this perspective, the authors have proposed to analyze the particular situation in which the person called to inherit under the law is a person of a special status, belonging to the ecclesiastical staff. Thus, special situations are identified, which derogate from the common law, with derogatory consequences from the normative character of the successor transfer. This is the case of monk succession, which is subjected, as we shall see, to special rules that generate, in the case of legal devolution, an anomalous succession in favor of the Diocese or the monastery, with the total exclusion of legal heirs.

Using the systemic method, the authors submitted to interpretation both the provisions of the Civil Code and some norms with a special character, which represent a reference point in the analyzed issue. In the absence of any doctrinal assessments as well as jurisprudential solutions, the present study may represent a starting point for the consecration of this anomalous succession case and the different consequences it identifies.

Keywords: *legal inheritance, successoral capacity, church, monk, special law.*

1. Introduction

The question of law to be analyzed derives from an attribute inherent in the human being, materialized and constitutional in that "the right to inheritance is guaranteed"[1]. The imperative of protecting this right also confers the legitimacy and the guarantee of the right to inheritance, thus constituting its intangibility.

The present approach has as a starting point a somewhat special hypothesis of the right to inheritance, that of the capacity to inherit of a category of individuals with a special status, that is, the ecclesiastical staff, a situation which at first sight should not deviate from the rules of common law, the Civil Code making no reference in this case.

The hypothesis is intended, of course, to interpret the provisions of the Civil Code and some special norms, being subject to provisions of the Functioning and Organization Statute of the Romanian Orthodox Church[2] (Statute of the Romanian Orthodox Church), Part IV, lit. D "Provisions on the succession rights of hierarchs and monks", art. 192-194. Is the latter a normative act that implies an atypical character of the well-known principles of the devolution of the inheritance? In particular, did the Statute referred to have and play the role of a special law that removes the applicability of civil provisions in the matter?

In order to answer these questions, a minimum of rigour obliges us to state both the laws that become applicable and, above all, the text that states the special effects, even the ones that are derogating from the legal legacy of the monks, to which we also join a brief presentation of the categories of ecclesiastical staff, which are the subject of this discussion.

Although at first sight an analysis of succession capacity in the context of current civil regulation[3] may seem an easy subject, however, all human activity, regardless of the field, is based on the synthetic concept of civilian capacity, and its exercise according to the legal milestones and boundaries gives the individual the general and abstract ability to have civil rights and obligations through the conclusion of legal acts, an aptitude that has a great influence in the legal life of a person.

Man is the cause and purpose of the law, both of civil and divine law. Claiming a privileged place within

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[1] Article 46 of the Romanian Constitution refers to both legal inheritance and testamentary legacy. The Constitution was amended and supplemented by the Law on the Revision of the Romanian Constitution no. 429/2003, published in the Official Journal no. 767 of 31 October 2003 and entered into force on 29 October 2003.

[2] Text approved by the Holy Synod of the Romanian Orthodox Church by Decision no. 4768/2007 and recognized under Law no. 489/2006 on religious freedom and the general regime of denominations, through Romanian Government Decision nr. 53 of 16 January 2008, published in the Official Journal of Romania Part I, no. 50 of 22 January 2008.

[3] The general regulation of the matter of inheritance is ensured by the Civil Code, in Book IV, entitled "On Inheritance and Liberties", art. 953-1163 and is concerned with legal relations that produce their effects at the end of a person's life. Prior to October 1, 2011, there were also other normative acts affecting legacy (for example, Act No. 319/1944 on a surviving spouse inheritance rights). We appreciate that the unitary regulation of the matter is beneficial in a single normative act.

the civil law, the succession field reflects, in essence, the completion of a person's life course, as a "legal response to the natural occurrence of death."[4]

"Inheritance," according to jurisconsult Julian, is nothing more than the acquisition of the whole right that the deceased had."[5] In other words, the succession right comes to legitimize the posterity of the deceased person, the accumulated patrimonial values, because the legal norms regard primarily the family of the missing person. On the other hand, the civil life of the person, the earthly life of the individual, is not indifferent to the Church, for the laws established by canons have as sole purpose the "salvation of the faithful"[6]. If in legal terms the death of a dead person implies the cessation of the civilian capacity of the deceased, from a religious point of view, death is only "the separation of the soul from the body", the soul being immaterial and eternal.

According to art. 953 Civil Code, "the inheritance is the transmission of the assets of a deceased individual to one or more persons in existence"[7]. From the interpretation of this text in conjunction with the provisions on property, according to art. 557 par. (1) C. civ., "The right to property can be acquired, under the law, by convention, by legal or testamentary inheritance (...)" it follows that inheritance is a way of acquiring mortis causa property through which *de cujus*, the deceased person, passes his or her heritage to one or more persons in existence[8].

Analyzing the definition given by art. 953 Civil Code, we can state that legacy is the transmission of the de cuius patrimony to one or more natural or legal persons, as acquirers[9]. The patrimony of a natural person - all of the patrimonial rights and obligations - is the permanent companion of the person throughout their life. The patrimony (the patrimonial asset and liability) does not disappear with the individual's termination of life, it is a factual reality in search of a legal subject to be attributed to[10]. Therefore, there can be no patrimony without a subject of right. Inheritance law provides the legal solution to transferring the patrimony of an individual at their time of death.

On the other hand, among the means of "patrimony acquirement," the Church can be the recipient of both inter-vivos and mortis causa liberties. In terms of patrimony, as a form of acquiring church heritage, canonists considered both the testamentary heritage, the most common type and the *ab intestat* one. According to how the Church was or was not recognized at different historical moments, there is much evidence proving the faithful believers desire to write legal documents to churches, monasteries[11]. In addition to these wills, the *ab instestat* form of inheritance is also mentioned, without a testament. This succession took place when someone, capable of having some heritage, dies without a testamentary heir, and the beneficiaries were governed by law. If there were no legal heirs, "the fortune was attributed to the Church, and especially to the monasteries, to serve the salvation of souls."[12].

Thus, in view of the above, the Church, as a legal person, may be the beneficiary of ties, by way of the testamentary inheritance. Throughout the paper, there will be identified atypical situations that have been missed by the legislator in drafting the Civil Code, situations that allow us to appreciate that the Church, through its dioceses and monasteries, may have a "legal" successor capacity, under its own regulations, and not under those of ordinary law. Obviously, we will talk about the situation of an anomalous heritage. In this context, we will refer to the inheritance of ecclesiastical staff and other normative forms of legitimacy in the field. Thus, by distinguishing the succession rights of this category, provisions will be interpreted in the functioning and organization Statute of the Romanian Orthodox Church[13].

2. Considerations about ecclesiastical staff

In accordance with the canon law, we will highlight and analyze the relevant canonical-legal aspects of the domestic law regarding the ability of ecclesiastical staff to inherit by comparative reporting to Orthodox canonical norms, seen as "legal rules of Christian society[14]."

A. Laity (or layman) is a broad category recognized by the Church, which includes the totality

[4] Jozsef Kocsis, Paul Vasilescu, *Civil Law*, Bucharest, Hamangiu Publishing House, 2016, p 1. The authors justify the role of establishing the set of legal rules not in the sense of "patrimonizing death", but in order to provide legal solutions for the fate of the heritage temporarily left without a holder, establishing by their content the destination of the asset and or the successor passive.

[5] Hereditas nihil est quam successio in universum ius quod defunctus habuit.

[6] Ioan N. Floca, *Orthodox Canon Law. Church Law and Administration*, Volume I, Bucharest, IBMBOR Publishing House, 1990, p. 43. Starting from the classification of canonical norms as prospective, pastoral, pedagogical and teleological, the author surprises the teleological type with a well-defined purpose: the believers' salvation.

[7] Art. 1 of the Law no. 71 for the implementation of the Civil Code: "Inheritances opened before the entry into force of the Civil Code are subject to the law in force at the date of the inheritance."

[8] Francis Deak, Romeo Popescu, *Successor Law*, vol. I, Universul Juridic Publishing House, Bucharest, 2013, p. 19.

[9] Veronica Stoica, Laurentiu Dragu, *Legal Heritage*, Bucharest, Publishing House Universul Juridic, 2012, p. 14; Gabriela Lupșan, *Civil Law. Succesoral Law*, Galati, Danubius Publishing House, 2012, pp. 14-15.

[10] D. C. Florescu, T*he Right of Inheritance in the New Civil Code*, Universul Juridic Publishing House, Bucharest, 2012, p. 7.

[11] For details, dates, the role and status of the Church at various historical stages, see I. Floca, op.cit., Pp. 466-469; Arghiropol Ioan, What is meant by church wealth, Bucharest, 1937; Iorgu Ivan, The Church Goods in the First Six Centuries, Bucharest, 1937. Along with the simple bonds, universal or private, there were also the pious purposeful links, a real source of wealth.

[12] Ibid.

[13] Part IV of the BOR Statute, lit. D "Provisions on the succession rights of hierarchs and monks", art. 192-194.

[14] Constantin Dron, *Current Value of Canons*. Iași, Doxologia, 2016, p. 117.

of Christian believers, members of the Church, who do not have priestly status or the status of inferior servants of the Church[15]. From a confessional point of view, in order to have this secular quality as a member of the Church, the person in question must have received the Sacrament of the Holy Baptism. In other words, the layman is similar to the civilian law.

As a mere difference, within the civil law, the person acquires civilian capacity to use and implicitly to inherit, from the very birth or by exception, before birth, during the conception stage (provided that he is born alive[16]), while within canonical law, by receiving baptism, the individual acquires legal capacity of canon law, thus becoming a subject of rights and obligations from a canonical point of view. That difference, on the other hand, does not imply any dependency between the two areas. Thus, although he did not receive the mystery of baptism, the secular can inherit. Even the non-baptized, who do not belong to any ritual church, will not be religiously prevented from exercising their subjective right to inherit.

Thus, the layman - a majority of the ecclesiastical staff and a subject of the canon law, acquires legal succession capacity by applying the rules of civil law without any religious impediment.

B. The Clerics are all the priests established by ordination. Ordination[17] means "stretching out the hand," and ordination is the service through which the Sacrament or ministry of the priesthood is given or transmitted. By ordination, the consecration of the candidates for the steps of the higher clergy is done, namely the consecration to the deacon, the priest and the bishop or the bishop. Therefore, by clergy we understand the bishop, the priest and the deacon.

The Bishop represents the first and highest step of the clergy in the Orthodox Church. The bishop is that person chosen and sanctified through the sacrament of the priesthood, anointed in the upper episcopate by at least two bishops, to whom a diocese is usually given for pastoral care[18].

According to art. 130 of the Organization and Functioning Status of the Romanian Orthodox Church, "It is considered to be eligible for the service, the worthiness and responsibility of the Archbishop and the eparhial bishop any hierarchical member of the Holy Synod, starting from the vacant diocese, as well as any archimandrite or priest widow by death, fulfilling canonical conditions, who has a PhD or is a graduate in Theology and has distinguished himself through pure life, theological culture, ecclesiastical dignity, missionary zeal, and household abilities. The list of eligible hierarchs is drawn in descending order, starting with the vacant eparchy. "

It is important to note in the field of succession that the bishop can not be married.

The Priest - The Romanian explanatory dictionary defines the priest as "a person who officiates the religious cult, being, in this posture, a mediator between man and divinity and representing his fellows in the sphere of the sacred without disturbing it."

Article 123 of the BOR Statute stipulates that "ministers and deacons are recruited from doctors, Masters graduates and graduates of theological faculties, specialized in Pastoral Theology, who have held the priestly capacity examination." Among the main attributions of this category we can mention the following: it is the delegate of the chariarch in the parish, charged with the spiritual pastoral care of the faithful believers, and within the administrative activity he is the head of the parish administration, being the president of all the existing fora in the parish, Parochial Assembly, Council and Committee.

In their turn, the category of priests knows a subclassification, the priestly priests, the celibate priests and the monks priests, the last two categories being subject to distinct rules of inheritance and the capacity of inheritance. If the priest is ordained as an unmarried clergy (celib), he will no longer be able to marry after he has joined the clergy.

The deacon is the third hierarchical rank of divine institution, and serves as a helping hand to the bishop and priest in the sacramental and administrative life.

C. Monks are another category of ecclesiastical staff. Monks can be either clergy, or laymen. The monks form the third state of the church together with the clergy and laity. In short, a layman can embrace the monastic state, not necessarily haing to be a cleric[19]. These, through the monastic votes deposited at the entrance to monasticism - the vote of poverty, the vote of virginity, the vote of obedience, give up the worldly things. In ancient times the entrance to the monastic rank was similar to a civil death and a spiritual rebirth, which is one of the reasons why the monks were obliged to give up any present or future property prior to the deposition of monastic votes by donation[20] or by will.

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[15] The inferior servants of the Church are those persons who have received the ordination, consisting of a prayer which grants one of the steps of the lower clergy: the singer or reader and the hypo deacon that is, a lower step than the deacon and who do not represent sacramental function within the church.

[16] According to Article 36 of the Civil Code, "the rights of the child are recognized from the conception stage, but only if the infant is born alive".

[17] Ordination (< gr. *heirotonia* „the power of the hand") female noun (In the Christian ritual) The mystery of the priesthood in which, through the prayer of invoking the Holy Spirit, by blessing and sacramental laying of hands by the bishop (or two or three bishops) on the head of the sacerdotal ministers, they are consecrated into one of the three steps: deacon, priest, bishop.

[18] Explanatory Dictionary of Romanian Language, 2nd edition, Bucharest, Univers Enciclopedic Publishing House, 1996, p. 842.

[19] Liviu-Marius Harosa, *Canonic Law*, Bucharest, Universul Juridic Publishing House, 2013, pp. 93-94.

[20] For details on the donation contract and the causes of its revocation, see Mirela Costache, *Civil Law. Contracts. Course notes*, Galati, Editura Zigotto, 2013, pp. 66-80.

3. Legitimate legacy of ecclesiastical staff as a case of anomalous inheritance

As I have previously argued, if laymen and the priests of myrrh, who are categories of ecclesiastical staff, are subject to civil law on the capacity to inherit, a special category is the monastic rank.

It is interesting to analyze the interference of the norm with civil law by which the monk renounces the goods he has and to the future goods in favor of others. According to private law, it is forbidden to renounce the personal assets[21].

We can not capitalize the subjective right of the monk's legal inheritance, without briefly specifying the rules of welcoming to the monastic life. Among these conditions, with incidence in the current analysis, we observe the provision in art. Article 16 (g) of the Regulations on the Organization of Monastic Life and the Administrative and Disciplinary Functioning of the Monasteries[22]: "The person wishing to enter the monastic life is obliged to give proof of the military service and the declaration that he renounces his property by donating it to his relatives or monastery[23]." Moreover, according to art. 41 of the same regulations, "it is not permitted for the abbot and for any monk to possess personal goods such as: cars, houses, apartments, studios, plots etc. This state contradicts the rules of authentic monastic life and monastic votes. "

The way in which the Church acquires property over temporal goods[24], through inheritance, is that of the succession of goods belonging to monks and hierarchs, the main source being the provisions of the Regulations and the BOR Statute cited above[25].

The Chapter in the Statute with implication in the matter is inappropriately entitled "Provisions concerning the inheritance of hierarchs and monks". By proceeding to a minimum reading and interpretation of these provisions, no rules are identified regarding the succession capacity of the hierarchs, on the contrary, rules are laid down claiming the succession to their possessions, the specific vocation coming to the eparchies[26]. Thus, the title misleads us as to the deception of the spirit of the established norm.

Regarding the unitary character of the successor transmission that ensures succession equality to those who fulfill the legal conditions to inherit, established by the Civil Code[27], the incidence in the matter and other rules for the award of the patrimony are what the doctrine calls anomalous succession[28]. The competition of the Civil Code texts with those of the BOR Statute imprints an anomalous character in the case of the succession law of the Diocese to the hierarchs / monks' property, but with some reservations regarding their priority application.

As in the case of the civil law and regarding the texts of the Orthodox church law concerning the succession to the hierarchs and monks property, there is a conflict of laws, the reference moment being the year 2008, in which the new Statute entered into force, the old one being abrogated. In this case, according to the principle of non-retroactivity of the law, the devolution of property will be governed by the law in force at the date of its opening. We can therefore talk about:

a) successions to the assets of hierarchs and monks opened under the old statute, prior to January 22, 2008;
b) successions to the hierarchs and monks' assets after January 22, 2008.

In either case, the statute texts do not refer to the rules of inheritance devolution established by the civil norms, nor vice versa. Neither the provisions of the old Code or the Civil Code in force qualify the Statute as a special law. Neither the civil doctrine we have reported will identify as an anomalous succession in our case. We are in the position of finding a "legal fracture" in this case. Moreover, another particularity created by this type of succession refers to the fact that it creates succession rights to a legal person, other than the State or the administrative-territorial unit, in the sphere of legal inheritance, which is the Diocese. This is the result of the autonomous interpretation of art. 192 of the

[21] The patrimony is not transmissible through acts among the living.

[22] The Regulation for the organization of monastic life and the administrative and disciplinary functioning of the monasteries drawn up by the Holy Synod is an integral part of the BOR Statute, approved by the Holy Synod of the Romanian Orthodox Church by Decision no. 4768/2007 and recognized under Law no. 489/2006 on religious freedom and the general regime of denominations, through Romanian Government Decision nr. 53 of 16 January 2008, published in the Official Journal of Romania Part I, no. 50 of 22 January 2008.

[23] The one who wishes to join the monastic life is obliged to submit to the Chiliarch of the place a written request, accompanied by the following documents: a) the birth certificate; b) the baptism certificate; c) the graduation documents (if the applicant is a minor, they should be a graduate of the Secondary School, should have at least the consent of the parent or guardian; d) the criminal record; e) civil status certificate, which states that they do not have any of the family obligations stipulated by the Civil Code; f) the parish priest's recommendation; g) the military service document and statement that he renounces his property by donating his property and assets to his relatives or to the monastery; h) the medical record regarding the state of physical and mental health.

[24] By temporal good, in a narrow sense, only the thing that offers economic utility and can be approached is meant. For details on the classification of goods, see Liviu-Marius Harosa, op. cit., pp. 108-138.

[25] These norms are based on the provisions of the Apostolic Canon 40, the Canon 24 of the Fourth Synod of Antioch and the canons 22 and 32 of the Local Council in Carthage.

[26] Articles 192-194 of the Statute. Art. 192: "The dioceses have a vocation on all the successions of their hierarchs." Art. 193: "The goods the monks and monasteries brought with them or donated to the monastery when they joined monasticism, as well as those acquired in any way during their life within the monastery remain entirely the property of the monasteries they belong to and can not be subject to any subsequent claims." Article 194: "For the retired or withdrawn hierarchs, the Holy Synod will regulate their rights in accordance with statutory and church regulations."

[27] Veronica Stoica, Laurentiu Dragu, *op. cit*., p. 21.

[28] Regarding the typology and specificity of anomalous succession, see also Dan Chirică, *Treaty of Civil Law, Succesions and Liberties*, C.H. Beck, Bucharest, 2014, p. 8.

Statute: "The dioceses have a vocation upon all the property of their hierarchs." In the present case, it is a legal legacy, as it is known that the legal heir is recognized as a universal heir.

Thus, we believe that by assigning and recognizing unequivocally the status text of a vocation to all the succession wealth, a successor capacity of the Diocese is created in the legal legacy.

A) The successions to the goods of the hierarchs and monks opened under the old statute, prior to January 22, 2008

The situation of the anomalous heritage has as concrete reflection the provisions of the Statute of the Romanian Orthodox Church of 1948[29]: "The possession of the monks and monasteries brought with them in the monasteries, as well as that acquired in any way during monasticism, remains entirely to monastery of which it holds". As it can be seen, the Monastery, a canonical legal person of public law, has an exclusive vocation to the legal succession of monks and nuns. According to this vocation and the attributed succession capacity, the monastery had the highest inheritance, by excluding both the classes of legal heirs and the categories of heirs reserved by the civil law, the inheritance reserve covering the entire succession. As a consequence, the will attributed by the monk to a person other than the institution to which he belongs does not have legal effects. Can we appreciate that the monastery even became a legal heir with a special status? As an exception, retired hierarchs or returnees at the Monastery, although monks, could test within the available limits of share provided by art. 194 and art. 197 of the BOR Statute of 1948.

B) successions to hierarchs and monks' assets after January 22, 2008

Art. 192 of the current BOR Statute does not bring substantial changes in the content of the legal norm, stating that "the Dioceses have a vocation on all the succession property of their hierarchs." The same exclusive vocation attributed to the Eparchy and the same quality of the "quasi-legal heir". The civilian capacity to inherit is therefore returned to the dioceses. At the same time, art. 193 of the new Statute provides that "Goods monks and nuns brought with them or donated to the monastery entry into monasticism and those acquired in any way while living within the monastery remain totally to the monastery they belong to and may not be subject to subsequent claims."

In this regulation as well we can talk about an anomalous succession of the eparchy, namely of the monastery, over "all" the hierarchs, monks and nuns. At a first glance, it appears that the Eparchy's vocation is on all the goods of the hierarchs[30], but we consider that art. 193 circumscribes the succession only to the goods brought with or donated to the Monastery at the entrance to monasticism, as well as those acquired in any way during monastic life (ie, all goods).

Special attention should be given to the latter article, which provides "the property which the monks and nuns brought with them or donated to the monastery at the entry into monasticism and those acquired in any way while living in the monastery remain totally monastery belonging and they may not be subject to subsequent claims."

The same prohibition is also enshrined in the Law on Cults 489/2006[31], by art. 31 paragraph 1: "the goods which are subject to contributions of any kind - contributions, donations, successions - as well as any other property lawfully entered into the patrimony of a cult, can not be the subject of subsequent claims."

Again, we must negatively note the major inaccuracy of the text and the legal terms used, as well as the incompatibility with the principles of the civil law, as well as of the constitutional ones[32], in the sense that the text of the fundamental law defends and guarantees the right to property, implying here the possibility of claiming the goods from the hands of any person who unfairly holds them. Thus, if a literal interpretation is given to Art. 193, it would appear that third parties would no longer be able to use the claim, irrespective of the way in which their property became the possession of the monk and later of the monastery.

Neither the provisions of the Civil Code on Inheritance make any mention or refer to any special law governing certain situations, such as the present one, of the inheritance of monks and hierarchs. A legal fracture between the special provisions contained in the canonical rules and the statutes of religious cults and the rules of the civil law is not perpetuated, although the Canonical Codes of the Catholic Churches and the United Church with Rome[33] are part of the domestic law, based on the provisions of the Law of Cults, and the Statute of the Romanian Orthodox Church is new.

In Art. 5 par. 4 the Law of Cults states that "in their activity, religious cults, associations and groups have the obligation to observe the Constitution and the laws of the country and not to prejudice public security, public order, health and morals, as well as human rights and fundamental freedoms." However, the revised Constitution in 2003 states that the State defends and guarantees the right to property, thereby implicitly defending the right to property through the action for revocation. Even if there were no legal norms concerning the special succession of monks and hierarchs and the succession capacity of the Church (through its canons), a reference to canonical norms, an integral part of the Romanian legal system, would have been necessary.

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[29] Statute for the Organization and Functioning of the Romanian Orthodox Church in 1948, in force since February 17, 1949, issuing the Great National Assembly, published in the Official Bulletin of February 23, 1949.

[30] According to art. 192 of the BOR Statute.

[31] Law no. 489/2006 on religious freedom and the general regime of denominations, published in the Official Journal no. 201 of 21 March 2014.

[32] Art. 44 para. 2 of the Constitution: "Private property is guaranteed and protected equally by law, regardless of the holder".

[33] Regarding the types of norms established by the canonical codes of the Catholic Church and the Orthodox Church, see Liviu-Marius Harosa, *op. cit.*, pp. 96-97.

In the silence of the Code, we consider that, given the quality of a hierarch or a monk and the origin of the goods, the eparchies and the monasteries are the beneficiaries of an anomalous succession by virtue of which they have a vocation to the entire mass of the deceased, consisting of the goods brought with it or donated at the entry into monasticism, as well as those acquired in any way during the life of the monastery (as provided for monks, article 193 of the BOR Statute). Consequence that is in the field of the civil law: indirect exertion. We can also discuss here a legal exertion, both in the legal succession and the testamentary succession.

According to the rules of interpretation, the special law applies as a matter of priority. The general derogatory specialty is a legal principle which implies that the special rule is the one which derogates from the general rule and that the special rule is a strict interpretation of the case. Moreover, a general rule can not remove a special rule from application. Thus, the High Court of Cassation and Justice of Romania[34] ruled that the concurrence between the special law and the general law is solved in favor of the special law, even if this is not expressly provided for in the special law , and if there are inconsistencies between the special law and the European Convention on Human Rights, the latter has priority[35].

The conflict between the previous special law and the subsequent general law is solved by the concurrent application of the principles according to which the special rule applies with priority to the general rule - the general special exception - and a special rule can only be changed or abrogated by a special rule, a subsequent general rule.[36]

Therefore, we assume that in the competition between the two, the civil provisions do not apply in the matter of the anomalous succession we are discussing. Thus, strictly related to the goods brought into monachism by the Hierarch or monks donated to the monastery, to the Church (by its legal persons under public law) or to the Pastoral Diocese, or to possessions acquired in any way during the monastic life, and to which the hierarch or monk arranged during his life in favor of other persons, at the time of the opening of the succession, no heir reservist can have a vocation to succession.

4. Conclusions

As we have argued, the open legacies of the Hierarchs, monks, and monks are subject to special rules which, in the case of legal devolution, create an anomalous succession in favor of the Diocese or the monastery, with the complete exclusion of the legal heirs. The general rules established by the Civil Code do not apply, and doctrinal points of view do not yet exist.

Thus, the succession vocation of the legal heirs disappears in the situation where de cujus embraced one of the indicated forms of monasticism. Even when legal documents or wills are established in favor of the legal heirs, they can not be executed for the same reasons. By its rules, the BOR Statute here plays the role of a special law, in the sense of inadmissibility of the rules of common law established in the case of the successor inheritance of a natural person. .

References

- The Romanian Constitution of 2003
- The Romanian Civil Code
- Law no. 489/2006 on religious freedom and the general regime of denominations, published in the Official Journal of Romania no. 201 of 21 March 2014
- Statute of the Romanian Orthodox Church, text approved by the Holy Synod of BOR by Decision no. 4768/2007 and recognized under Law no. 489/2006 on Religious Freedom and the General Religious Regime, by Government Decision no. 53 of 16 January 2008, published in the Official Journal of Romania Part I, no. 50 of 22 January 2008
- The Statute for the Organization and Functioning of the Romanian Orthodox Church of 1948, in force since 17 February 1949, issuing the Great National Assembly, published in the Official Bulletin of 23 February 1949
- Explanatory Dictionary of Romanian Language, 2nd edition, Bucharest, Univers Enciclopedic Publishing House, 1996
- Jozsef Kocsis, Paul Vasilescu, *Civil Law*. Successions, Bucharest, Hamangiu Publishing House, 2016
- John N. Floca, *Orthodox Canon Law. Church Legislation and Administration*, vol. I, Bucharest, IBMBOR Publishing House, 1990
- Francis Deak, Romeo Popescu, *Successor Law*, vol. I, Universul Juridic Publishing House, Bucharest, 2013
- Veronica Stoica, Laurenţiu Dragu, *Legal Heritage*, Bucharest, Universul Juridic Publishing House, 2012
- D. C. Florescu, *Inheritance Law in the New Civil Code*, Universul Juridic Publishing House, Bucharest, 2012
- Daniela Negrilă, *Heritage in the new Civil Code. Theoretical and Practical Studies*, 3rd edition, revised and added, Bucharest, Universul Juridic Publishing House, 2018

[34] High Court of Cassation and Justice, Decision no. 33/2008, published in the Official Journal of Romania, Part I, no. 108 of 23 February 2009.

[35] v High Court of Cassation and Justice, Decision no.27 of 14.11.2011, File no. 28/2011, published in the Official Journal no. 120 of February 17, 2012, http://www.legex.ro/Decision-27-2011-118553.aspx.

[36] High Court of Cassation and Justice, Decision no. 13/2012, File no. 14/2012, accessed online at http://www.lege-online.ro/lr-DECISION-13%20-2013-(146010).html

- Arghiropol Ioan, *What is meant by church wealth*, Bucharest, 1937
- Iorgu Ivan, Church Goods in the First Six Centuries, Bucharest, 1937
- Ilioara Genoiu, *Right to inheritance in the new Civil Code*, Bucharest, C.H. Beck, 2012
- Constantin Dron, *The Current Value of Canons*. Iaşi, Doxologia, 2016
- Liviu-Marius Harosa, *Canonic Law*, Bucharest, Universul Juridic Publishing House, 2013
- Soreaţă Marieta, Legislative News on the succession introduced by the new Civil Code, Bucharest, Hamangiu Publishing House, 2013
- Gabriela Lupșan, *Civil Law. Succesoral Law*, Galati, Danubius Publishing House, 2012
- Dan Chirică, Civil Law Treaty, Successions and Liberties, C.H. Beck, Bucharest, 2014
- Mirela Costache, *Civil Law. Contracts. Course notes*, Galati, Editura Zigotto, 2013
- High Court of Cassation and Justice, Decision no. 33/2008, published in the Official Journal of Romania, Part I, no. 108 of 23 February 2009
- High Court of Cassation and Justice, Decision no.27 of 14.11.2011, File no. 28/2011, published in the Official Journal no. 120 of February 17, 2012, http://www.legex.ro/Decision-27-2011-118553.aspx
- High Court of Cassation and Justice, Decision no. 13/2012, File no. 14/2012, accessed online at http://www.lege-online.ro/lr-DECISION-13%20-2013-(146010).html

THE RIGHTS OF THE PERSONAL CREDITORS OF THE HEIRS IN THE INHERITANCE DIVISION

Silviu-Dorin ŞCHIOPU*

Abstract

As opposed to the situation of an asset that is in co-owner-ship, in the case of an inheritance the fraud of the personal creditors of an heir may occur more easily. That's why article 1156 of the Romanian Civil code regulates the rights of the personal (unsecured) creditors of the heirs regarding the inheritance partition.

The personal creditors of the heirs may request the partition of the inheritance on behalf of their debtor when the debtor, in the prejudice of the creditor, refuses or neglects to demand the partition. They may claim to be present at the voluntary partition or may intervene in the judicial partition in order to supervise that the partition is carried out correctly in accordance with the legal provisions. Also, creditors can request even the revocation of the partition either without being obliged to prove the fraud of the co-owners, when they requested to be present but the partition was done in their absence, either under the conditions of general law, situation in which the fraud of the heirs is no longer presumed, but they will have to prove it.

For a better understanding of their rights in the inheritance partition, this short overview presents, on the one hand, the means available to creditors to avert a possible fraud, and, on the other hand, how can they remove a fraud committed by the debtor against their interests within the inheritance partition.

Keywords: *inheritance partition (division), heirs, personal (unsecured) creditors, opposition to partition, revocation of the inheritance division.*

1. Introduction

Following the opening of the inheritance, when we have a plurality of heirs the *co-owned succession is born*, each co-heir receiving an ideal quota in the inheritance, none of them being the exclusive holder of an asset or of a material fraction of an asset.

In order to put an end to this state of co-ownership between co-heirs, in the sense that the inherited assets mutually owned are divided, in their materiality, among the heirs who thus become exclusive owners of their respective assets[1], the inheritance partition must intervene. As a result, the ideal undivided quota on the inherited assets is replaced, with exclusive rights of each of the co-heirs on some assets (values) determined in their individuality[2].

The end to this state of co-ownership between co-heirs is necessary because, according to art. 1156 paragraph (1) from the Civil Code[3], the personal creditors of an heir can not track the heir's part from the assets of the inheritance *before* the inheritance partition. In this context, the Romanian legislator regulated several rights for the benefit of the personal creditors of the heirs so that they could make their claims. Thus, the personal creditors of the heirs may request the partition of the inheritance on behalf of their debtor, they may claim to be present at the voluntary partition or may intervene in the judicial partition. Also, creditors can request even the revocation of the partition in case it was done in fraud of their rights.

Taking into account the above, for a better understanding of their rights in the inheritance partition, this short article presents, on the one hand, the means available to creditors in order to avert a possible fraud, and, on the other hand, how can they remove a fraud already committed by the debtor (heir) against their interests within the inheritance partition.

2. The purpose of regulating the rights of the personal (unsecured) creditors of the heirs in the inheritance partition

As opposed to the situation of an asset that is in co-owner-ship, in the case of an inheritance the fraud of the personal creditors of an heir may occur more easily by the fact that the co-owners may understand to one another that the part of the indebted heir should be less than it must actually be, for example, by assigning over-valued assets (with the occult payment of a balancing payment), so that his/her creditors will not be able to cover the debt, they may sustain that the debtor-heir must report a fictitious donation, which implicitly would diminish the heir's part from the succession assets, that another co-heir or a third part is the creditor of the inheritance or that certain movables are not part

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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.

of the succession. Likewise, there could be included easy-to-hide assets, including money, or unsalebles, in the debtor-co-heir lot, rendering a forced execution ineffective.

Due to these possibilities of fraud of the creditors' interests, so that their rights will not remain ineffective, paragraphs (2) and (4) of the art. 1156 from the Civil Code provide several rights for the benefit of the personal creditors of the heirs.

3. The rights of the personal (unsecured) creditors of the heirs in the inheritance partition

First of all, according to art. 1156 paragraph (2) from the Civil Code, „the personal creditors of the heirs […] *may request the partition* in the name of their debtor". Second of all, according to the same paragraph, they „may pretend *to be present at the voluntary partition* or *they may intervene in the judicial partition*". Third of all, according to paragraph (4), they „may request the *revocation of the partition* without being forced to prove the co-owners' fraud only if, although they had requested to be present, the partition was done in their absence and without being summoned".

Thus, the creditors of the heirs can get involved in the partition of the inheritance, either by provoking it or by intervening in the voluntary or judicial partition already started, the intervening creditors being able to prevent the possible fraud by their presence, or by requesting the revocation after the partition took place in order to remove a fraud committed by the debtor against their interests within the inheritance partition.

4. The right to provoke the inheritance partition (oblique action)

According to art. 1560 paragraph (1) from the Civil Code regarding the oblique action, the creditor whose debt is certain and exigible can exercise the rights and the actions of the debtor when the debtor, in the prejudice of the creditor, refuses or neglects to exercise them. As an exception, the creditor will not be able to exercise the rights and the actions which are closely connected to the creditor's person. Since the right to introduce the action for the inheritance partition is not a strictly personal right, as a particular application of the oblique action, the Civil Code provides, in paragraph (2) of art. 1156, that the personal creditors of the heirs may request the partititon on behalf of the debtor.

The existence of a right of the creditors to provoke the partition is required especially as, according to art. 1156 paragraph (1) from the Civil Code, the personal creditors of a heir can not track the heir's part from the assets of the inheritance *before* the succession partition. Consequently, if the debtor heir refuses or neglects to exercise the right to partition the inheritance, the creditors, by means of oblique action, could require the partition so that, subsequently, they would be able to make their claims. However, the other heirs mai obtain the rejection of the partition introduced by the creditor by paying the debt in the name and on behalf of the debtor heir.

In the hypothesis in which the creditors could make their claims through direct actions resulted from their legal relashionships with the debtors, the inheritance partition introduced by means of oblique action will be rejected if it turns out that the creditor only pursued an abuse of law, a vexatory purpose[4]. If the partition was already requested by the heirs, then the action of the creditors would lack the interest, leaving them only the right to intervene[5].

5. The right to participate in the inheritance partition (right of intervention and opposition)

The right of the personal creditors to participate in the inheritance partition used to be named in the doctrine „*the right of opposition*[6] *(of intervention)"*, name that was taken in the marginal name of the art. 894 of the 2004 Draft of the new Civil code [7]. However, the Amending Commission of the 2004 Draft of the new Civil code mentioned that the name „*opposition to partition*" is *improper* because the creditors do not oppose to partition, but they demand a certain way of realizing it. For reasons related to getting accustomed with the name we prefer to continue to use it, obviously with the limitations expressed by the Amending Commission.

As we have seen, the opposition to partition has the purpose to avoid the fraud of the interests of the creditors by the heirs. Thus, according to paragraph (2) of the art. 1156 from the Civil Code, the personal creditors of the heirs may pretend *to be present at the voluntary partition* or *they may intervene in the judicial partition.*

As the Civil Code specifies in art. 1409 that the creditor could, even before meeting the condition, do acts to conserve his or her right, and the opposition or the intervention to the partition is an act of conservation, this also gives benefits to the creditors

[4] See Valerius M. Ciucă, Procedura partajului succesoral (The Procedure of inheritance partition) (Iași: Polirom, 1997), 184, n. 431.

[5] 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), 766.

[6] See Francisc Deak, *Tratat de drept succesoral (Treatise on Succession Law)*, (Bucureşti: Universul Juridic, 2002), 515.

[7] See Proiectul Noului Cod Civil (The Draft of the New Civil Code) (Bucharest: C.H. Beck, 2006), 183.

whose debts are affected by a condition or a term[8]. In the case of a plurality of creditors, the opposition exercised only by one of them produces effects only in favour of the opposing creditor, excepting the situation in which the debt is joint, that is in the case of an active solidarity when the opposing creditor represents the other joint creditors, or in the situation when the claim is indivisible and the creditor is deceased but he/she has more heirs but only one of the heir of the creditor made opposition[9].

The law does not provide a certain way in which the opposition must be made, so that the jurisprudence considered that to be valid *any act from which would clearly result the intention of the creditors to oppose the partition* (e.g. notification to co-owners through court bailiffs or by simple or recommended letter, the fulfillment of an act from which results the intention of the creditor to take part in the partition, as in the case of a request of partition made by the creditor by means of an oblique action etc.) For the opposition to take effect it is enough that all the co-heirs get acquainted with it. The opposition can be made until the partition becomes final (until the date of the settement of the judicial partition by the court or until the conclusion of the partition convention by the co-heirs in the case of the voluntary partition), that is, aslong as the partition operations are in progress[10].

If the creditors asked to be present at the voluntary partition or to intervene in the judicial partition process, the co-heirs are obliged to call them to all the partition operations, and the creditors have the right to supervise the partition being able to oppose to the acts that would be done in their fraud, without being able to interfere in the partition operations. So the rights of the creditors are limited to the faculty to control the partition, to be carried out correctly in accordance with the legal provisions.

Consequently, the opposition produces a number of legal effects. First of all, the creditor who exercised the right of opposition must be called to participate in the partition operations, no matter if the partition is voluntary or judicial. If the creditor was not supoenaed, the creditor would be able to attack the partition by means of revocative action (Paulian), in this case the fraud of the heirs being presumed.

Second of all, the creditor has the right to supervise the regularity of the partition, especially in what concerns the evaluation of the assets, the composition of the lots (forming the lots equal in value) and their assignment, but the creditor cannot claim that the partition should be done in accordance with his interests (e.g. he cannot claim that a certain asset should be assigned to his debtor). Likewise, the creditor can not claim that the partition should be done by means of a trial when the co-heirs agree to do it by private agreement, and nor can it prevent the making of a donation report when proven that the conditions for its realization regarding its debtor are fulfilled.

Third of all, opposition values deduction (seizure), solution admitted under the old Civil Code by the judicial practice and by the doctrine[11], in the sense that the succession assets that fall into the heir's lot become unavailable, that is the debtor can not alienate them, because otherwise the opposition would be devoid of the purpose for which it was conceived[12]. Likewise, nor can he recover the sums that are due to him from inheritance[13].

No least, the creditor who did not oppose the partition may require its revocation only under the conditions of general law (art. 1562 Civil Code), situation in which the fraud of the heirs is no longer presumed, but he will have to prove it.

6. The right to request the revocation of the inheritance partition (Paulian action)

Regarding the right to request the revocation of the inheritance partition, the Civil Code dispenses in art. 1156 paragraph (4) that „The creditors may request the revocation of the partition without being obliged to prove the fraud of the co-owners only if, even though they requested to be present, that partition was was done in their absence and without being summoned. In all the other cases, the action in the revocation of the partition remains subject to the provisions of the art. 1562." According to paragraph (1) of the art. 1562 from the Civil Code regarding the *revocative action*, the creditor, if he proves a prejudice, may request that the legal acts concluded by the debtor in breach of his or her rights be declared unenforceable, like the ones through which the debtor creates or increases his state of insolvency.

[8] 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), 768.

[9] 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, 208.

[10] I. Rosetti-Bălănescu, Ovid Sachelarie, Nic. G. Nedelcu, *Principiile dreptului civil român (The Principles of Romanian Civil Law)* (Bucureşti: Editura de Stat, 1947), 588-589.

[11] See Dan Chirică, Tratat de drept civil: succesiunile şi liberalităţile (Treatise on Civil Law: Successions and liberalities) (Bucharest: Hamangiu, 2017), 489.

[12] See Doina Anghel, Partajul judiciar în reglementarea noilor coduri (The Judicial Partition in the New Codes), (Bucureşti: Hamangiu, 2015), 339. For the contrary opinion, 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), 774-775.

[13] See Mihail Eliescu, Transmisiunea și împărțeala moștenirii în dreptul R.S.R. (The Transmission and Partition of Inheritance under the S.R.R. Law) (București: Editura Academiei R.S.R., 1966), 281.

From the above-mentioned results that, in the case that, although the personal creditors of the heirs asked to be present, the partition was done in their absence and without being summoned, these, being extempt from proving the fraud of the copartner heirs, could request the revocation of the partition under conditions lighter than the ones of the creditors who had not exercised their right of opposition.

If the creditor, although *he exercised his right of opposition*, was not summoned, he may attack the partition act by means of a revocative action (Paulian) simplified in the sense that *the fraud of the heirs is* presumed. The partition in the absence of the opposing creditors determins the overturning of the presumption of good faith, transforming it into a presumption of fraud[14]. The creditor who *did not* oppose could request the revocation of the partition only under the conditions of the general law, situation in which the fraud of the heirs will no longer be presumed, but it should be proved.

In the end, we specify that the period of prescription in the case of the Paulian action is of one year and it starts, according art. 1564 from the Civil Code, from the date in which the creditor of the heir knew or was supposed to know the prejudice resulted from the succession partition.

7. Conclusions

The Romanian legislator, separately from the rights of the personal creditors of the co-owner regulated in the art. 679 from the Civil Code, stipulated a special norm regarding the situation of the personal creditors of the heirs just because of the particularities of the inheritance partition, as opposed to the usual partition of an asset. Thus in the art. 1156 from the Civil Code were regulated both the means available to creditors to avert a possible fraud, and the possibility to remove a fraud committed by the debtor against their interests within the inheritance partition.

The means available to creditors to avert a possible fraud include the right to provoke the inheritance partition (oblique action), in the absence of the partition the personal creditors of a heir not being able to track his part in the assets of the inheritance to make the claims, and the right to participate in the inheritance partition (right of intervention and opposition), which allows the creditors to control the partition so that this should be exercised corectly respecting the legal dispositions. We also have to mention that, *de lege ferenda*, it would be necessary to clarify the effects of the right to participate in the inheritance partition (right of intervention and opposition) in the sense of the express regulation of freezing the succession assets that fall into the lot of the debtor heir, in the limit necessary to the providing of the creditor who opposed, thus ensuring the claim of the latter.

Subsequent to the partition, the removal of a fraud committed by the debtor against their interests within the inheritance partition could be done due to the Paulian action which allows the creditors of the heirs to revoke the partition done with the fraud of their interests.

References

- *** Proiectul Noului Cod Civil (The Draft of the New Civil Code), Bucharest: C.H. Beck, 2006
- 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
- Doina Anghel, Partajul judiciar în reglementarea noilor coduri (The Judicial Partition in the New Codes). Bucureşti: Hamangiu, 2015
- Gabriel Boroi, Carla-Alexandra Anghelescu, Bogdan Nazat, Curs de drept civil: drepturile reale principale (Course of Civil law: Main Real Rights). Bucureşti: Hamangiu, 2013
- Dan Chirică, Tratat de drept civil: succesiunile şi liberalităţile (Treatise on Civil Law: Successions and liberalities). Bucharest: Hamangiu, 2017
- Valerius M. Ciucă, Procedura partajului succesoral (The Procedure of Inheritance Partition), Iași: Polirom, 1997
- Francisc Deak, Tratat de drept succesoral (Treatise on Succession Law). Bucureşti: Actami, 1999
- 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
- Mihail Eliescu, Transmisiunea și împărțeala moștenirii în dreptul R.S.R. (The Transmission and Partition of Inheritance under the S.R.R. Law), București: Editura Academiei R.S.R., 1966
- I. Rosetti-Bălănescu, Ovid Sachelarie, Nic. G. Nedelcu, Principiile dreptului civil român (The Principles of Romanian Civil Law), Bucureşti: Editura de Stat, 1947

[14] See Ciucă, Procedura partajului succesoral (The Procedure of inheritance partition), 185.

THE EXERCISE AND LIMITATIONS FOR THE EXERCISE OF NON-PATRIMONIAL RIGHTS AND OBLIGATIONS OF THE SPOUSES

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Abstract

The evolution of contemporary private law is due to the recognition of the importance of human rights, knowing a real progress in the last period of time, which has led to the promotion and protection of the person's subjective civil rights. It is very important that, in addition to legal coercive values, society should accept the importance of civil subjective rights and respect them. Correspondences to civil subjective rights are the obligations, and in terms of family law, the personal obligations of spouses are of particular importance.

In order not to be ineffective, these rights must be applied rationally and it is necessary that they come to defend the injured person both physically and mentally. It is very important that, in addition to legal coercive values, society should accept the importance of civil subjective rights and respect them. Although at European level we can observe an exponential increase of the values protected by the adoption of the European Convention on Human Rights and its implementation from the adoption until now in Romania the respect of the civil subjective rights remains at the discretion of each individual, force can not cover all the cases that may arise.

Correspondences to civil subjective rights are the obligations, and in terms of family law, the personal obligations of spouses are of particular importance.

The husband's personal rights and obligations are inseparable from spouses and can not be alienated. They can not be the subject of the matrimonial agreement or of any other contracts. This provides an essential principle of family law - the equality of spouses in family - and excludes any attempt to violate it by concluding legal acts. Equality of spouses in rights derives from all social relations based on the Universal Declaration of Human Rights, the Convention on the Political Rights of Women, adopted by the United Nations on 20 December 1952, the Convention on the Elimination of All Forms of Discrimination against Women adopted on 18 December 1979, Civil Code.

Keywords: *non-marital rights and obligations of spouses, cohabitation, fidelity, name.*

Introduction

The current civil law brings important changes in the sphere of private law institutions. By introducing several special laws into the Civil Code, romanian legislator sought the harmonization of civil law and the uniformity of non-unitary judicial practice. Family relationships enjoy a new, modern approach that seeks to meet the needs of contemporary family life.

The new civil regulation brings significant changes to marriage although innovative in relation to previous regulation, the solution offered by the legislator is limiting and, therefore, criticism may occur from this point of view. Legislation should be more flexible in the sense of introducing the possibility of concluding customized matrimonial conventions to enable spouses to determine non-patrimonial issues.

1. The obligation of cohabitation

Under article 309 (2) civil code, spouses have the obligation to live together.[1] In some situations they can live separately, for example: to pursue a profession, health care, training, etc.[2] The refusal of one of the spouses to live together may constitute grounds for divorce thoroughly. [3] Traditionally the wives have a duty to live together, because the purpose of marriage is to live a life in common. This obligation does not imply, however, that either spouse may be compelled to cohabitation, through coercive measures.[4]

1.1. The choice of domicile

The Romanian legislator gave the possibility for spouses to choose their domicile or residence. As a legal principle common to the spouses, housing is where they live constantly dwelling on, i.e. they choose by mutual agreement. Domicile is, in principle, the result of a voluntary act. The choice of the place of residence of the spouses disagree about is can

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[1] Prof. Dr. Teodor Bodoaşcă, family law, 3rd Edition, Rev., Bucharest, Editura Universul Juridic, 2015, p. 94

[2] Tribe., dec. civ. No. 546 of March 6, 1973, in 1974, CD p. 169; Tribe., dec. civ. No. 1334 from 1970, in 1970, pp. CD 114-117; Tribe. jud. , Dec. civ. No. 849 of 18 September 1986, CD nr. 2 of 1987, p. 65.

[3] Ion P. Filipescu, Andrei i. Filipescu, treatise on family law, 6th Ed. All Beck, Bucureşti, 2001, p. 41

[4] Aurelian Ionascu, Mircea Mureşan Mircea b. Carter, Victor Stewart, the family and its role in the socialist society, ed. Dacia, Cluj Napoca, 1975, p. 109

materialize through expressing one of the spouses to change his place of residence or the desire to establish separate residences. [5]

1.2. The residence of spouses and family housing

The actual location where the family is probably more important for the majority of the couples than the notion of residence or domicile[6]. In proclaiming the equality of spouses in family housing choice, the legislator had to ensure equality and same spouses in respect of ownership rights to dwellings. So the wife cannot, one without the other, to avail itself of the right of ownership of the dwelling or to goods falling within its membership.

This co-insurance-management of family housing thus protects each spouse against the other acts on them may end alone and that would endanger the common dwelling property. Therefore, this community of life for the spouses (and their children) is ensured through common housing.

Through art. 321 of the Civil Code shall be suburban home defines the term family as custom-built municipality or, failing the spouses, the spouse dwelling upon which lies the children. These legal provisions relating to housing family double perspective: that of the residential building and that of family life. As a consequence of the Declaration of the building housing the family is that the spouse who is not the owner may oppose acts of disposition over the property, even though it is the exclusive property of the other spouse. In this situation the husband owner cannot dispose of his rights over the property without the consent of the other spouse, in the event of a sale, mortgage: usufruct, waiver of a right, lease, etc. There are stipulated provisions regarding family housing assets. In order to avoid any abuses, you can straighten the owner spouse against spouse who opposes such action being within the competence of the Court of guardianship.

Another issue concerns the situation of spouses who live in a property held under a lease. So, in this case, each spouse will have a housing law. In the event of a divorce each of the spouses will have their own right to live in housing rented, will be determined by the Court which of the two spouses to retain the right, depending on the needs of each.

1.3. Evacuation and protection order

In practice, several difficult situations have been shaped and the question is whether one of the spouses has the opportunity to obtain, through the court, the evacuation of the other spouse from the joint house, but the opinions were contradictory. However, we believe that an evacuation action is admissible because most situations are critical and require the protection of the spouse who formulated the action. The evacuation[7] of the other spouse may be requested for reasons leading to the impossibility of continuing coexistence, such as domestic violence, which could seriously endanger life, body integrity, health of the other spouse or members family.[8] The evacuation solution is temporal and has no consequence of the loss of ownership of the house.

According to article 23 of Law No. 217/2003 for the prevention and combating of family violence, republished[9], the person whose physical or mental integrity is endangered, may ask the Court for a protection order.[10] This measure is provisional and requires certain obligations and prohibitions imposed to protect the injured spouse

1.4. The property consequences of the absence of cohabitation

As regards the heritage consequences of the absence of cohabitation we will refer to the contribution of the spouses to household expenditure. Thus, the refusal of one of the spouses to Cohabita does not prevent the other spouse from getting a contribution from his husband to household expenditure, even more so as they have children together.

But if the link between the contribution and the common residence is not or is no longer compulsory, the courts will tend to link the obligation to contribute and the legitimacy of this refusal of life in common. Therefore, in the light of the circumstances of the case, the courts may oblige the spouse who refuses to coexist to contribute to the expense of the other spouse.[11]

1.5. The separation in fact of the spouses

A husband may refuse the cohabitation, both in his marital aspect and in his material aspect, that of living in the same house. Separation can also be the result of the common will of the spouses. However, in order for the factual separation to be a good reason for divorce, it is necessary to pass a period of two years.[12]

As a sociological phenomenon that the law cannot ignore, de facto separation may be amicable or solicited by one of the spouses. This is manifested by the choice of a separate residence by one of the spouses. Its duration will depend only on the will of the spouses.

[5] M. Avram, N. Nagaraju, matrimonial regimes, Ed. Hamangiu, Bucharest, 2010, p. 116
[6] Ioan Albu, family Law, Ed. Didactic and Pedagogical, Bucharest, 1975, p. 111
[7] Prof. Univ. Dr. Teodor Bodoaşcă, Family Law, 3rd edition, Rev., Bucharest, publishing House of the Legal universe, 2015, p. 95
[8] Ion P. Filipescu, Andrei I. Filipescu, treated by family Law, ed. VI, ed. All Beck, Bucharest, 2001, p. 42
[9] Law No. 217/2003 for the prevention and combating of family violence, republished, M. Of. No. 205 of 24 March 2014
[10] Emese Florian, Family Law. Marriage. Matrimonial regimes. Parentage. Edition 5, Ed. C. H. Beck, Bucharest, 2016, p. 93
[11] Judicial practice Fractional Instances: Civic 1, May 8, 1979, Civil Bull I, No. 135, D. 1979. IR 495, Obs. D. Martin; Civ. 1, 16 Feb. 1983, D. 1984. 30, note J. Revel, and the case-law cited; Adde: Bordeaux, January 8, 1985, Cah. Around. Aquitaine 1985, 66; Civ. 1 7 November 1995, Nr. 92-21.276, Bull. Civ. I, No. 394, Dr. and Shabeena., 1996, p. 72, Obs. A. Bénabent, RTD Civ. 1996. 227, Obs. B. Vareille
[12] Emese Florian, Family Law. Marriage. Matrimonial regimes. Parentage. Edition 5, Ed. C. H. Beck, Bucharest, 2016, p. 94

2. The obligation of fidelity

2.1. The notion of fidelity

The duty of loyalty constitutes a part of marriage. This promise of spouses to comply with and be loyal to each other is of the essence of marriage[13]. Considering that the wives have freedom in expressing the will of the conclusion of the marriage, consider it their duty to respect each other and thus comply with the obligation of fidelity later celebration of marriage[14].

If we look at in terms of the word etymologically, fidelity, we can see that it comes from the Latin word ' fides ' meaning faith[15]. The ideology of the obligation of loyalty is based on the fact that spouses must be faithful to each other. Mutual trust and awareness of the importance of love worn each other are fundamental to a marriage.

The duty of fidelity presents two important aspects:

a) a positive aspect, which implies a positive obligation to have intimate relationships within the marriage,
b) a negative aspect, not to maintain intimate relationships outside of marriage.

Failure to comply with this obligation may even lead to the divorce of the marriage, for reasons attributable to the unfaithful husband. However, it is important to note that this obligation can not restrict the individual freedom of each spouse, so the refusal of one of the husbands to have intimate relationships can not be a valid reason for defamation of marriage.

2.2. The principle of monogamy

Because marriage is monogamous[16] in Romanian civil law, the obligation of fidelity in its negative aspect is a necessary corollary. The principle of monogamy is based on the fact that the conclusion of marriage takes effect between the two spouses, who owe each other love and fidelity. Due to the principle of monogamy, in Romanian civil law, the paternity presumption of the mother's husband contracted, without the need to prove the filiation of the child born within the marriage[17].

The sanction of the breach of the duty of fidelity, namely the principle of monogamy, was sanctioned in the old Romanian criminal legislation. Although adultery has been disinclined, the law allows the deceased husband to promote divorce on grounds of husband's infidelity, which is a cause of marriage dissolution.

2.3. Extending the notion of infidelity

Closely related to the legal definition of marriage, the duty of fidelity seemed to be protected directly by law, but as a very personal area, the legislator did not want to interfere in a limited way in spouses' relations. We believe, however, that infidelity is a topic of topicality and a good reason for divorce, and the development of this subject is imperative from a practical point of view. Although the obligation of loyalty requires that spouses have marital relationships only with the other spouse, being forbidden to sex with third parties, we consider that this obligation does not refer only to physical but moral obligations[18]. For example, there have been some cases of correspondence exchanges which, by their nature, have morally violated the obligation of loyalty to the other spouse. Given that we find ourselves in an era of digitization, the question is whether virtual messages can be the basis for divorce. We consider that, to the extent that they are made public and their obtaining does not violate the secrecy of correspondence, they may be a valid reason for breaking marriage.

2.4. Finding infidelity

The abstracto's assessment of infidelity is hard to prove, but infidelity based on an extramarital relationship can be proven.

Infidelity is appreciated in concrete by the judge and will therefore be done in a subjective, personalized manner. In order to establish a blame in a divorce case, the judge must assess the existence of a serious violation or continued violation of the obligations arising out of marriage. In addition, violation of the loyalty obligation made it unacceptable to maintain a common life. This allowed the judge to appreciably extend his discretion to both the gravity of the infringement and the responsibility for such an infringement.

2.5. Responsibility for Infidelity

In order for infidelity to be invoked in the defense of a spouse, it must be imputable. In practice, there may be different cases that may disguise the unfaithful husband, such as: factual error, personam error, violence exerted on him by a third party to compel him to engage in intimate extramarital relationships, believed to be free from marriage, and so on In these cases, the husband must be in good faith.

2.6. Agreements on loyalty

We must bear in mind that, although marriage involves certain aspects of a civil contract, the obligation of loyalty can not be determined by the two spouses only. The loyalty obligation can not be regarded as a mere contractual obligation from which the spouses could discard.

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[13] Aurelian Ionascu, Mircea Mureşan Mircea b. Carter, Victor Stewart, the family and its role in the socialist society, ed. Dacia, Cluj Napoca, 1975, p. 106

[14] Prof. Univ. Dr. Teodor Bodoaşcă, Family Law, 3rd edition, Rev., Bucharest, publishing House of the Legal universe, 2015, p. 94

[15] www.limbalatina.ro/dictionar.php

[16] Aurelian Ionascu, Mircea Mureşan Mircea b. Carter, Victor Stewart, the family and its role in the socialist society, ed. Dacia, Cluj Napoca, 1975, p. 106

[17] Idem., p. 106

[18] Idem., p. 106

We have in this regard the model of the United States of America, where husbands can set prenuptial contracts clauses for the situation where one of them is unfaithful. These clauses may contain moral and material damage. In France, for example, there have been requests to draw up twinning arrangements. In this regard, both the judicial practice and the French doctrine have concluded that a marriage can not be concluded in the form of a brokerage contract, and fidelity can not be negotiated[19].

2.7. Obligation of fidelity and divorce proceedings

The fate of fidelity during divorce proceedings can be taken into account by judging the judge's husband's culpable divorce, in which sense the judge is a true guardian of public order, especially in the function of protecting the divorce.

However, we consider that from the date of filing the divorce request, none of the spouses can no longer oppose the other duty of loyalty. With the request for divorce and the divorce of the spouses, the effects of the marriage are suspended until the final settlement of the divorce request is terminated.

2.8. Sanction

The sanction will, of course, be divorce or separation for violating the loyalty obligation resulting from marriage. The severity and consequences of unfaithful behavior during marriage can be determined in the divorce proceedings, and may lead to the divorce of the unfaithful husband.

3. The marital obligation

3.1. Notion

The new Civil Code does not expressly provide for this obligation, but in the literature[20] the importance of marital duties is attached.

The marital obligation is separate from that of the common dwelling and there is no matter whether the spouses have a common dwelling or do not live separately.

3.2. The marital obligation is strictly related to marriage

It is important to note that although the Civil Code does not refer to the marriage obligations of married couples, there were some canonical laws that imposed the "carnalis copula"[21] as a condition for the validity of marriage. This ideology lasted until the 12th century and claimed that it is imperative that the relationship be consumed in marriage to make it indissoluble. This can also be justified by the fact that marriage was perceived as a remedy for concupiscence.

3.3. Failure to comply with the marriage obligation

There is no explicit sanction in our Civil Code for non-observance of the obligation of loyalty or marital debt, however non-compliance may lead to divorce, so that in this case the judge will have to set the limits.

First of all, from the point of view of divorce, in order for this obligation to be a valid reason for the dissolution of marriage, one of the spouses must be at fault and the refusal to represent the wrongful husband's behavior. We can discuss a thorough ground of divorce in the context of breaching the common obligation by denying physical relationships or by applying a behavior of rejecting the other husband in these relationships. In his defense, the deceived husband can invoke medical reasons (for example, impotence, etc.) or moral (desire for chastity, for religious or other reasons).

3.4. Lack of consent and legal recognition of the offense of rape between spouses

Even though these aspects of the loyalty obligation have been introduced to establish a normality of marital behavior, the issue of rape appears between spouses. Traditionally, in the past, it is possible for the husband to force his wife to maintain intimate relationships. There were no legal provisions to protect the wife from such abuses, and society did not consider the obligation to maintain intimate relationships between spouses as rape.

Although the illicit nature of coercion in sexual relations between spouses is not expressly established, however, the application of the provisions of Art. 218 The Criminal Code also applies to rape with the wife injured as a person.

Therefore, the courts recognize the notion of rape between spouses, and there is European jurisprudence: ECHR March 22, 1995, S.W. and C.R. v. United Kingdom, Civ. 1996, 512, obs. J.-P. Marguénaud: The Court makes an explicit reference to "a civilized notion of marriage." In practice, there have been cases of rape with violence. The presumption of consent of spouses or complicity in the privacy of marital life can only be valid until the proof of the opposite[22].

We believe that the current criminal legislation could be improved, following the model of the French Criminal Code, which provides in Art. 222-22 par. The following provisions: "Rape and other sexual assaults are constituted when they have been imposed on the victim in the circumstances provided for in this section, regardless of the nature of the relationship between the aggressor and his / her victim, united by the marriage ties. In this case, the presumption of the consent of the spouses to the act Sexuality is valid only until the evidence goes wrong. "

[19] M.-T.-CALAIS AULOY, for a wedding in conventionally limited effects, RTD civ . 1988. p. 255
[20] Prof. univ. Teodor Bodoaşca, Family Law, Third Edition, Rev., Bucharest, Publishing House Universul Juridic, 2015, p. 95
[21] V. C. SAINT-ALARY-HOUIN, Sexuality in Contemporary Civil Law, Ann. Do. Toulouse, Vol. 33, 1985, p. 7
[22] CEDO 22 march1995, S.W. şi C.R. v. United Kingdom Civ. 1996, 512, obs. J.-P. Marguénaud

It should be noted that it is not a system of protection only for husbands, but for all couples, even unmarried.

It is found that there is a contradiction, on the one hand, a marital duty is imposed on married couples and, on the other hand, any constraint in the sexual relations between spouses is repressed.

Since sexual intercourse must be voluntary, one should state the constraint that one of the spouses can use for the other to fulfill the marital legal obligation.

The issue must also be studied under the consent given at the time of marriage. In order not to be in a situation of a constraint that enters the sphere of the penalty, the question arises whether this consent should always be repeated for every constituent act of the spouses' sexual relations. Thus, each spouse's responsibilities with regard to the marriage obligation should be clarified. Such clarification, however, can not be made objectively, but the particularities of each couple relationship must be taken into account.

If such a case is invoked in a divorce process, it should be determined primarily whether failure to comply with this obligation has led to the impossibility of continuing marriage. In this case, we can assume that the consent expressed at the end of the marriage is valid throughout the marriage, and the marriage relationship is a constituent part of the marriage.

However, then we are discussing a criminal case, it is obvious that we must consider whether at the time of the rape deed, respectively, the husband had the consent of the wife. When we talk about marital relationships through violence, we will rightly consider that the consent expressed at the end of the marriage was given for consensual relations and under no circumstances can it be used by the husband to discredit abusive behavior.

4. Obligation of moral support

4.1. The concept of moral support

In fact, it has always been very difficult to establish the concrete legal content of this obligation. As a result of marriage, the moral support obligation refers to the assistance given by spouses to each other in matters of daily life during marriage[23].

Wives are morally obliged to consult each other about marriage issues. Certain authors[24] consider that marriage should be governed by the principle of co-decision. It requires that the spouses decide together to complete an act or make a decision, choosing the most appropriate solution[25].

4.2. Obligation to assist in case of illness

In practice, certain situations may arise which extend the effects of mutual moral support from a purely moral point of view to an obligation to do, which occurs essentially when one of the spouses is unable to produce income for non-imputable reasons or is ill or infirm.

The obligation of mutual moral support may also have a pecuniary nature, where for improper reasons one of the spouses can not produce an income and thus can not secure his existence. In this situation, we may consider it the duty of the income-producing spouse to provide the necessary living. Family maintenance is an obligation for the spouse who produces income. In practice, there are countless cases where the wife has to deal with one or more juvenile children, providing them with raising and educating, in which case the husband, income producer, owes to support both minors and children his wife.

4.3. Obligation of the guilty husband to grant the other husband moral support in the case of divorce

Violation of the moral support obligation may occur in several ways, such as: lack of sincerity, patience, solidarity, honor, courtesy, mutual respect, etc. These moral values are fundamental to any relationship and, moreover, to a marriage. It is almost impossible to force a husband, guilty of violating this obligation during marriage, to respect the divorce. As a coercive measure, the husband may be forced into at least civilized behavior that does not even affect the other husband. If it is found that failure to comply with this obligation causes serious harm, the spouse affected by inappropriate behavior may request possible moral damages.

4.4. Sanction

Breach of the obligation of mutual moral support may entail civil, contravention or criminal liability of the guilty party[26].

Art. 378 paragraph 1 lit. of the Criminal Code provides that the commission by a person of an act likely to endanger the life of a family member constitutes the offense of family abandonment. These legal provisions also apply if the offense is committed by one of the spouses by leaving the other husband in need, exposing him to certain physical or moral suffering.

It is punishable from the criminal point of view, the fact of leaving a member of the family, or the husband without help, and the fact of failing to pay the legal obligation of maintenance. Although both facts are committed by inaction, they can have particularly serious consequences.

[23] Aurelian Ionașcu, Mircea Mureșan, Mircea N. Costin, Victor Ursa, The Family and Its Role in the Socialist Society, Ed. Dacia, Cluj Napoca, 1975, p. 108

[24] Emese Florian, Family Law. The marriage. Matrimonial regimes. Filiation. Edition 5, Ed. C. H. Beck, Bucharest, 2016, p. 95

[25] Prof. univ. Teodor Bodoașca, Family Law, 3rd Edition, Rev., Bucharest, Publishing House Universul Juridic, 2015, p. 93

[26] Prof. univ. dr. Teodor Bodoașcă, Dreptul familiei, Ediția a III-a, rev., București, Editura Universul Juridic, 2015, p. 93

5. Obligation of mutual respect

5.1. Exercising the duty of mutual respect

The legal duty of respect may embody several types of obligations. In addition to the above-mentioned obligations, we can say that husbands are obliged to behave properly for each other during the marriage.

Spouses must respect the profession of the other and support each other in all its aspects. In the same sense, it is necessary for spouses to respect their passions, habits, social relationships, to offer affection to each other.

5.2. Sanction

Failure to comply with this obligation may result in the impossibility of continuing marriage. These deficiencies may lead to the divorce of the marriage depending on the seriousness of the offense committed by the spouse, and may even result in criminal offenses. These may include physical or mental injuries or aggressions to the other spouse. The most common are: lack of loyalty to the other, violation of honor, lack of affection, neglect, refusal to participate in activities of interest to the other spouse, prohibition of certain inter-human relationships, development of certain vices, etc.

Some situations may arise in court practice, for example: alcoholism or refusal to undergo medical treatment to suppress addiction[27] may be a reason for divorce for breach of the duty of mutual respect, refusal to seek nursing care or the procreation of a child without taking into account the opposition of the other husband[28], the fact of having surgery to change sex without the consent of the husband[29].

6. The effects of marriage on spouses' names

6.1. Effects on the spouse's name during marriage

The spouses have, according to art. 282 Civil Code, several variants: the preservation of names before marriage, the bearing of the common name of any of the spouses, the bringing together of both names or the bearing by one of the spouses of the names together.

According to art. 311 The Civil Code is obliged to bear the declared name at the end of the marriage. Changing the name of one of the spouses, when they have a common name, is allowed by administrative means, but only with the consent of the other spouse. We believe that this solution could be changed in the sense that the law could allow the name change without the consent of the other husband for good reasons (for example, the profession of the spouse who wants to change his name, the commencement of divorce proceedings when the preservation of the common name affects the image , dignity or honor, etc.).

In the doctrine[30] some special situations regarding the spouses' names were analyzed. One of the cases is that of the surviving spouse bearing the predecessor's family name. If he wants to remarry, he can keep the name of his predecessor and, moreover, he can agree to be the common name in the new marriage. The considerations underlying this view refer to the fact that the right to name can not be restricted, but also to the fact that the legislator does not make the difference between the ways of acquiring the name when referring to the name of the future spouses.

6.2. The existence of a right of use over the name worn during marriage

The marriage declaration entitles the spouses to use the name after the marriage. In the event of a divorce, the spouses may decide to return to the previously worn-in name or, with the consent of the other spouse, to keep the name worn for the duration of the marriage.

Divorce does not distinguish between husband and wife, which is why both spouses lose their husband's name in case of divorce. Use of the name can only be done with the consent of the other spouse. From a practical point of view, the question arises if the husband is entitled to request the return of his wife to the name before marriage. Judicial practice has held that it is contrary to Art. 8 and 14 of the European Convention on Human Rights, that national law should establish the name of the spouse.

A practical problem occurs when the husband, who has received the other husband's consent to the common name, remarries because art. 282 The Civil Code also applies in this case. Otherwise, the spouse of the second marriage may decide to bear the name obtained by her husband after her first marriage. From a legal point of view this situation is not foreseen and the question arises whether the spouse whose name is in question can intervene in this situation. We believe that once the divorce has been completed, the husband who has given his consent to the other spouse's name can no longer return to this matter. There is, however, the possibility of requesting in this case possible damages[31], where the use of the name may affect the image[32], for example in the case of a public figure, or simply causes discomfort to the former spouse whose name is in question.

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[27] Aix-en-Provence, February 27, 2008, Dr. fam 2008. Comm. 142, obs. V. Larribau-Terneyre, D. 2009. Pan. 832, obs. L. Williatte-Pellitteri Bordeaux, March 19, 2008, Family Dr. 2008. Com. 142, D. 2009. Pan., 832, L. Williatte-Pellitteri obs.

[28] Nimes, March 21, 2007, JCP 2007. II, 10149, note J. Vassaux, Dr. fam. , 2008. 91, Obs., J. Hauser

[29] Nimes, June 7, 2000, Dr. fam 2001. Comm 4 Obs H. Lécuyer, RTD civ 2001 335 Obs J. Hauser

[30] Alexandru Bacaci, Viorica Claudia Dumitrache, Cristina Codruța Hageanu, Family Law, 6th Edition, C.H. Beck, Bucharest, 2009, p. 40

[31] TGI Briey, June 30, 1966, JCP 1967. II. 15130, note by J. Carbonnier

[32] Anne Claire Aune, The phenomenon of multiplication of droit subjectifs en droit de personnes et famille, Ed. Presses Universitaires d'aix Marseille, 2007, p. 247

6.3. The effects of marriage termination on the name worn during marriage

If the marriage ends by the death of one of the spouses, the choice to maintain the use of the name worn during the marriage is done automatically. This is mainly a consequence of the social character of the spouse's name during marriage. In Romanian civil law, bearing the name of a deceased husband after marriage has an absolute character.

In practice, there were certain situations in which the deceased's family opposed the use of the common name by the surviving spouse, because they considered it abusing the name of the worn by various means. This aspect can be noticed in concrete terms if the surviving spouse chooses to remarry[33].

Unlike the situation of ending marriage by death, in the case of divorce the spouse who has taken the common name can not keep this name except with the consent of the spouse whose name it bears.

The ability to use the spouse's name may result from his / her consent or from the court's solution, but only if the applicant warrants a special interest for him / her or for the children.

Conclusion

Non-matrimonial rights of spouses are part of the category of personal rights, being found in the subcategory called the doctrine of rights relating to the existence and integrity of the person.

The provisions governing the spouses' personal relations are declaratory and do not contain sanctions for violation of the provisions stipulated in them. However, they are of particular importance in ensuring the equality of the spouses in the family, protecting the interests of each of them and ensuring the effective education of children in the family.

It is preferable for the legislator not to be involved in the personal matters of spouses, but if they so wish, they should be able to lay down certain clauses on non-pecuniary rights and obligations (loyalty, cohabitation, etc.) and possible sanctions for non-compliance.

References

- Prof. Dr. Teodor Bodoaşcă, family law, 3rd Edition, Rev., Bucharest, Editura Universul Juridic, 2015
- Emese Florian, Family Law. Marriage. Matrimonial regimes. Parentage. Edition 5, Ed. C. H. Beck, Bucharest, 2016
- M. Avram, N. Nagaraju, matrimonial regimes, Ed. Hamangiu, Bucharest, 2010
- Ion P. Filipescu, Andrei i. Filipescu, treatise on family law, 6th Ed. All Beck, Bucureşti, 2001
- Alexandru Bacaci, Viorica Claudia Dumitrache, Cristina Codruţa Hageanu, Family Law, 6th Edition, C.H. Beck, Bucharest, 2009
- Aurelian Ionascu, Mircea Mureşan Mircea b. Carter, Victor Stewart, the family and its role in the socialist society, ed. Dacia, Cluj Napoca, 1975
- Ioan Albu, family Law, Ed. Didactic and Pedagogical, Bucharest, 1975
- Anne Claire Aune, The phenomenon of multiplication of droit subjectifs en droit de personnes et famille, Ed. Presses Universitaires d'aix Marseille, 2007
- C. RONDEAU-Rivier, Resignation, Thesis, Lyon, 1981, p. 173 et seq
- TGI Briey, June 30, 1966, JCP 1967. II. 15130, note by J. Carbonnier
- V. C. SAINT-ALARY-HOUIN, Sexuality in Contemporary Civil Law, Ann. Do. Toulouse, Vol. 33, 1985
- M.-T.-CALAIS AULOY, for a wedding in conventionally limited effects, RTD civ . 1988
- Law No. 217/2003 for the prevention and combating of family violence, republished, M. Of. No. 205 of 24 March 2014
- Tribe., dec. civ. No. 546 of March 6, 1973, in 1974, CD p. 169; Tribe., dec. civ. No. 1334 from 1970, in 1970, pp. CD 114-117; Tribe. jud. , Dec. civ. No. 849 of 18 September 1986, CD nr. 2 of 1987
- Judicial practice Fractional Instances: Civic 1, May 8, 1979, Civil Bull I, No. 135, D. 1979. IR 495, Obs. D. Martin; Civ. 1, 16 Feb. 1983, D. 1984. 30, note J. Revel, and the case-law cited; Adde: Bordeaux, January 8, 1985, Cah. Around. Aquitaine 1985, 66; Civ. 1 7 November 1995, Nr. 92-21.276, Bull. Civ. I, No. 394, Dr. and Shabeena., 1996, p. 72, Obs. A. Bénabent, RTD Civ. 1996. 227, Obs. B. Vareille
- CEDO 22 march1995, S.W. și C.R. v. United Kingdom Civ. 1996, 512, obs. J.-P. Marguénaud
- Aix-en-Provence, February 27, 2008, Dr. fam 2008. Comm. 142, obs. V. Larribau-Terneyre, D. 2009. Pan. 832, obs. L. Williatte-Pellitteri
- Bordeaux, March 19, 2008, Family Dr. 2008. Com. 142, D. 2009. Pan., 832, L. Williatte-Pellitteri obs.
- Nimes, March 21, 2007, JCP 2007. II, 10149, note J. Vassaux, Dr. fam. , 2008. 91, Obs., J. Hauser
- Nimes, June 7, 2000, Dr. fam 2001. Comm 4 Obs H. Lécuyer, RTD civ 2001 335 Obs J. Hauser

[33] C. RONDEAU-Rivier, Resignation, Thesis, Lyon, 1981, p. 173 et seq.

ATAD (DIRECTIVE 2016/1164/EU) AND BEPS

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Abstract

In the latest tax competition between the European countries, and not just them (as we will see that this is happening at a global level), made the private companies to chose the best optimization plan for their businesses in all areas so choosing the country that best fitted their needs. This aroused multiple complaints from the countries that had a higher levele of taxation blaming the others and the business men for fiscal crime. As a result of this argument an labeling, there were born two important legislative acts: BEPS and ATAD. In this article I will try to show the connection between this two legislative acts, showing their importance in the intelectual property area and also in the business field. We will se the similarities between them and why this exists and I will explain just a part of the numerous rules established by the international acts BEPS and ATAD. The importance of fiscality and of the businesses, of the multinationals in the context of the globalisation and of the R&D, patents, trademarks, copyrights, all of them are connected and cannot survive without each other in nowadays society, that is why I consider important to present this article and to have together a look into the complicate world of fiscal law.

Keywords: *BEPS, ATAD, tax, fraud, company.*

Introduction

When we talk about the European Union, as we are regarding its legislative acts, we ask ourself in the actual context – which one was the first, BEPS or ATAD? Both legislative acts contain references to the same fiscal aspects, but no are the both applying to all the European Union state members. If we are talking about Romania, for sure we will have the tendency to say that is is ATAD the first, because we are not an OECD member, but our Romanian law no 124/2017 regarding the approval for the Romania participating as an associate state to the BEPS plan - Base erosion and profit shifting – concieved by the The Organisation for Economic Co-operation and Development (OECD). So here we are, applying BEPS legislation!

But what is exactly BEPS? What is ATAD? And mor, why ATAD 1 (Directive (EU) 2015/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market) and ATAD 2 (Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries)?

1. BEPS

Alias BEPS, Base Erosion and Profit Shifting, is a project started by The Organisation for Economic Co-operation and Development – alias OECD – which regards theb state members fiscal planfication in order to stop the tax avoidance strategies that allows the business companies to shift the profits in other countries than those were they are having their activity, countries that have a low level of taxation or even a non-existing one. In few, they are trying to avoid fiscal fraud, but in my opinion, this project was kindly exagerated because it seems like it forgets about the term "fiscal optimisation" and it does make the things even more difficult for the business world, which is already supra-taxed.

How was born the idea of BEPS and why I am presenting it as linked to the intellectual property? This is, probably, a questions already aroused by you. Why fiscality and intelectual property both together and, especially, this two acts that are regarding exclusively fiscality aspects? Well, IP BOX REGIMES. This is the answear.

Starting with the 1970's at an European level a new curent of taxation was born which meant a different taxation of the revenues from the intelectual property than those from other activities. The digitization,the internet conexions, all the tehnlogical advance that made possible the growing and the spread of the music, movies, arts in general, then of the databases and computer's softwares, of all the patents, all this contributed to the intelectual property's amplitude - copyright and industrial property alike. The goal was the encouragement in this ares and as a fact, what else was to do than a smaller taxation?

Irleand was the first country to put in legality the "box regime" fiscal system by Section 34 in the Finances Act from 1973 which stipulated an easier burden, from the fiscality's point of view, for the copyrights and the licenses patented in Ireland. It was a system loved by those who obtained such revenues and hates by the European Community, SAU and G20, a duality which attracted the big companies to establish a small headquarter in Ireland (Google, Facebook, Apple etc.), especially in the IT area, but a system that eventually gave birth to an alignament for the fiscal policies acording to the OECD recommendations named in BEPS – however, late in 2015 (Ireland being the first country which adopted the so-called Knowledge Development Box, a smaller taxation –

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6.25% - for the research and development (R&D) results that were provided by intelectual property activities).

"IP box regime" aroused in amplitude starting with 2000's when it was adopted in many Eurpoean countries, starting with France, 15% and then Hungary 2003 – taxation 8% for the copyrights. Then, in 2014, 14 coutries had their own preferential system for the intangible assets coming from intelectual property activities and R&D: the Neatherlands (hitting 5% taxation in 2010), Spani (15%), Belgium (the taxation with 34% for just 20% of the revenue coming from the intelectual property activities and R&D), Malta (0%), Luxemburg (5.76%), Great Britain (10%), Switzerland (8.5%), the Nidwladen canton (8.8%), Cyprus (2.5%), Liechtenstein (2.5%), Portugal (15%). The wish to stimulate and to atract new investors, but also to collect funds for the state's bugets from a smaller taxation but a large number of companies, "IP box regimes" have become a fiscal optimisation competition.

However, nowadays, there are rumors that the Great Britain is a fiscal pradise from this point of view, and it is hoped thet after the Brexit the country will regain a kinder system for taxation, as Theresa May said "if we are forced to be something different, then we will have to become something different"[1].

The idea of this regim and it's labbeling as bad is directly connected with de globalization phenomena and the existence of more and more multinationals. As an effect, they are connecting countries, but also them are struggling between the legislative differences of each country. Every budget wants to collect more and when other country preffers to collect less, but to be sure it will collect something, the one with a more drastic regim will rebel and will consider this concurential act as a fiscal paradise. "In such conditions, the state, but also the private realised that the finances that they are obtaining and to which they respond need to be managed separately, in different conditions: while the state (compelled to manifest transparently) is interested that the public money to follow a strict rule (to which path can be easily found), the other entities – legal entities and individuals feel the need of a mor relaxed management of funds (...)[2]".

I believe that an alignment towards a kinder taxation will be a response that will give results more than continous watching and the rashly accusation for fiscal fraud or „fiscal paradise". As the fiscal burden is bigger, so more obvious will be it's avoidance. And also we should not forget that there exists the term „fiscal optimisation" which reffers exactly to this thing: the possibility of chosing the most favorable regim. But from the latest trends, if a company does this it is a higer possibility that it will be labelled as a fraud operating in a fiscal paradise.

Channing Flynn, EY Global Technology Industry Leader in the taxation area said once that the multinationals are forced to constantly balance between the intelectual property's oportunities from a country A and the risks of the anti-tax avoidance campains from countries B and C, but the reality is that, in fact, the multinationas just need a permanent establishment from where to conduct it's business[3]. The problem of the moment are the fiscal paradises, or better said, the attempt to eradicate them. So, this is how the idea of BEPS was born, in 15 different actions:

- Action: 1 Address the tax challenges of the digital economy
- Action 2: Neutralise the effects of hybrid mismatch arrangements
- Action 3: Strengthen CFC rules
- Action 4: Limit base erosion via interest deductions and other financial payments
- Action 5: Counter harmful tax practices more effectively, taking into account transparency and substance
- Action 6: Prevent treaty abuse
- Action 7" Prevent the artificial avoidance of PE status
- Actions 8, 9, 10: Assure that transfer pricing outcomes are in line with value creation
  - Action 8 – Intangibles
  - Action 9 – Risks and capital
  - Action 10 – Other high-risk transactions
- Action 11: Establish methodologies to collect and analyse data on BEPS and the actions to address it
- Action 12: Require taxpayers to disclose their aggressive tax planning arrangements
- Action 13: Re-examine transfer pricing documentation
- Action 14: Make dispute resolution mechanisms more effective
- Action 15: Develop a multilateral instrument.

From all of these, with direct impact for intelectual property are Actions 5 and 8-10, as I will describe them below, but all the plan's actions will apply to each and every company which is activating in the business area.

2. ATAD

As it is revealed in the preamble of the Directive 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, it is necessary to „identify common, yet flexible, solutions at the EU

[1] Adam Bienkov, *Theresa May 'stands ready' to turn Britain into a tax haven after Brexit* (http://uk.businessinsider.com/theresa-may-stands-ready-to-turn-britain-into-a-tax-haven-after-brexit-2017-1).

[2] M.Șt. Minea, C.F. Costaș, *Dreptul finanțelor publice, Vol. I. Drept financiar*, ed. a II-a revizuită, Ed. Universul Juridic, București, 2011, p. 18.

[3] Stephen Bates, Ray Beeman, Ian Beer, Joe Bollard, Andrew Choy, Jim Hunter, *Global taxation of intellectual property: new and emrging tax policies create high-stakes balancing act* (http://www.ey.com/Publication/vwLUAssets/EY-global-taxation-of-intellectual-property-20160518.pdf/$FILE/EY-global-taxation-of-intellectual-property-20160518.pdf)

level consistent with OECD BEPS conclusions" and that the best method for applying it is by european legal instruments – such as directive. The areas in which the directive is applying are: limitations to the deductibility of interest, exit taxation, a general anti-abuse rule, controlled foreign company rules and rules to tackle hybrid mismatches, taking in account also the double taxation. Very important to observe is that the directive is applying also to the resident entities from third parties of the Union if these have a permanent establishment in one or more Member State.

But what is a permanenet estalishment? Aligning to the OECD recommendation, the taxation of the companies is managed to be done at the place where the business is conducted. This is the place where the economical, strategical and necessary decisions for the existing of the business are made or is the place were the executive director is having his activity. In this case, living in the full ares of the technology, where can we say that is this place of the efective conduting when the decisions are made in on-line (teleconferences, for example) or even at the phone, or how do we establish this place when the directors of the company have their departments in different countries? Well, the jurispruence in this ares is very contradictory and does not offers very clear answears. For example, in *Unit Construction Co. Ltd. c. Bullock* (1960) 3 big companies registred in Kenya were considered to be fiscal residents in the country where was registred the parent company, because there were considered to take in place the major decisions. In other case[4], as opposite, there was established that a company registred in Great Britain is fiscal resident in Neatherlands because the management decisions were made at the advice of a consultant living there. In this way, we can see that the place of the efective management is left to interpretations and we do not have imperative stipulations to establish the exact criteria for this terminology.

However, BEPS has an action dedicated to this term of „permananent establishment". This definition is present in all the countries jurisdictions and, especially, in the treaties for the avoidance of double taxation. BEPS suggeested two situations to which will apply this terminology: the first is that of a fixed place in other country, a place where the activity is conducted also in the name of tha parent company, and the second of an dependent agent – meaning a person which is working on another teritory but on behalf of the parent company and who has the ability to sign contracts in the name of the company. Also, it is remembered about the permanent establishment in the Model-Convention of the OECD when it talks about royalty that comes from a contractant state and for which the efective beneficiar is a resident of the other contractant state, this royalties will be taxaed only in that other state. However, this will not be applied if the effective beneficiar of the royalty, being a resident of a contractant state, has activity as an entrepreneur in the other contractant state – from which the royalty comes from – by the means of a permanent establishment situated there and the rights or the property for which are the royalties paid is effective linked to that permanent establishment. In the same direction, Action 5, or the so-called Nexus Approach, proposed by the OECD's members and then developed in BEPS plan, says that the companies should benefit from a preferential fiscal regim only for the substantial activities which generated the revenues in that country where the fiscal burden is smaller. In other words, there should exist a direct link between the revenues and the activity that contributes to it in order to obtain fiscal benefits. However, the actual fiscal regimes will be applied for all the memebers imperatively and progressively until 30 june 2021.

At 29 may 2017 it was decised that „It is necessary to establish rules that neutralise hybrid mismatches in as comprehensive a manner as possible. Considering that Directive (EU) 2016/1164 only covers hybrid mismatches that arise in the interaction between the corporate tax systems of Member States, the ECOFIN Council issued a statement on 12 July 2016 requesting the Commission to put forward by October 2016 a proposal on hybrid mismatches involving third countries in order to provide for rules consistent with and no less effective than the rules recommended by the OECD report on Neutralising the Effects of Hybrid Mismatch Arrangements[5]". In this way was born the Directiva 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries. This defines the "hybrid mismatche" as being an "entity or arrangement that is regarded as a taxable entity under the laws of one jurisdiction and whose income or expenditure is treated as income or expenditure of one or more other persons under the laws of another jurisdiction". The directive actions should be applied by the state members until first of January 2022, so there exists a derogatory term from the Directive 2016/1164 - 2021.

3. Intangible Assets

When we talk about the intelectual property we are automatically talking about what is called intangible assets. A book, a CD, a invention, this objects just give birth to the rights from which the creative person will aquire legal protection and will benefit from all the economical and non-economical advantages. This rights are a part from the intangible assets and what is called by BEPS Hard To Value Intangibles (HTVI) and to which it dedicates a plain plan – Action 8. „**The business enterprise has two– and only two–basic functions: marketing and innovation**. *Marketing and innovation produce results;*

[4] Wood c. Holden (2008).
[5] Directive (UE) 2017/952 alin. (5) Preamble.

all the rest are costs"[6], how beautiful could caption the essence itself of BEPS and ATAD in the area of intelectual property Peter Druker in this quotation! The world is going to a continuous digitizations, towards an ease of day-by-day life and all of this can be done through R&D, creations, writings and innovation. The intangible capital is formed from assets without material substance, how are in the intelectual property are the patents, the trademarks, the softwares etc. – assets for which there exist rules IAS 38 (International Accounting Standards Board) for evaluating them, because so hard is to establish their value at an international level.To the companies which are activating in this area of business there are applying the stipulations of BEPS and ATAD and because of them this two legislative acts were born. But when it comes to copyrights, even for each individual author, the rules are present, so the royalty that comes from a contractant state and for which the efective beneficiar is a resident of the other contractant state, this royalties will be taxaed only in that other state. However, this will not be applied if the effective beneficiar of the royalty, being a resident of a contractant state, has activity as an entrepreneur in the other contractant state – from which the royalty comes from – by the means of a permanent establishment situated there and the rights or the property for which are the royalties paid is effective linked to that permanent establishment. Also, in the case when because of some special relationships existing between the he who pays and the effective beneficiar or both of them and another third parties, the amount of the royalty regarding to using it, the right or thr information for which is paid, overcomes the amount that was agreed between the payer and the effective beneficiar, and this was not applicable if there was not about that special relationship, than were applicable the rules of the Model-Convention only for the amount mentioned. In this situation, the excendentary part of the payments will remain taxable as the law in every contractany state establish it.

4. BEPS - ACTION 5

Since 2016 there started the tranzition fromthe old fiscal systems regarding the intelectual property to a new system, harmonized, at the level of all the OECD state member for reducing the possibilities of the business companies to avoid tax payement. „Action 5" from BEPS is dedicated especially to this thing and it highlights the importance of transparency, of rewarding just of a few specified substantial activities regarding intangble assets, from the OECD analyze emerging that the base activity that generates revenues as those from R&D, the expenditures should be supported by the entrepreneur itsfel. The new joiners are not allowed to benefit from no preferential regim that exists, starting eith 30 June 2016, for them being mandatory applicable BEPS rules. The new joiners are considered to be the new registred companies after 30 June 2016, but also the ones to whom is applicable the old system until 2021, but for the intelectual property revenues after the date of 30 June 2016, this ones are submissed to the new legislation.

Action 5 is based, especially, on Nexus Approach, a direct connection between the reveues which are submissed to this benefits and the activity that contributes to this revenue and it refers only to the patents and the results of the research and development activities. So, the fiscal benefits are dependent to the expenditure implied in the R&D process.

$$\frac{\text{Qualifying expenditures incurred to develop IP asset}}{\text{Overall expenditures incurred to develop IP asset}} \times \text{Overall income from IP asset} = \text{Income receiving tax benefits}$$

5. BEPS - ACTIONS 8-10

The principle of Arm's lenght is applicable to all the transactions with related parties, shareholders, inclusively for the ones with a foreign legal entity and its permanent establishment from another country. As the Directiva 2016/1164 says, an "associated enterprise" means:

a) an entity in which the taxpayer holds directly or indirectly a participation in terms of voting rights or capital ownership of 25 percent or more or is entitled to receive 25 percent or more of the profits of that entity;
b) an individual or entity which holds directly or indirectly a participation in terms of voting rights or capital ownership in a taxpayer of 25 percent or more or is entitled to receive 25 percent or more of the profits of the taxpayer;

If an individual or entity holds directly or indirectly a participation of 25 percent or more in a taxpayer and one or more entities, all the entities concerned, including the taxpayer, shall also be regarded as associated enterprises.

For the purposes of Article 9 and where the mismatch involves a hybrid entity, this definition is modified so that the 25 percent requirement is replaced by a 50 percent requirement[7].

As the Arm's length principle says, the transaction must be made at what the price of that transaction would be on the open market for the same transaction, in other words at the same agreements as the transaction is made between two parties freely and independently of each other, and without some special relationship. If the price is another, and the general tendency for it is to be smaller, then tha level of the taxed amount is affected and the action can be interpreted as tax fraud. As a control method, there was born the transfer pricing documentation, as a plan of BEPS, and which is periodically controled by the fiscal authorities from each member state.

[6] Peter Druker, The Practice of Management, 1954.
[7] Art. 2.4 Directive 2016/1164.

Conclusion

In the end, we are takling about two different legislative acts of the fiscal area, ATAD that was born because of the need for the uniformity and harminy in this ful era of the globalization, esspecially at the business level, from BEPS, a reformal plan sprung from the dissatisfaction of some countries which whished to tax mor the intelectual property, seeing in this field e future economical boom. The general tendency for the countries is to be submissive to this rules and we have the example of Malta which already announced the adopting of the rules sincer 2016.

References

- M.Șt. Minea, C.F. Costaș, *Dreptul finanțelor publice, Vol. I. Drept financiar*, ed. a II-a revizuită, Ed. Universul Juridic, București, 2011, p. 18
- Peter Druker, The Practice of Management, 1954
- Adam Bienkov, *Theresa May 'stands ready' to turn Britain into a tax haven after Brexit* (http://uk.businessinsider.com/theresa-may-stands-ready-to-turn-britain-into-a-tax-haven-after-brexit-2017-1)
- Stephen Bates, Ray Beeman, Ian Beer, Joe Bollard, Andrew Choy, Jim Hunter, *Global taxation of intellectual property: new and emrging tax policies create high-stakes balancing act* (http://www.ey.com/Publication/vwLUAssets/EY-global-taxation-of-intellectual-property-20160518.pdf/$FILE/EY-global-taxation-of-intellectual-property-20160518.pdf)

THE LEGAL REGIME OF UNFAIR CLAUSES IN COMPARATIVE LAW

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Abstract

The concept of unfair clauses has legitimately held the headlines in recent European case law and its relevance is due to the innovative case law solutions and due to the increasing volume of legal contractual relationships which may be considered as being under the legal regime of abusive clauses. The purpose of this article is to analyse unfair clauses in countries with a long history in consumer law, by comparing the manner in which these clauses are stipulated and what each state deems to be unfair. Also, the author's study is aimed to outline the legal solutions identified by the foreign legislator in comparison with the ones established by the Romanian legislator with respect to unfair consumer clauses.

This study is also directed towards emphasizing the necessity of amending the current legal framework regulating abusive clauses, since current technological developments are susceptible of creating situations where the consumer is unlikely to be guarded from a legal point of view. For example, even though contracts concluded online are highly frequent nowadays, consumer protection is still directed towards more classic contracts and is unable to provide for relevant liability in cases when the consumer is subject to intelligent agents acting in cyber space. In particular, the usual lists of clauses deemed as abusive does not reflect and are not exactly applicable to cases when the consumer orders a product or a service through online platforms and therefore, the legal framework must be amended in accordance with common cases usually encountered in today's modern reality.

Keywords: *unfair clauses, unfair contract terms, standard contract terms, good faith, contractual balance, consumer protection rules.*

1. Introduction

All parties enter a contract, when trying to perform an activity, regardless if the activity is focused on selling or procuring assets, obtaining financing for the establishment of a business or insuring their existing business. Contracting parties may be both professionals or individuals. If the parties to the same contract are one professional and one individual, there is a significant protection which the individual should be aware of, since, based on consistent legal provisions, in most cases the individual is deemed to be a consumer.

Under European Union laws[1], the consumer is defined as any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession, whereas the seller or supplier' means any natural or legal person who, in certain contracts, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned. For the purpose of this analysis, we shall refer to such a seller or supplier as a "professional".

The importance of establishing adequate and balanced contractual relationships in cases when a consumer enters a contract where the contracting party is a professional has been emphasized both by European Parliament and by member states officials whose purpose was to create a coherent and convergent legal framework for the protection of consumers.

The creation of this legal framework is fully justified and was embraced by consumers who requested the application of such framework in their own agreements. For example, large law offices have sustained that there is a growing tendency in recent years for borrowers in Spain to file claims alleging that certain provisions included in their mortgage loans are abusive or unfair[2]. In Romania, this tendency has also been increased in cases where consumers who benefited from credits in CHF reacted promptly by filling claims financial instituitions for the annulment of potentially abusive clauses. This tendency was exacerbated most likely by the huge increase of CHF exchange rate[3] and the tendency of Romanian courts is to determine that most clauses related to the manner of establishing interest rates and certain commissions are abusive and therefore, should be annulled.

2. Legal framework regarding abusive clauses and unfair terms in the European Union

The necessity to ensure proper guidelines at the level of the European Union was considered given that it is the responsibility of the European Union to supervise and ensure that contracts concluded with consumers do not contain unfair terms. Also, Member

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[1] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31993L0013

[2] http://www.allenovery.com/publications/en-gb/european-finance-litigation-review/southern-europe/Pages/Increasing-litigation-in-Spain -regarding -abusive-clauses-in-mortgage-loans.aspx

[3] https://www.economist.com/blogs/economist-explains/2015/01/economist-explains-13

States took into consideration the creation of a tool aimed to facilitate the stablishment of the internal market and to safeguard the citizen in his role as consumer when acquiring goods and services under contracts which are governed by the laws of Member States other than his own.

Based on these premises of protecting European citizens from the risks of unfair terms practiced by other contracting countries, Member States adopted Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (hereinafter "Directive no. 93/13/EEC").

Directive no. 93/13/EEC focuses on the notion of "good faith" to prevent imbalances in the rights and obligations of consumers on the one hand and sellers and suppliers on the other hand.

Under EU law, standard contract terms used by traders have to be fair. Based on Directive no. 93/13/EEC, a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

Since Directive no. 93/13/EEC was aimed to create a legal environment safeguarding consumer, it has produced a large influence regarding fundamental notions and principles of contract law in the traditional domestic legal systems of the Member States[4].

Further on, this article shall analyze the manner in which some Member States have implemented Directive no. 93/13/EEC and how the protection exercised by the European Union has affected consumers.

3. Legal framework regarding abusive clauses and unfair terms in Romania

Directive no. 93/13/EEC has been transposed in Romania through Law no. 193/2000 regarding unfair terms in contracts concluded between professionals and consumers (hereinafter "Law no. 193/2000").

Law no. 193/2000 establishes basic principles for contracts concluded between professionals and consumers for the sale of assets or for the performance of services, which include the provision of clear contractual clauses which may be understood by any individual, without specialized knowledge.

Also, pursuant to Law no. 193/2000, any unclear clauses shall be interpreted in favour of the consumer.

Law no. 193/2000 establishes a complex mechanism for determining the abusive character of a contractual clause. As per article article 4 of Law no. 193/2000, a clause which was not subject to negotiation directly with the consumer shall be deemed as abusive if by itself or along with other contractual clauses, creates with bad-faith a significant imbalance between your rights and obligations as a consumer and the rights and obligations of professionals. Also, a clause shall be deemed as not being directly negotiated with the consumer in case it has been established without the consumer's effective possibility to influence its content.

If specific terms in a contract are unfair, they are not binding on the consumer and the professional may not rely on them.

If the unfair term is not an essential element of the contract, the rest of the contract, except for the unfair term, remains valid and must be observed by the parties.

It is relevant to observe that the notions of "good-faith" and "significant imbalance" are not defined by Law no. 193/2000. To this end, consumers may revert to the practice of the European Court of Justice, which states that a significant imbalance should not been seen only in connection to an economical quantitative difference between the total value of the contractual operation and the costs borne by the consumer. More precisely, in the Court's opinion[5], a significant imbalance may result solely from a sufficient damage to the legal situation of the consumer, as a contractual party, manifested as a limitation of the consumer's rights or as a restriction for the exercise of such rights.

Also, in another case[6], the Court deemed that the observance of the good-faith should be analyzed in connection to the legal situation of the consumer, by considering the mechanisms available to the consumer as per the national legislation for the termination of unfair terms usage. In the same case, the Court mentioned that the national court must verify whether the professional could have had reasonable expectations that the consumer accepts a potentially unfair clause following an individual negotiation.

National doctrine[7] emphasizes the importance of the evaluation of the professional's behavior in general, by considering several elements, both prior and subsequent to the conclusion of the contract, for the establishment of the professional's good faith.

A point which national doctrine[8] correctly emphasized is that some clauses inherently connected to and which define the object of the contract or establish the equivalence between the price and the product or service provided by the professional are excluded from the application of Law no. 193/2000 and implicitly, Directive no. 93/13/EEC, if they are expressed in a clear and intelligible language.

As opposed to most continental law, US laws do not comprise a definition of unfair terms and do not provide

[4] Paolisa Nebbia, Unfair Contract Terms in European Law. A Study in Comparative and EC Law, , Hart Publishing, 2007.
[5] ECJ, Judgment of the Court (First Chamber), 16 January 2014, Constructora Principado SA v José Ignacio Menéndez Álvarez
[6] Judgment of the Court (First Chamber), 14 March 2013,
Mohamed Aziz v Caixa d´Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)
[7] Lucian Mihali Viorescu, *Clauzele abuzive in contractele de credit,* Ed. Hamangiu, p. 176.
[8] Liviu Stanciulescu, *Curs de drept civil. Contracte,* Ed. Hamangiu, 2014, p. 100.

criteria for establishing whether a clause may be deemed as unfair[9]. However, good faith is defined by US laws and this provision may be a proper start for determining whether by breaching good contractual faith, one may generate a significant imbalance to a consumer.

4. The black and grey lists of unfair terms as per Directive no. 93/13/EEC and Law no. 193/2000

Current legal framework does not only provide the conditions which a clause must meet in order to be deemed as unfair, but also exemplifies the types of clauses which may be ab initio considered as unfair.

For example, the Annex of Directive no. 93/13/EEC provides several types of indicative and non-exhaustive list of the terms which may be regarded as unfair. Some of these terms refer to requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation, irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract, enabling the professional to alter the terms of the contract unilaterally without a valid reason which is specified in the contract or to to alter unilaterally without a valid reason any characteristics of the product or service to be provided or even obliging the consumer to fulfil all his obligations where the professional does not perform his.

This list has been considered as a „grey list" by Romanian doctrine[10], since the determination of the abusive character of such clauses must be performed by analysing the conditions set our in national legal framework. This point of view emerged from European practice[11], based on the findings of the European Court which mentioned that the Annex of Directive no. 93/13/EEC serves as a „grey list" of terms which may potentially be deemed as unfair, whereas the Annex of Law no. 193/2000 represents a „black list" of clauses which must be interpreted as unfair, without any subsequent analysis.

The Annex to Law no. 193/2000 comprises, among others, clauses which allow the professional to unilaterally amend the contractual terms, without a serious ground which must also be stipulated in the contract, clauses which oblige the consumer to observe contractual conditions which he could not effectively be aware of at the date of signing of the contract and clauses which allow the professional to exlusively interpret contractual terms.

In addition, the Annex to Law no. 193/2000 also includes clauses based on which the consumer must may substantial amounts of money if the consumer does not observe certain obligations. These amounts of money are usually excessive in comparison with the actual damage suffered by the professional. Also, another type of abusive clauses are the ones in which the professional is entitled to claim damages from the consumer even if the professional did not execute its own obligations. Legal doctrine[12] identifies that certain clauses comprised in agreements concluded by professionals with phone companies are abusive, since these provide that the consumer must pay penalties for the non-observation of his obligation to pay the due amounts. In some cases, these penalties even exceed the main amount, therefore the lack of proportionality of the clause is more than clear.

Under Romanian law, if a clause may not be initially included in the Annex of Law no. 193/2000, the national court must analyse whether the conditions stipulated within article no. 4 of Law no. 193/2000 are cumulatively met in order to determine that said clause represents an unfair term.

5. Unfair terms in comparative law

Even prior to the adoption of Directive no. 93/13/EEC, both Member States and foreign states have been preoccupied in addressing the issue of consumer protection.

For example, foreign literature[13] revealed that in the United Kingdom, in 1973, the Supply of Goods (Implied Terms) Act 1973 was adopted, limiting for instance the use of warranty exclusion clauses, considered unfair, particularly in consumer contracts.

In France, the Loi No 78-23 du 10 janvier 1978, Loi sur la protection et l'information du consommateur de produits et de services was the normative act which innovatively introduced the concept of abusive clause in contracts entered into between professionals and consumers. This Law provided that certain clauses may be prohibited, limited or regulated when imposed on non-professionals or consumers by the other party's abusive use of economic power, which confers an advantage to the professionals.

In Germany, the Act against Misleading Advertising (Das Gesetz gegen den unlauteren Wettbewerb) was adopted in 1965. On December 9, 1976, Germany adopted the General Conditions of Sale Act (Das Gesetz zur Regeland des Rechts des Allgemeinen Geschäftsbedingungen), which was not limited only to consumer contracts and protected natural as well as legal persons against unfair pre-formulated (standardized) contract clauses.

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[9] Anca Ruen, *Paradoxurile juridice ale bunei-credințe în contractele de consum. Privire comparativă între sistemul continental şi sistemul american,* Revista Jurisprudentia nr. 3/2011.

[10] Lucian Mihali Viorescu, Clauzele abuzive in contractele de credit, Ed. Hamangiu, 2018, p. 142.

[11] European Court of Justice, Judgment of the Court (Ninth Chamber) of 26 February 2015, Bogdan Matei and Ioana Ofelia Matei v SC Volksbank România SA

[12] Ana-Maria Lucia Zaharia, *Clauzele abusive în contractele încheiate de consumatori*, Revista Forumul Judecătorilor nr. 3/2009.

[13] Union des consommateurs, Ending abusive clauses in consumer contracts - Final Report of the Project presented to Industry Canada's Office of Consumer Affairs, Canada, September 2011.

Currently, the perspective on unfair terms has been treated both in common law and in continental law.

For example, in the United Kingdom, in 1977, the Unfair Contract Terms Act 1977 (hereinafter the "UCTA") was adopted. This Act incorporated SOGITA's regulation of liability limitation or exemption clauses and extended the law's scope to adhesion contracts between merchants. Once Directive no. 93/13/EEC was adopted, United Kingdom has integrated its dispositions in the Unfair Terms in Consumer Contracts Regulations (hereinafter the "UTCCR"), for the first time in 1994 and then in 1999. Currently, both normative acts are applied. As opposed to the UCTA, the UTCCR proposes a list of clauses presumed unfair and contains no list or example of clauses considered unfair.

French doctrine[14] states that the theory of contractual obligations is influenced by socialist ideology, which substitues contractual equality with the protection of the weakest party, by developing consumer rights. In France, the credit agreement is currently regulated within the Consumer Code and Loi nº 95-96 du 1er février 1995 transposing Directive no. 93/13/EEC. Specialized literature[15] pointed out that the so-called "Loi L.M.E."*(Loi no 2008-776 du 4 aout 2008 de modernisation de l'economie)* of 2008 provided for two lists of unfair clauses depending on the features and conditions related to the terms of the: a grey and a black list of clauses. While the grey list presumes some clauses are unfair and the professional must prove the non-abusive nature of the clause, the black list comprises clauses which must be considered as abusive.

In Spain, as in other European countries, the legal framework allows consumers to address courts in view of censoring the unfair terms included in contracts concluded between consumers and professionals. Recently, there is an accentuated tendency in case law that leans towards declaring the abusiveness of many clauses standardly used by financial institutions in the mortgage market. For example, Spanish Supreme Court has ruled that rounding-up clauses are unfair since they generate a significant contractual imbalance between parties**[16]**. Once the rounding-up clause is rendered nul land void, the bank is obliged to repay the excess amounts it has collected as a result of the operation of the clause. The Court's conclusion is reasonable, considering that rounding-up clauses represent standard clauses in floating interest mortgage loans and facilities, whereby the lender is entitled to always round up an interest rate to the nearest full percentage point. Also, the Spanish Supreme Court has deemed that default interest rate clauses which specify that a default interest rate is more than three times the legal rate of interest (measured as at the date of default), it shall be declared abusive.

In the Netherlands, the fundamental premise of contract law is not contract freedom, but "reason and fairness", as per the Dutch Civil Code of 1992, in the sense that "*a contract term that conflicts with the requirements of reason and fairness is not applicable*[17]". Based on this general principle, in Dutch law the notion of an adhesion contract is not acceptabile. Dutch law provides a distinction between general terms, which are basically represented by all contractual clauses, except for the ones destined for the actual purpose of an agreement, including its price. Nevertheless, Directive 93/13/EEC has been integrated in the Dutch Civil Code, which contains two lists of clauses which must be or may be considered as abnormally onerous – a black list and a simple list.

3. Conclusions

By adopting Directive 93/13/CEE, a new legal framework was created, leading to an almost uniformization of the legislation regarding the protection of consumers in the European Union. Directive no. 93/13/EEC also represented the basis on which some Member States adopted a stricter policy regarding consumer rights and unfair terms in contract concluded between professionals and consumers. Its relevance is that prior to the adoption of Directive no. 93/13/EEC, professionals had the liberty to include unfair terms in their contracts, without any sanction. In present, the high tendency of consumers to address the court for the annulment of unfair clauses has emerged based on the protective legislation created by the European Union. Therefore, professionals cannot insert standard, unfair terms in their agreement and if these clauses are successfully contested, professionals may bear financial liability before consumers.

Although not all Member States have adopted black lists of clearly unfair terms, the progress made in the field of protecting consumers has been hugely appreciated. Nevertheless, this European progress should be assessed also in relation to the impact that this may have on the domestic traditions which may have been more permissive with potentially unfair clauses in the past.

Last but not least, consumer laws should also be adapted considering the increase in technology development, which leads to a higher numer and type of agents offering services in online to consumers. As such, the interest of the legislator should be guided also towards the innovative nature brought by intelligent agents[18], such as the legally binding nature of a web page, the neutrality of an intelligent agent etc.

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[14] Rémy Cabrillac, Droit des obligations, 3e édition, Dalloz, Paris, 1998, p.5.

[15] Anna Tarasiuk-Flodrowska, Abusive clauses in consumer and insurance contracts – Recent developments in Europe, published in The European insurance law review no.1/2014, available at http://www.erevija.org/eng/home.php.

[16] http://www.allenovery.com/publications/en-gb/european-finance-litigation-review/southern-europe/Pages/Increasing-litigation-in-Spain-regarding-abusive-clauses-in-mortgage-loans.aspx

[17] Art. 6:2 al. 2 Nieuw Burgerlijk Wetboek (NBW).

[18] Silvia Feliu, *Intelligent Agents and Consumer Protection*, International Journal of Law and Information Technology, Vol. 9, No. 3, Oxford University Press 2001.

References

- Paolisa Nebbia, Unfair Contract Terms in European Law. A Study in Comparative and EC Law, , Hart Publishing, 2007
- Liviu Stanciulescu, Curs de drept civil. Contracte, Ed. Hamangiu, 2014
- Lucian Mihali Viorescu, Clauzele abuzive in contractele de credit, Ed. Hamangiu, 2018
- Rémy Cabrillac, Droit des obligations, 3e édition, Dalloz, Paris, 1998
- Union des consommateurs, Ending abusive clauses in consumer contracts - Final Report of the Project presented to Industry Canada's Office of Consumer Affairs, Canada, September 2011
- Anca Ruen, Paradoxurile juridice ale bunei-credințe în contractele de consum. Privire comparativă între sistemul continental și sistemul american, Revista Jurisprudentia nr. 3/2011
- Anna Tarasiuk-Flodrowska, Abusive clauses in consumer and insurance contracts – Recent developments in Europe, published in The European insurance law review no.1/2014, available at ,http://www.erevija.org/eng/home.php
- Silvia Feliu, Intelligent Agents and Consumer Protection, International Journal of Law and Information Technology, Vol. 9, No. 3, Oxford University Press 2001
- Ana-Maria Lucia Zaharia, Clauzele abuzive în contractele încheiate de consumatori, Revista Forumul Judecătorilor nr. 3/2009
- http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31993L0013
- http://www.allenovery.com/publications/en-gb/european-finance-litigation-review/southern-europe/Pages/Increasing-litigation-in-Spain-regarding-abusive-clauses-in-mortgage-loans.aspx
- https://www.economist.com/blogs/economist-explains/2015/01/economist-explains-13
- ECJ, Judgment of the Court (First Chamber), 16 January 2014, Constructora Principado SA v José Ignacio Menéndez Álvarez
- ECJ, Judgment of the Court (First Chamber), 14 March 2013, Mohamed Aziz v Caixa d´Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)
- European Court of Justice, Judgment of the Court (Ninth Chamber) of 26 February 2015, Bogdan Matei and Ioana Ofelia Matei v SC Volksbank România SA

ACTION FOR DECLARING THE ABUSIVE CHARACTER AND FOR ASCERTAINING THE ABSOLUTE NULLITY OF SOME CLAUSES FROM A CREDIT CONTRACT CONCLUDED BETWEEN A PROFESSIONAL MERCHANT AND A CONSUMER. CONDITIONS OF ADMISSIBILITY FROM THE PERSPECTIVE OF THE SPECIAL LAW AND OF THE COMMON LAW. EFFECTS ON THE DEVELOPMENT OF THE CONTRACT

Eugenia VOICHECI[*]

Abstract

The Council Directive 93/13/EEC on unfair terms in consumer contracts was transposed into the Romanian legislation under the Law no. 193/2000 on unfair terms in the agreements concluded by professionals and consumers.

The above legislation sets the legal framework of consumer protection, defines both the consumer and professional and establishes the conditions to be cumulatively met in order for a term to be declared unfair.

The above-mentioned legislation does not institute a juris et de jure presumption regarding the unfairness of the terms listed in the annex, therefore the supervisory body and courts of law are called upon to assess in each case subjected to control whether a certain term is unfair or not.

The Council Directive 93/13/EEC and the Law no. 193/2000 do not impose, exhaustive definitions for the professional and the consumer status and do not exclude the incidence of other provisions of internal law, either lex specialis or lex generalis, for determining such status.

The above-mentioned legislation does not exclude the possibility to invoke other grounds for nullity specified in other lex specialis or in lex generalis in a trial for ascertaining the unfairness of the terms and the nullity of certain clauses. Thus, an analysis of the specific jurisprudence reveals a juxtaposition of distinctive legal grounds.

Not lastly, the above-mentioned legislation does not expressly provide whether the courts of law are competent to modify a term which was declared unfair, nor does it provide the circumstances under which an agreement could be executed after the elimination of the unfair term. The above-mentioned legislation provide in terminis solely the incumbent nature of the consumer's agreement for the continuation of the contractual relationship. In this context, the relevant materials for finding solutions which could lead to safeguarding the agreement are the C.J.E.U. case-law and the Romanian law.

Keywords: *credit contract; consumer; abusive clauses; nullity; the carrying out of the contract.*

Introduction

The objectives of the paper are focused on shaping the legal regime of this type of legal action and on highlighting its peculiarities, while harmonizing the internal legislation with the European legislation, changing at national level the paradigm of the system for regulating the relations of private law in the context of the existence of a manifest inconsistency in the regulatory framework in defining the concept of „professional" and the increased frequency of The study addresses the topic of consumer rights protection in concluding and executing contracts concluded by them with professionals, by means of an action for finding unfair terms in these contracts, regulated by the European Union legislation and the national law.

The analysis is of particular importance since the approach of this procedural protection mean shows the legislator's concern for safeguarding the contractual balance by setting up measures in favour of the weak contractor, who has to resort to the contracts concluded with the professionals that represent the constancy of social and economic relations of satisfying the general interests court cases in which the allegedly unfair nature of contractual terms is claimed.

In order to meet the stated objectives, the approach must go from the exhaustive presentation of the internal and European legal framework, from underlining the basic concepts, to highlighting the common elements, but especially particular elements of the action in finding the unfair nature of the terms in the concluded contracts between professionals and consumers in determining the consequences of admitting such an action, highlighting the main guidelines of a rich judicial practice of the Romanian courts and the Court of Justice of the European Union.

The need for this study emerged from the fact that there is a wide jurisprudence in the matter, but that the problem of the particular nature of the action in finding the unfair terms has been poorly addressed in the doctrine, and that it needs highly welcome theoretical specifications.

The content itself

By Law no 193/2000 on unfair terms in the contracts concluded between professionals and

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consumers, the Council Directive 93/13/EEC on unfair terms in consumers contracts was transposed into the Romanian legislation and between the two legal acts there are no notable differences.

Article 1 of the Law no 193/2000 specifies the types of contracts concerned, namely those relating to the sale of goods or the provision of services, and the article 3 paragraph 1 extends the scope of the law and to other contractual instruments (requisition orders, delivery bills, tickets, vouchers), provided they refer to the pre-established general conditions.

Article 1 sets out three guiding principles, all in favour of consumers:

1. the types of contracts announced must contain clear contractual terms, for which understanding no specialty knowledge is required;
2. in the event of doubt as to the interpretation, the unclear terms shall be interpreted in favour of the consumer;
3. it is forbidden for professionals to stipulate unfair terms. From this perspective, the contracts the Law no 193/2000 refer to can be considered contracts with terms prohibited by law, and they are, in this context, part of the forced contracts category.

In the article 2 of the Law no 193/2000 „the consumer" and „the professional" are defined.

With the abolition of the Romanian Commercial Code of 1887, which operated with the notion of „trader" and provided the Law no 287/2009 on the Civil Code operates with the notion of „professional", who is defined as the person operating an enterprise, the definition proposed by the article 2 paragraph 2 of the Law no 193/2000 for a professional appears doubtful and contradictory to the purpose of the law itself, since in the traditional activities associated with trade the legislator unjustifiably adds liberal professions.

Besides, it should be noted that in the initial form of the legal act to which we refer the legislator referred in the title of the law to the contracts concluded between traders and consumers, in which case we can conclude that the protection regime provided by the legal act analyzed concerns the situation of the professionals-traders. An argument in this respect is also the provision in the article 4 paragraph 2, which discusses the general conditions practiced by the merchants (emphasis added) on the market of the respective product or service.

Article 4 of the Law no 193/2000 establishes the legal status of the terms considered to be abusive.

From the examination of this ample article the following theses are broken:

1. The premise of qualifying a term as unfair is its non-negotiated nature. It is considered as not non-negotiated directly with the consumer the term that was established without giving the consumer the opportunity to influence its nature, meaning in which the article 4 paragraph 2 of the law refers to pre-formulated standard contracts or to the general conditions of sale practiced by traders on the concerned product or service market.

The non-negotiated nature is not removed when only certain terms were negotiated if, for the rest of the contract, a global assessment leads to the conclusion that it was pre-established by the professional.

Related to the non-negotiated character of the term, the legal act analyzed provides in the article 4 paragraph 3 the final thesis that if the professional claims that a standard term was negotiated directly with the consumer, the professional has the burden of proof of this aspect, by way of derogation - we underline - from the *actori incumbit probatio* rule, since in the actions for annulment the professional is a defendant.

In this way, the legislator constituted in terms of evidence a consumer's favour regime, establishing virtually a presumption of non-negotiation of terms in the pre-formulated contracts, a relative presumption that the professional may overturn according to the principle *in excipiendo reus fit actor*.

It is necessary to emphasize that the wording of the Law no 193/2000 unquestionably reveals that the legislator understood to establish in favour of consumers a special regime that will protect them from possible imbalance in the contractual relations with the professionals and this regime mainly concerns the moment of conclusion of the contract and the stage of the negotiations, this is why the analysis of all the conditions required to verify the unfair nature of a term must relate to those two moments, being, in that logic and in terms of the unfair nature of the terms, quasi-irrelevant that a contract was enforced with regard to retrospective character of the nullity sanction attached to that unfair nature.

The evidence thesis to be traced and proved by the professional – trader concerns a stage prior to that of the agreement of will, namely the negotiation phase, from the logical-grammatical interpretation of the evoked legal text, and it can be reasonably inferred that the legislator does not give unconditional preference to the aspect formally related to the signing of the contract, but to the way the agreement of will is achieved and the real possibility for the consumer to discuss the terms proposed by the professional, negotiate them and accept them knowingly and in accordance with their own interest.

In this logic, we have to highlight, *exempli gratia*, grace in the loan agreements, which are most frequently denounced, that it is irrelevant that the borrowers - consumers signed the loan agreements and the fact that they have opted for a particular type of pre-formulated contract from a series of similar contracts of the same type, as long as the legislator does not consider sufficient to adhere to the contract or the choice between several types of adhesion contracts, but firmly requires proof of direct negotiation of the contract in its entirety or some of its terms, respectively the proof of those discussions prior to the conclusion of the contract showing the borrower's agreement was reached regarding the content of the denounced term.

2. The terms considered to be unfair are set out in an exemplary annex to the law.

We appreciate that this inventory of unfair terms in the annex to the law cannot lead to the conclusion that these terms are unfair *de plano*.

In this respect, we evoke the provisions of the article 4 paragraph 1 of the legal act examined, which states that the contractual term is considered to be unfair, which „by itself or with other provisions of the contract, creates a significant imbalance between the rights and obligations of the parties, to the detriment of the consumer and contrary to the requirements of good faith".

The provisions of the paragraph 5 of the article 4 cited above lead to the same conclusion, which provide the parameters against which the unfair nature of a contractual term is assessed (emphasis added):

a) the nature of the products or services which are the subject of the contract at the time of its conclusion;
b) all the factors that led to the conclusion of the contract;
c) other terms of the contract or other contracts on which it depends.

The annex 1 to the Law no 193/2000 comprises a list containing terms considered as unfair and the Annex to Directive no 93/13/EEC is relative to the terms referred to in the article 3 paragraph 3 of the Directive.

Both legal acts show that in the accompanying annexes there is an inventory of some terms *that can be considered unfair* .

None of the legal reference acts provides that in the annexes there is an exhaustive inventory of the terms considered unfair.

None of the legal acts mentioned provides *in terminis* that the terms mentioned are presumed to have *per se* - in the absence of any other conditionings - an unfair character.

On the contrary, by reference to the article 3 paragraph 3 of the Directive, even in the title of the Annex, the conclusion that imposes is that the inventory of the terms in the Annex does not contain unfair terms only to the extent they meet the other conditions required to declare their unfair nature.

Under the circumstances, we consider that the reference to a certain typology of the terms contained in an exemplary list, not limitative, cannot in itself lead to the conclusion that those terms are presumed *juris et de jure* as unfair, since the absolute legal presumptions must be expressly stated in unequivocal terms not deducted *per a contrario* or by other interpretative considerations, in which case it is proposed to consider that the annex to a legal act may derogate from the rules which make up the body of that legal act.

Consequently, we consider that there can be no absolute presumption of the unfair nature of the terms mentioned in the annexes cited and that this unfair nature must be proved in the circumstances of the article 4 of Law no 193/2000, respectively under the article 3 and following of the Directive no 93/13/EEC.

3. According to the article 4 paragraph 6 of the Law no 193/2000, certain terms cannot be censored from the point of view of their unfair character:

„The assessment of the unfair nature of the terms is not associated either with defining the main object of the contract or with the quality of meeting the price and payment requirements on the one hand and the goods and services offered on the other, to the extent these terms are expressed in a readily understandable language".

Although the text outlined seems to censor those intimate terms related to the contract price and the specific nature of the consideration, the exemption is only partial and justifiably operates only when the terms are expressed in easily understandable language.

The doctrine and the jurisprudence consistently established that whenever a term of the kind provided in the article 4 paragraph 6 of the law does not meet the requirement of clear and easily comprehensible expression, it can be examined under the same article in terms of its unfair nature.

This is the case, for example, of the terms regarding the interest and bank charges, where the courts, retaining their essential character, nevertheless made an assessment of the unfair nature precisely because of the unclear expression and concluded that the positions expressed and assumed by the litigants show that the borrower and the lender had different representations of the interest variability rate at the time of the conclusion of the contract; this aspect, in conjunction with the absence in the special contract concluded with each borrower, a contract which necessarily singularizes the terms of the agreement and to which all the assumed concrete obligations have to be reported, of any indication regarding this variability criterion makes the contractual provision relating to the variable reference interest be considered unquestionably a provision expressed in terms of maximum equivocal, which authorizes the examination of this term in the light of the provisions of the article 4 paragraphs 1 and 2 of Law no 193/2000.

The courts went further and analyzed, referring to the specificity of the contracts concluded and the particular form of the denunciated terms, that the expression in a readily understandable language cannot be limited to a correct grammatically, morphologically, syntactically and semantically and that easily intelligible language means that in the case of conventions, each of the contracting parties should have the unambiguous representation of the nature and extent of its own acquired rights and obligations and of the rights and counterparts of the other side.

4. We consider that, in order to establish/declare the unfairness of a term, it must meet cumulatively the requirements of the article 4 paragraphs 1 and 6 (if it is an essential term of the contract) of the law, respectively the term was not negotiated directly with the consumer, was not expressed in a language that is easy to understand and creates, contrary to the requirements of good faith, by itself

or together with other provisions of the contract, a significant imbalance between the rights and the obligations of the parties. They are, in fact, the conditions for the admissibility of the action for annulment, to which is added the requirement-premise of the existence of a contract concluded between a professional and a consumer, a contract which, as provided by the article 3 paragraph 2 of the Law no 193/2000 does not fall under any other legal text in force.

Also from the point of view of the admissibility conditions, we consider that it is necessary to specify that the law in the analysis concerns the contracts for the sale of goods and the services, mentioned in the article 1 paragraph 1 of the law. In this context, we note that the provisions of the article 7 of the Law no 193/2000 have an improper or rather incomplete wording, given that the contracts provided by the legislator include, together with successive enforcement contracts, also contracts with *unoictu* execution, which would require that the resolution be mentioned and sanctioned together with that of termination, expressly provided.

For reasons to be further shown, we consider that the action to establish the unfairness of contractual term, based on the provisions of the article 4 of Law no 193/2000 has the effect of ascertaining the absolute nullity of those terms, which, in accordance with a consistent doctrine and case-law on that point, requires an examination of the grounds for nullity and of the requirements imposed by the article 4 paragraphs 1 and 6 of the law at the time of the conclusion of the contract.

For this particular type of action, however, the examination of the significant imbalance requirement between the rights and obligations of the parties exceeds this reference moment of the conclusion of the contract and is, in reality, placed in the overwhelming majority of cases in the next time, that of the execution of the contract.

This is because the consumer's rights are actually harmed not at the time when an unclear term is stipulated and left exclusively at the hands of the professional – trader, but at the time when the latter uses it. The establishment and collection of a fluctuating interest rate, generally increasing, depending on changes considered significant in the financial market, the anticipated maturity of the balance in case of alleged devaluation of the collateral, the increase of the principal to be repaid when the exchange rate fluctuates, etc. are significant in this respect.

The wording of the text of the Law no 193/2000 implicitly shows that an action for finding the unfairness of the contractual terms can be promoted also during the course of the contract and the provisions of the article 6, article 7, article 12 paragraph 4, article 14 of the law can be interpreted as such. It reinforces the idea that the assessment of the contractual imbalance is inevitably placed on the executive realm, exceeding the moment of conclusion of the contract, when the terms in question have only the potential to create an imbalance between benefits.

In many of the judgments pronounced, the Court of Justice of the European Union ruled on the moment of the conclusion of the contract as the one to which it relates, including the establishment of the imbalance between benefits. It is relevant the judgment of the Court (Second Chamber) of 20 September 2017 in case C-186/16 Ruxandra Paula Andriciuc and others against Banca Românească S.A., in which the Court stated the following:

„The article 3 paragraph (1) of the Directive 93/13 is to be interpreted as meaning that the assessment of the unfairness of a contractual term must be made in relation to the time at which the contract is concluded, taking into account all the circumstances the professional might have known at the time and were likely to influence the subsequent performance of the contract in question. It is for the referring court to assess, having regard to all circumstances of the main case and taking into account, in particular, the expertise and knowledge of the professional, in the present case of the bank, regarding possible fluctuations in foreign exchange rates and the risks inherent in the contracting of a foreign currency loan, the existence of any imbalance within the meaning of that provision" [1].

It is retained from the grounds of that judgment that „It follows that, as the advocate general observed in points 78, 80 and 82 of these conclusions, the assessment of the unfairness of a contractual term must be made in relation to the time at which that contract was concluded, taking account of all circumstances of the case which the professional could have known at that time and which were likely to influence the subsequent execution of the contract, a contractual term involving an imbalance between the parties which would not occur until the performance of the contract.

In the present case, it is apparent from the order for reference that the term in question in the main case, inserted in foreign currency loan contracts, states that the monthly repayment rates of the loan must be made in the same foreign currency. Such a term places the risk of foreign exchange to the consumer in case of devaluation of the national currency in relation to that foreign currency.

In that regard, it is for the referring court to assess, in the light of all circumstances of the main case and having regard, in particular, to the expertise and knowledge of the professional, in this case the bank, as to possible fluctuations in foreign exchange rates and risks inherent in contracting a foreign currency loan, in the first place, the possible non-compliance with the requirement of good faith and, second, the existence of any significant imbalance within the meaning of the article 3 paragraph (1) of the Directive 93/13.

In order to ascertain whether a term such as that at issue in the main dispute, contrary to the requirement

[1] The judgment can be found at http://curia.europa.eu/juris/document/document.jsf?text=&docid=194645&doclang=RO

of good faith, a significant imbalance between the rights and the obligations of the parties to the contract, to the detriment of the consumer, the national court must verify whether the professional by acting fairly and fairly towards the consumer, it could reasonably be expected that the latter would accept such a term following an individual negotiation (see, to that effect, the Decision of March 14 2013 Aziz, C415/11, EU:C:2013:164, points 68 și 69)"[2].

Or, while the judgement firmly referenced at the reference point of the conclusion of the contract, the Court of Justice of the European Union itself cannot categorically separate the timing of the contract to be executed while referring to the placement of foreign exchange risk in the consumer's task, which implies the execution of the contract.

That is why we believe that the approach of this kind of action must be done with maximum finesse and taking into account its specificity, which, for a fair and judicious application of the requirement to assess the significant imbalance between the parties' performance must be transgressing from the moment of the formation of the contract at the time when it is enforced, but without thereby confusing the unpredictability mechanism, provided it is based on a non-negotiated term, contrary to good faith and potentially harmful, therefore virtually null.

Moreover, we believe that in order to understand the peculiarity of the action based on the article 4 of the Law no 193/2000 should be referred to the virtual nullity institution, the effects of which shall be objectified during the execution of the contract. Since an abrupt and strict approach to assessing the significant imbalance between benefits only from a theoretical perspective by limiting at the time of the conclusion of the contract is not intended to make that procedural remedy an effective remedy to protect the consumer since an assessment *in abstracto* imposed even to a professional, especially in the case of those long-term loan contracts, is unrealistic and makes the stated intention of protecting the consumer a dead letter.

Action to establish the unfairness of contractual terms.Characters and effects

The provisions of the Law no 193/2000 do not link *in terminis*, but only implicitly the action for finding/declaring the unfair nature of contractual terms of the nullity action, but that is undoubtedly apparent from the corroborated examination of the article 6, and article 7 and article 12 paragraph 4 of the law, legal texts which refer to the fact that the terms found to have unfair nature do not have any effect on the consumer, that they will be deleted/removed from the contract and the consumer who opposes an adhesion contract containing unfair terms has the right to invoke the nullity of the term by way of action or exception, according to the law - we emphasize - before the common law court.

The systematic interpretation of the analyzed legal texts leads to the conclusion that the declaration/finding of the unfair nature of a term (some terms) is the premise and also the cause of its nullity, a *sui generis* nullity cause, based on the non-negotiated character (which can be subsumed to the lack of consent) and the injurious character of contractual balance.

Although the type of nullity is not provided in the Law no 193/2000, we consider that it can only be absolute nullity. In order to reach this conclusion, we proceed from the very purpose of the Law no 193/2000, to establish a legal protection regime for the consumer in contractual relations with the professional – trader, which implies vigorous sanctions for violation of the rules of protection issued for this purpose, public order rules in our appreciation.

Secondly, if we start from the sanction related to the non-negotiated nature of the term/terms, we can conclude that the legislator has understood to protect the parties' willingness to consent, which presupposes the existence of consumer's consent to the insertion of contractual terms. Or, under the Civil Code regime of 1864 (under which the Law 193/2000 was adopted), the lack of consent at the conclusion of the act is sanctioned with absolute nullity, according to the provisions of the article 948 point 2 of the Civil Code.

Last but not least, related to the provisions of the article 12 paragraph 4 of the law, referring to the nullity regime deduced from the interpretation of the provisions of the article 2 of the Decree no 167/1958 (in force at the time of the adoption of the Law no 193/2000), only absolute nullity could be invoked at any time, either by way of action or by way of exception.

Establishing the type of nullity implied by the unfair character of a (some) contractual term(s) is of particular interest, because in the wording of the Law no 287/2009 regarding the Civil Code the rule is the relative nullity, as it results from the interpretation of the provisions of the article 1252: „In cases where the nature of the nullity is not determined or is not unquestionably apparent from the law, the contract is reversible". In the present case, according to the preceding arguments, the nullity is absolute, as it is clear from the law.

A constant problem in court practice has been the possibility for the consumer to invoke also the grounds for common law nullity, in addition to the unfair nature and disregard of the provisions laid down by the special law.

We appreciate this accumulation as possible, considering that the provisions of the article 12 paragraph 4 of Law no 193/2000 confers the right of the consumer to invoke the nullity by way of action or exception, under the law (emphasis added). Or, as long as there is no obligation on the consumer to use only the route provided by *lexspecialis*, we consider that he

[2] idem

has open the way of common law in which he may juxtapose grounds for nullity provided by consumer protection law and grounds for nullity provided for by common law, the purpose of the action being one and the same, namely the lack of efficiency of the terms that are contrary to the law.

In accordance with the principle of safeguarding the contract (*favor contractus*), the Romanian legislator in 2000 reaffirmed the settled rule of nullity, namely partial nullity, endorsing it in the article 6, article 12 paragraphs (3)-(4) and the article 13 paragraph (1) of the legal act above mentioned.

Therefore, the rule is to continue the performance of the contract after the cancellation of the terms found to be null, provided that it can still be executed in the absence of these terms and provided that the consumer agrees to do so.

The latter condition seems somewhat bizarre, and can be regarded as a consumer-recognized surplus of protection. This is because, for the assumption that the contract may continue after the abolition of unfair terms, it must be acknowledged that this also benefits the consumer, who does not contest the contract as a whole. In that case, the expression of the consumer's consent appears to be excessive, especially as it has been given the reparation function of the nullity penalty, which is the removal of the term and the full repair of the damage suffered by the parties in the previous situation (*restitutio in integrum*).

Where the contract no longer produces legal effects after cancellation of a term/some terms, the consumer is granted the right to request termination (we have shown in the previous one that the termination in the contracts with enforcement at a time), with damages. We consider this provision to be inappropriate, since the impossibility to execute the contract leads to the application of the sanction of its obsolescence.

Conclusions

In the analysis made we aimed to tackle the following research directions of the topic chosen:

Thus, we identified the types of contracts covered by the Law no 193/2000 and we highlighted the principles imposed by this legal act for the elaboration of the contracts concluded between professionals and consumers and we characterized these contracts as contracts with terms prohibited by law considering the legal prohibition to insert unfair terms in them.

I have synthesized the legal definitions of the professional and the consumer, highlighted the inadequate and inappropriate nature of the professional definition, and concluded, with regard to the provisions of the new Civil Code, but also to the original title of the law and certain legal provisions that survived the changes that occurred in the course, that the legal act refers to the category of professionals-traders.

We have extensively presented the legal regime of unfair terms, with theoretical arguments and examples of judicial practice.

Finally, we highlighted the characters, the specificity and the effects of the action in finding the unfair nature of some contractual terms.

We appreciate that the present study will be a starting point, an opportunity for reflection and a theoretical and practical guide to understanding and solving actions to establish the unfair nature of contractual terms, being - to the author's knowledge - the first attempt to synthetically and systematically tackle the issues addressed.

We consider that the researched field is far from exhausted and future directions of analysis will have to go towards the crystallization of the definitions of the professional and the trader, the delimitation between the actual consumer and the irregular traders, depending on the type of activity carried out, towards the position the conventions concluded between the consumers and liberal professions has in the wording of these contracts.

We also believe that there are still arguments to be exploited in relation to the type of nullity implied by a term declared unfair in the context of the regulation of the new Civil Code, especially from the point of view of the characterization of the economic public order, but also from the perspective of the formation of the will agreement as the expression of consent and the aspect of lesion regulation.

Last but not least, we consider that the interferences between the institutions of unpredictability and the nullity action, as well as between the institution of termination/cancellation and the caducity or other causes of ineffectiveness of legal acts may be exploited in a beneficial sense.

References

- The Council Directive 93/13/EEC
- The Law no. 193/2000

INTERACTION BETWEEN HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION AND DOMESTIC LITIGATIONS CONCERNING DOMICILE OF THE CHILD AND PARENTAL AUTHORITY

Anca Magda VOICULESCU[*]

Abstract

In the vast majority of cases, international abduction of a child determines almost per se litigations both at international and national level, namely an international litigation based on provisions of Hague Convention on the civil aspects of international child abduction and a domestic litigation aiming at establishing the domicile of the child in the state of destination and other different measures concerning the child which fall within the area of parental authority (joint or exclusive).

The purpose of the article is to analyze the interaction between the international and the national case and how they influence each other from a double perspective (procedural and substantial), taking into account that the two litigations are generally pending at the same time. Even the mere coexistence of the two litigations gives rise to the question which one should have priority in solving.

Therefore, the objectives of this study are, on the one hand, to examine the implications in the domestic litigation of the decision pronounced in the Hague litigation (international competence, suspension of the national case, elements which are covered by the res judicata principle), and on the other hand to identify how a national decision on domicile and parental authority may influence the solution in the Hague case.

Keywords: *international abduction of a child, international litigation, domestic litigation, procedural implications, substantial implications.*

1. Introduction

The present study aims to analyze the interaction between two types of litigations (one national and the other international), which generally appear at the same time in case of international child abductions.

The subject presents significant importance, from both practical and theoretical point of view.

International child abductions give birth in practice, almost automatically, to an international case based on provisions of the 1980 Hague Convention on the civil aspects of international child abduction that pursues to return the child to the state of origin, as well as a to a domestic litigation, where the goal is to establish the domicile of the child in the state of destination (and eventually other different measures concerning the child that fall within the area of parental authority – joint or exclusive).

The parties involved in these disputes have opposite interests on the same major aspect that is at stake in both cases, namely to establish the domicile of the child[1] in the state of origin (the parent left-behind) or in the state of destination (the abductor parent).

Depending on the solution on this point, other procedural and substantial aspects are to be determined. Moreover, the mere coexistence of the two litigations gives rise to the question which one should have priority in solving.

In this context, it comes natural that there is an interaction between the two cases, which expresses both in procedure and substance, and not only during court proceedings, but also after settlement by judicial judgement.

The great number of cases in the particular area of international child abductions where national and international litigations coexist, doubled by the fact that this aspect has not yet been discussed in Romanian juridical literature, fully illustrates the importance of identifying the interdependence aspects of and providing an answer to questions raised by this interdependence.

To reach this purpose, we intend to make a short presentation of the 1980 Hague Convention (nature, objectives, mechanism provided to assure the prompt return of abducted children to the state of origin), in connection to Council Regulation (EC) no. 2201/2003 (applicable for Member States of European Union).

As in practice 1980 Hague Convention and the Regulation apply in compliance with national law, we will also identify relevant provisions in Romanian domestic law and present case law (both national and international).

Specialized opinions (where they have been expressed) will also be identified and discussed.

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[1] „*Habitual residence*" in the words of the 1980 Hague Convention (notion specific to 1980 Hague Convention, distinct from the notion of domicile in national legislations).

Interconnecting all these different perspectives (legislative, judicial and doctrinal), we will finally conclude over the main interaction points in procedure and substance and solutions proposed from our national domestic perspective.

2. Content

2.1. The 1980 Hague Convention on the Civil Aspects of International Child Abduction

The Hague Convention on the Civil Aspects of International Child Abduction is an intergovernmental agreement concluded at The Hague on October 25, 1980, during the 14th Session of the Hague Conference on Private International Law, which entered into force on December 1, 1983[2].

Similar to other Hague Conventions, an Explanatory Report was drafted by Eliza Pérez-Vera[3] and is a useful working tool for professionals who deal with international child abductions in their practice.

The 1980 Hague Convention governs issues related to parental kidnapping of children under the age of 16[4] across international borders and involving the jurisdiction of different countries[5].

It's objectives are „to secure the prompt return of children wrongfully removed to or retained in any Contracting State and ensure that the rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States" (Article 1 of 1980 Hague Convention).

The very first article of 1980 Hague Convention expresses threfore the idea that this international agreement does not address the question who should have domicile of the child[6], but only aims to achieve the objectives presented above[7], of which the most important is considered to be the prompt return of the child to the state of origin[8].

Once the child has been returned to the state of habitual residence, the dispute concerning domicile and parental authority can then be solved in the courts of that jurisdiction under the applicable national law[9].

The mechanism provided by 1980 Hague Convention to achieve the immediate return of the child is simple and efficient and should be applied complemented by domestic law of each Contracting State[10].

Each country party to 1980 Hague Convention designates a Central Authority to carry out specialized Convention duties. Central Authorities cooperate in order to achieve the objects of the convention (Articles 6 and 7 of 1980 Hague Convention).

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance

[2] For an online text, see for example www.hcch.net. In 1999, the Hague Conference established INCADAT, a database of significant decisions in the area of international child abductions, available in general in summary and full text, in English, French, Spanish and sometimes the original language at www.incadat.com.

[3] Explanatory Report on the 1980 Hague Child Abduction Convention drafted by Eliza Pérez-Vera, Madrid, April 1981, published in 1982 and available online at the following link: https://www.hcch.net/en/publications-and studies/publications2/explanatory-reports, last accession on 28.02.2018; 17,57.

[4] The 1980 Hague Convention does not apply to unborn children (cases involving pregnant mothers). Also, it considers age 16 of the child, specific to this international instrument and different from the age of emancipation in different domestic legislations.

[5] M. Welstead & S. Edwards, *Family Law*, Oxford University Press, 2nd Edition, 2008, p. 352-353: „Where abduction occurs in countries which are signatories to the Convention, the Convention applies. (…) Where countries are not signatories to the Hague Convention, inter-country cooperation is difficult and outcomes for parents are haphazard and unpredictable, with the result that the courts have adopted divergent rules with regard to non-Convention cases."

[6] K. Standley, *Family Law*, 6th Edition, Palgrave Macmillan Publishing House, New York, 2008, p. 352: „The scheme of the Convention is to provide a speedy extradition-type remedy whereby Contracting States agree to return abducted children to their country of habitual residence so that the matter can be dealt with there. In this sense it is a provisional remedy, for Hague Convention proceedings are not concerned with the merits of a custody issue – that is a matter for the court in the child's country of habitual residence."

[7] For the same conclusion, see D.F. Barbur, *Autoritatea părintească*, Hamangiu Publishing House, 2016, p. 215. ECtHR held that failure of national authorities to secure return of abducted children may lead to a breach of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and therefore national authorities must take positive measures to enable parents to be reunited with their children, unless contrary to children's best interests (ECHR, Decision adopted on 29 April 2003, Application no. 56673/00, case *Gil and Aui v. Spain*; ECHR, Decision adopted on 26 June 2003, Application no. 48206/99, case *Maire v. Portugal*).

[8] C. Mol LL.B., *Non-traditional Family Forms & the International Dimension of Family Life:* A Report on the ERA Seminar, 'Recent Case Law of the European Court of Human Rights in Family Law Matters', p. 1, available online at the following link: http://www.familyandlaw.eu/tijdschrift/fenr/2016/06/FENR-D-16-00006/fullscreen, last accession on 28.02.2018; 19,14: „ (…) at the time of the adoption of the Hague Convention the opinion was that it is in the best interests of the child to be returned immediately to the country of habitual residence. Primarily because most abductors were believed to be fathers who no longer had custody rights and abducted the children out of frustration or spite, but also because the Hague Convention aimed to dissuade parents from abducting their children as it is in children's best interests not to be abducted. However, research has shown that nowadays most abductors are mothers with the role of primary caretakers." Starting from case *Neulinger and Shuruk v. Switzerland* (ECtHR, Decision adopted on 6 July 2010, Application no. 41615/07), the author expresess doubts that, at present, automatic and prompt return is still considered to be in the best interests of the child (ECtHR developed the opinion that a swift return is not always in the best interests of the particular abducted child, and the best interests of the child must be assessed in each individual case).

[9] There are countries where abducting a child is a criminal offence (e.g., United Kingdom of Great Britain and Northern Ireland, under the Child Abduction Act 1984 - see K. Standley, *op. cit.*, p. 350).

[10] K. Standley, *op.cit.*, p. 352: „Instead of making a return order, the English courts have sometimes adopted the practice of accepting an undertaking from a party to the proceedings. An undertaking is a promise to the court (for example, to return the child, to provide accommodation, travel costs or maintenance) and breach of the undertaking can be contempt of court. (…) The problem with undertakings, however, is that, compared to court orders, they are not easily understood by foreign courts and enforcement abroad may be difficult."

in securing the return of the child (Article 8 of 1980 Hague Convention).

The judicial and administrative authorities of the Contracting States under the Convention are required to use the most expeditious procedures for the return of children according to their national law (Article 2 of the Hague Convention).

To this respect, a period of six weeks from the date of commencement of the proceedings is recommended in order to take a decision (Article 11 of 1980 Hague Convention).

Participation of Romania to 1980 Hague Convention was assured by Law no. 100/1992 for Romania's accession to 1980 Hague Convention on the Civil Aspects of International Child Abduction[11].

Subsequently, Law no. 369/2004 on the application of 1980 Hague Convention on the Civil Aspects of International Child Abduction[12] provided procedural and substantial domestic rules under which international child abductions are dealt with[13].

In Romania, the designated Central Authority is the Romanian Ministry of Justice.

Since 2004, Romania has unified national territorial competence for international child abductions in Bucharest (Bucharest Tribunal is the first instance and Bucharest Cort of Appeal is the instance of appeal).

The case may be brought to court either by the Ministry of Justice as Central Authority or by any person, institution or other interested body and no costs are attached.

By exeption to the general rule, no defence procedural act is mandatory; free legal aid and advice by an attorney are assured.

The period between court sessions cannot be longer than two weeks and participation of the prosecutor is imperative.

Adoption of judgement may be postponed 24 hours and motivation of decision should be made within 7 days from date of pronouncement.

2.2. Connection to Council Regulation (EC) no. 2201/2003

Abduction of children is a growing problem in European Union, where citizens increasingly move freely across borders. It is a frequent situation that abductions occur among EU citizens, who decide either to wrongfully remove, or illegally retain a child in the territory of another EU Member State[14].

Relation between 1980 Hague Convention and the Council Regulation no. 2201/2003[15] is very important, as there are EU State Members which at the same time are contracting parties to 1980 Hague Convention[16].

The connection between them is legiferated by Article 60 of the Regulation, according to which, in relations between Member States, the Regulation shall take precedence over the Hague Convention in so far as they concern matters governed by the Regulation[17].

Nevertheless, 1980 Hague Convention will continue to govern issues not dealt by the Regulation, as well as abduction cases involving EU State Members and third countries that are parties to 1980 Hague Convention[18].

Recital 17 of the Preamble of the Regulation clarifies that in case of wrongful removal or retention of a child, provisions of 1980 Hague Convention will continue to apply, as complemented by article 11 of the Regulation[19].

In this context, we consider important to underline the progress made by the Regulation in comparison to 1980 Hague Convention, related to some particular matters concerning international child abductions[20].

First, when applying Articles 12 and 13 of 1980 Hague Convention[21], it shall be ensured that *the child*

[11] Published in the Official Gazette of Romania no. 243/30.09.1992.

[12] Published in the Official Gazette of Romania no. 888/29.09.2004 and republished in the Official Gazette of Romania no. 468/25.06.2014.

[13] For short references to 1980 Hague Convention (without further comments), see M. Avram, *Drept civil. Familia*, 2nd Edition revised and completed, Hamangiu Publishing House, 2016, p. 492.

[14] Most of international abduction cases in which Romania is involved concern Italy, Spain, France, United Kingdom of Great Britain and Northern Ireland and Germany. Also, there have been cases with Hungary, Austria, Ireland, Greece, Cyprus, Portugal, Mexic, USA.

[15] Council Regulation (EC) no. 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) no. 1347/2000, OJ L338/1 (12/23/2003).

[16] This „double participation" arises the problem of priority/armonisation between 1980 Hague Convention and Regulation no. 2201/2003.

[17] The Regulation is not limited to issues related to child abduction. It intends to solve, in general, conflicting issues related to jurisdiction, recognition and enforcement of judgments in family relations and questions of parental responsibility, in order to create a common judicial area in civil matters, based on trust and mutual confidence in judicial systems of EU Member States.

[18] K. Standley, *op. cit.*, p. 377: „If a child is abducted (...) to a country which is not party to the Hague or European Conventions, the wronged parent is in a precarious position because (...) there are no international mechanisms in place. A parent will therefore have to try to reach an amicable settlement with the abducting parent, or commence legal proceedings in the country to which the child has been taken. (...) Bringing proceedings in countries with Islamic legal systems can be particularly difficult."

[19] To this respect, see T. Papademetriou, Implications of European Union Regulation Hague Convention on International Child Abduction, in Hague Convention On International Child Abduction. An analysis of the applicable law and institutional framework of fifty-one jurisdictions and the European Union, Report for Congress, June 2004, p. 11, James Madison Memorial Building; 101 Independence Avenue, S.E.; Washington, DC, available on-line at the following link: https://www.loc.gov/law/help/archived-reports/hague-convention-on-international-child-abduction.pdf, last accession on 27.01.2018, 15:38.

[20] For some references to this aspect, see A.-G. Gavrilescu, *Drepturile și obligațiile părintești. Drept român și comparat*, Universul Juridic Publishing House, 2011, p. 293.

[21] Exceptions to the general rule of prompt return, in case the child integrated to the new environment (Article 12) or lack of interest/consent of the holder of rights concerning the child/grave risk for the child in case of return (Article 13).

is given the opportunity to be heard during the proceedings, unless this appears inappropriate having regard to his or her age or degree of maturity (Article 11 Para 2 of the Regulation)[22]. The importance attached to the voice of the child is thus enhanced, as in the context of 1980 Hague Convention the child is to be heard only in case of Article 13 Para 2 (when the child opposes to return)[23].

Secondly, according to Article 11 Para 4 of the Regulation, a court cannot refuse return of a child on the basis of Article 13b of 1980 Hague Convention *if it is established that adequate arrangements have been made to secure the protection of the child after his or her return* (this exception is not prescribed by 1980 Hague Convention)[24].

Thirdly, pursuant to Article 11 Para of the Regulation, a court cannot refuse to return a child *unless the person who requested the return of the child has been given an opportunity to be heard* (another exception not to be found in the Hague Convention).

Finally, the Regulation introduced *new obligations for the court settling 1980 Hague case by a non-return order based on Article 13 of the Hague Convention* (Article 11 Para 6-8 of the Regulation). The central idea is that a non-return decisions in 1980 Hague cases must be followed by a clarification of legal situation of the child in the courts of the jurisdiction where the child was habitually resident immediately before the wrongful removal or retention[25].

2.3. Procedural interconnections

Procedural interconnections between the national and the international case appear while they are both pending, but also if 1980 Hague dispute is settled first[26].

It is of great importance to establish how these interconnection points are to be solved, as the two disputes generally take place at the same time under jurisdictions of different Contracting States.

Thus, the Hague case is always settled by courts in the state of destination and the domestic litigation falls within the competence of jurisdiction of the state of habitual residence[27].

a) Suspension of national litigation

The 1980 Hague Convention has specific provisions for the situation that the two disputes mentioned above are pending at the same time.

According to Article 16 of 1980 Hague Convention: „After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under the Convention is not lodged within a reasonable time following receipt of the notice." (our underline)

As clearly explained in Pérez-Vera Explanatory Report (Para 121), „ (…) so as to promote the realization of the Convention's objects regarding the return of the child, (this article – our note) seeks to prevent a decision on the merits of the right to custody being taken in the State of refuge. To this end, the competent authorities in this State are *forbidden* to adjudicate on the matter when they have been informed that the child in question has been, in terms of the Convention, wrongfully removed or retained." (our underline)

Nevertheless, 1980 Hague Convention gives no clue to application in practice of the principle prescribed by Article 16 presented above. The response is thus to be looked for in national law of each Contracting State (in general, procedural law[28]).

There are still courts considering that no provision of domestic law is necessary and apply directly (and only) Article 16 of 1980 Hague Convention when deciding suspension of the domestic case[29].

Our opinion is that the above-mentioned Article 16 prescribes a mere principle and therefore its application in practice must be individualized by provisions of domestic law (as already precised, procedural provisions left at the discretion of each Contracting State).

In Romanian case-law there was no debate on the procedural solution of suspension of national litigation; nonetheless, an intensely debated question concerns the legal nature of suspension: mandatory or facultative?

In our opinion, the answer resides in application of Article 412 pt. 8 of Romanian Procedural Civil Code, under which: „ (1) Suspension of cases operates by law:

[22] See ECJ, Decision adopted on 22 December 2010, C-491/10, case *Aguirre Zarraga v. Pelz*, where a question concerning whether the child has had the opportunity to be heard under Regulation (the case was based on Article 42 of the Regulation, but in essence the reasoning should also apply to Article 11). ECJ's approach was to emphasize the mutual trust between EU courts (if Spanish courts certified that the child had the opportunity to be heard, then they should be trusted). ECtHR's approach was very different and examined (not trusted) whether the Spanish courts had adequately protected the child's human right to be heard.

[23] K. Standley, *op. cit.*, p. 356: „It has been increasingly recognised in Hague Convention cases that children may not be being heard enough."

[24] For example, in case of a violent parent left-behind in the state of origin, the authorities of this state assure for returning parent and child protection in houses and state-sponsored shelters.

[25] This provision exemplifies an application of the well-known principle of *best interests of the child* and represents at the same time a type of cooperation among different national courts.

[26] The 1980 Hague Convention promotes the idea that domestic litigation should be settled after the Hague case, as it will be argued in the foregoing considerations.

[27] Habitual residence of the child prior to removal to the state of destination is to be established in 1980 Hague case.

[28] In case of Romania, Romanian Procedural Civil Code adopted by Law no. 134/2010, published in the Official Gazette of Romania no. 606/ 23.08. 2012.

[29] E.g., case no. 36836/301/2015 (judgement pronounced on 30.03.2016), where Judecătoria Sector 3 Bucureşti decided suspension of the domestic case concerning parental authority, based only on Article 16 of 1980 Hague Convention.

… 8. in other cases provided by law" (in case of international child abductions, the „law" to which Article 412 pt. 8 makes reference is to be individualized in Article 16 of the Hague Convention).

We consider application of Article 412 pt. 8 of Romanian Procedural Civil Code to be the right solution because it is a case of mandatory suspension (by force of law) that fully accomplishes the idea expressed by Article 16 of 1980 Hague Convention.

Romanian case-law is not unified on this aspect, and there are courts considering that Article 413 pt. 3 or Article 413 Para 1 pt. 1 of Romanian Procedural Civil Code should be applied (facultative suspension)[30].

We have strong doubts concerning this procedural solution.

Article 16 of 1980 Hague Convention is formulated in binding terms: „the judicial (…) authorities of the Contracting State to which the child has been removed or in which it has been retained *shall not decide*" – our underline. Likewise, the Explanatory Report Eliza Pérez-Vera states that „the competent authorities in this State are *forbidden* to adjudicate on the matter" (our underline).

Moreover, Article 413 of Romanian Procedural Civil Code allows national judge to appreciate upon suspension of the domestic litigation (suspension does not imperatively operate by law but falls within the margin of appreciation of the domestic judge).

Or, a facultative suspension is contrary to the text of 1980 Hague Convention quoted above.

Also, it is contrary to the spirit of 1980 Hague Convention. Let us remind that the primary scope of 1980 Hague Convention is to ensure prompt return of the child to the state of origin. This goal would become much more difficult to be attained if, prior to settling the 1980 Hague case, the national court establishes that the domicile of the child is in the state of destination[31].

Another question appeared in Romanian jurisprudence, namely suspension should be considered only in case of national litigations concerning the merits, or also in case of litigations concerning provisional measures asked to be taken by the urgent procedure in Romanian Procedural Civil Code called „ordonanță președințială"[32]?

In disagreement to the case-law[33], we consider that suspension must be decided indepently of nature of the measures asked for in the domestic case (on the merits or provisional).

We argue by the same teleological interpretation of 1980 Hague Convention presented before and also paying attention to the fact that Article 16 of 1980 Hague Convention makes no diference between provisional measures/merits of the case.

In addition, according to Article 13 of Law no. 369/2004, measures of protection concerning the child under Romanian domestic legislation (provisional by their own nature) may be taken only by the court seized with 1980 Hague case[34].

Or, there is no good reason to consider that, contrary to the spirit of these provisions, *other* provisional measures might be taken by domestic courts, while the Hague case is still pending.

We conclude that suspension of national litigation is mandatory if a 1980 Hague Convention case is pending at the same time, albeit the domestic litigation concerns the merits of the case or simply provisional measures.

In Romanian law, the correct procedural solution is to apply Article 412 pt. 8 of Romanian Procedural Civil Code, which prescribes a case of imperative suspension.

b) International competence

If 1980 Hague dispute is settled first, the judgement pronounced in this case establishes indirectly (but undeniably) the international competence of domestic court invested with the dispute concerning measures for the child under national legislation which fall within the area of parental authority (domicile, exercise of parental authority, etc.).

Article 8 of Regulation (EC) no. 2201/2003 stipulates as a rule on the matter of international competence[35]: „*The courts of a Member State shall have jurisdiction* in matters of parental responsibility *over a child who is habitually resident in that Member State* at the time the court is seised". (our underline)

As already pointed out, the state of habitual residence of the child prior to his/her removal to the state of refuge is always established in the international abduction case.

This aspect, once decided in 1980 Hague dispute, will be covered by the *res judicata* principle and therefore the national court must take it into account when deciding on its own competence.

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[30] For example, in case no. 14153/193/2017 registered at Botoșani Tribunal (judgement pronounced on 01.11.2017), the court decided suspension of domestic case based on Article 413 pt. 3 of Romanian Procedural Civil Code in connection to Article 16 of 1980 Hague Convention (facultative suspension). In a smilar reasoning of facultative suspension, Judecătoria Sector 1 București decided in case no. 16819/299/2017 (judgement pronounced on 17.01.2018), suspension based on Article 413 Para 1 pt. 1 of Romanian Procedural Civil Code (it is to be noted that, in this case, a different basis for facultative suspension was considered).

[31] For example, one may consider that, in this situation, the child is lawfully retained in the state of destination and Hague application for return should be dismissed, as conditions prescribed by Article 3 of 1980 Hague Conventin are not fulfilled.

[32] Articles 997 and subsequent of Romanian Procedural Civil Code.

[33] E.g., in case no. 37303/301/2015 (judgement pronounced on 15.01.2016), Judecătoria Sector 3 București denied suspension of national litigation („ordonanță președințială" concerning domicile of the child and exclusive parental authority) arguing that the measures making the object of the case were provisional and did not concern the merits of the case. Further on, the court decided to establish the domicile of the child to the abductor, to whom also granted exclusive parental authority.

[34] Article 13 Para 1 of Law no. 369/2004.

[35] There are also other situations apart from the general rule, where competence is attained by other means (prorogation of competence, presence of the child, etc.), according to Articles 9-14 of the Regulation.

In Romanian law, under Article 131 of Romanian Civil Procedural Code, the national judge is obliged to verify the general (international), material and territorial competence of the court at the first hearing[36].

If 1980 Hague dispute is settled and habitual residence of the child has been established in the state of origin, the national court in the state of refuge should deny its general competence.

According to Article 17 of the Regulation: „Where a court of a Member State is seised of a case over which it has no jurisdiction under this Regulation and over which a court of another Member State has jurisdiction by virtue of this Regulation, it shall declare of its own motion that it has no jurisdiction".

A similar solution is provided by Romanian Civil Procedural Code: „ If the court decides it has no jurisdiction (...) it shal reject the request (...) as not falling under the jurisdiction of Romanian courts" (Article 132 Para 4).

If 1980 Hague dispute is settled and habitual residence of the child has been established in the state of refuge, the courts in this state will gain international competence.

Finally, if the 1980 Hague dispute has not yet been settled (and international competence has not yet been established), we consider the national court should apply Article 16 of 1980 Hague Convention complied to domestic legislation and dispose suspension of the domestic case until the Hague case is pronounced by definitive judgement.

2.4. Substantial interconnections

As soon as one of the two disputes in discussion is settled, important substantial interconnections appear.

If the international dispute is solved first, juridical elements and even facts discussed and settled fall afterwards within the area of application of the principle of *res judicata*.

One example is parental authority and it's exercise prior and after removal of the child from one Contracting State to another.

Upon Article 3 of 1980 Hague Convention[37], parental authority (common or exclusive according to the law of the state of origin or judgements already pronounced in this state) and it's practical exercise represent conditions to be necessarily analyzed in order to determine if removal or retention of a child was wrongful (or not) and and decide on admission or denial of 1980 Hague application.

Once these juridical or factual elements have been established in 1980 Hague case, they must be considered by the national court and, according to appreciation of the national judge, may influence the solution to be pronounced.

Depending on the aspects established in the international litigation, the outcome in the national dispute may result in exclusive authority, change of domicile of the child to the left-behind parent and/or restricted rights of access for the abductor parent.

For example, in a 1980 Hague case, Romanian court decided return of the children to USA, stating that their habitual residence was in USA[38].

In the state of the habitual residence (even prior to the decision in the Hague case[39]), the court decided to change the custody agreed by parents at divorce (joint common legal and sole physical custody in favour of the abductor parent) into sole physical and legal custody in favour of the left-behind parent.

At the same time, the domestic court in USA decided to restrict the time to be spent by the abductor parent with children to "supervised visitation at a commercial parental supervision facility due to (…) risk of flight and abduction of the minor children[40]".

Another example consists in factual elements in the corpus of a decision of non-return based on Article 12 Para 2 or Article 13 Para 1 b of 1980 Hague Convention (integration of the child in the new environement in the state of refuge/grave risk to physical or psychological harm to the child in case of return to the state of origin)[41].

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[36] Article 131 of Romanian Civil Procedural Code: „ (1) At the first hearing when the parties are legally summoned before the court, the judge must, ex officio, examine and determine whether the court seised has general, material and territorial jurisdiction ... (2) In exceptional cases, if clarifications or additional evidence are necessary for establishing jurisdiction, the judge will take the conclusions the parties and provide a single postponement for this purpose".

[37] Article 3 of 1980 Hague Convention: „The removal or the retention of a child is to be considered wrongful where: a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

[38] Bucharest Tribunal, case no. 24670/3/2017, judgement no. 1522 pronounced on 27.10.2017.

[39] We are of the opinion that Article 16 of 1980 Hague Convention should have been applied.

[40] The Fourth Circuit Tribunal for Knox County, Tennessee, USA, case no. 131115, judgement pronounced on 17.07.2017, where the court reasoned as follows: „There has been no valid reason presented to this Court or to any Court to explain …(the abductor parent 's – our note) actions in failing to obey Orders of this Court, for denying the plaintiff coparenting time, and for removing the minor children to Romania and refusing to return them. (…) the Plaintiff has been forced to seek legal relief under the Hague Convention on the Civil Aspects of Child Abduction and there is an upcoming trial set in Romania (…) (The abductor parent – our note) has unilaterally and without cause completely denied the Plaintiff his coparenting time and as such, does not have the ability to facilitate a relationship between the Father and the minor children (…) did abduct the minor children, has refused to follow a child-custody determination of this Court (…) has engaged in conduct that Court considers relevant to risk of abduction, specifically seeking Romanian citizenship for the children (…)."

[41] Article 12 Para 2 of 1980 Hague Convention: „The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."

Integration of the child in the state of destination with the abducting parent may very well lead to establishment of domicile of the child to this parent.

Similarly, great risc to physical or psychological harm to the child based on mental illness of the left-behind parent may justify granting to the abductor parent domicile of the child and even exclusive parental authority[42].

On the other hand, the situation where the national case is pronounced first is a bit different and is expressly dealt with in 1980 Hague Convention.

Articles 17 and 18 of Hague Convention[43] invest the court solving the international case with a large margin of appreciation concerning reasons of national decision which may be taken into account in applying Hague Convention; practice has proved that, in general, courts are reluctant to refuse a return order[44].

This difference in treatment (as there is no provision in 1980 Hague Convention to leave to the appreciation of national judge the effects of the jugement pronounced in the international litigation) may well be explained by the aim to discourage national courts to solve their cases in breach of Article 16 of 1980 Hague Convention discussed above[45].

Considering limitation by law itself of influence of decision pronounced in the national litigation (Articles 17 and 18 of 1980 Hague Convention), we conclude that it is the judgement pronounced in the abduction case that has a more pregnant influence, as presented above.

3. Conclusions

In case of coexistence of national and international disputes based on situations of international child abduction, the international litigation should be settled first, according to Article 16 of 1980 Hague Convention.

This first procedural interaction between the two disputes while they are both pending should be solved according to domestic legislation, whereas 1980 Hague Convention does not prescribe a specific procedural means in order to ensure practical application of Article 16 referred to above.

Under Romanian law, we consider that the solution consists in application of Article 412 pt. 8 of Romanian Procedural Civil Code (mandatory suspension by law of the national case).

Nevertheless, taking into consideration that Romanian case – law on this point is not unified (a considerable number of courts decide facultative suspension under Article 413 of Romanian Procedural Civil Code), we appreciate that a clear legislative solution would be very useful.

In this respect, we suggest a solution similar to the one legiferated in Article 412 Para 1 pt. 7 of Romanian Procedural Civil Code[46] in case of preliminary questions pursuant to Article 267 TFEU (ex. Article 234 EC) addressed to ECJ by domestic courts, which expressly states mandatory suspension of the national dispute.

This clear legislative procedural solution would eliminate all possible interpretations of national courts that are against the text and spirit of 1980 Hague Convention and ensure at the same time a correct application of Article 16 of the same Hague Convention.

Once the 1980 Hague litigation is (priorily) settled, the implications of this decision in the national case concern both procedural and substabtial aspects.

First, it is obvious that return/non-return of the child (admission or denial of Hague application) imply establisment in 1980 Hague case of the habitual residence of the child in the state of origin or the state of destination.

Once this problem is settled, a very important procedural consequence arises in the national case, respectively international competence of the domestic court to decide on the merits in the national case.

Depending on the state of habitual residence as established in 1980 Hague case, international competence to take measures concerning the child belongs either to the court in the state of origin, or to the court in the state of destination.

Article 13 Para 1 b of 1980 Hague Convention: „Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that (…) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

[42] Article 398 of Romanian Civile Code (Law no. 287/2009 concerning Romanian Civil Code, published in the Official Gazette of Romania no. 511/24.07.2009 and republished per Article 218 from Law no. 711/2011, published in the Official Gazette of Romania no. 409/10.06.2011, in force from 01.10.2011) and Article 36 Para 7 of Law no. 272/2004 concerning protection and promotion of children's rights, published in the Official Gazette of Romania no. 557/23.06.2004, successively modified and lastly republished in the Official Gazette of Romania no. 159/05.03.2014.

[43] Article 17 of 1980 Hague Convention: „The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but *the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention*." (our underline)

Article 18 of 1980 Hague Convention: „The provisions of this Chapter *do not limit the power of a judicial or administrative authority to order the return of the child* at any time." (our underline)

[44] K. Standley, *op. cit.*, p. 366: „Thus, the alleged abductor has a heavy burden to establish a defence. Even if a defence is proved, the court retains an overriding discretion under art. 18 to order the child's return."

[45] The Explanatory Report drafted by Eliza Pérez-Vera states on this point that: „The solution contained in this article (article 17 – our note) accords perfectly with the object of the Convention, which is to discourage potential abductors, who will not be able to defend their action by means (…) of a decision obtained subsequently, which will, in the majority of cases, be vitiated by fraud."

[46] Article 412 Para 1 pt. 7 of the Romanian Procedural Civil Code: „ (1) Suspension of cases operates by law: (…) 7. in case that the national court addresses a preliminary question to the ECJ according to the Treaties on which the Union is founded."

Secondly, there are certain substantial aspects comprised in the merits of the decision pronounced in 1980 Hague case that are covered by the *res judicata* principle and therefore become mandatory for the national court and influence/may influence the solution in domestic case.

Such aspects are always those concerning parental authority and it's exercise prior and after removal of the child from one state to another (conditions imposed to be analyzed by Article 3 of the 1980 Hague Convention in order to determine if a wrongful cross-border removal or retention of a child has taken place).

In adition, in case of non-return based on Articles 12 Para 2 or 13 Para 1 b of 1980 Hague Convention, integration of the child in the new environement of the state of destination or grave risc to expose the child to physical or psychological harm in the state of origin are also substantial aspects discussed and settled in the international litigation.

All these substantial aspects may influence the national decision on parental authority (joint or exclusive), domicile of the child or rights of acces to the child.

In case the national dispute is pronounced before 1980 Hague (contrary to Article 16), the influence of the national judgement on the solution to be adopted in the international dispute is much weaker. It *may* appear only in substance and is to be decided always by the judge invested with 1980 Hague dispute, depending on the particularities of the case.

Article 17 and 18 of 1980 Hague Convention are relevant to this aspect and give to the court solving the international case a large margin of appreciation concerning reasons of the national decision which may be considered in applying Hague Convention.

We consider that all aspects taken in discussion above could help to ensure a unified case – law on procedure and substance of courts settling both national and international case, a goal necessary to be reached in general and moreover in a realm as sensible as international abduction of children.

Also, corresponding to the foremost importance that the European Court of Human Rights has attached to settling international abduction cases in a reasonable time within the sense of Article 6[47] of the European Convention for the Protection of Human Rights and Fundamental Freedoms[48], we consider that some specific legislative solutions may be taken into consideration.

To this end, expres prohibition of regularization and prealable procedure prescribed by Articles 200 and 201 of Romanian Procedural Civil Code as a rule would be clear means to ensure faster settlement of international abduction cases[49].

The judge invested to solve such a dispute will thus establish automatically the date of first court session from the very moment of receiving the file case and not consider waiting for the prealable procedure to be exhausted.

Also, shorther express legal periods of time for receiving citation by parties in cases of international child abductions might offer a solution.

On the one hand, given the fact that Romania has unified territorial competence in Bucharest, it is a usual situation that parties have domiciles all over Romania and shorter periods as proposed above would be useful, in connection to the recommended period of 6 weeks to solve the 1980 Hague case[50].

On the other hand, it is not always the case that judges use the possibility to shorten themselves these periods per Article 159 of the Romanian Civil Procedural Code[51].

References

- Avram Marieta, *Drept civil. Familia*, 2nd Edition revised and completed, Hamangiu Publishing House, 2016
- Barbur Diana Flavia, *Autoritatea părintească*, Hamangiu Publishing House, 2016
- Gavrilescu Alin-Gheorghe, *Drepturile și obligațiile părinteşti. Drept român și comparat*, Universul Juridic Publishing House, 2011
- Mol Charlotte LL.B., *Non-traditional Family Forms & the International Dimension of Family Life*: A Report on the ERA Seminar, 'Recent Case Law of the European Court of Human Rights in Family Law Matters'
- Papademetriou Theresa, Implications of European Union Regulation Hague Convention on International Child Abduction, in Hague Convention On International Child Abduction. An analysis of the applicable

[47] The notion of „reasonable time" should be interpreted in the specific area of international child abduction in connection to Article 11 Para 2 of 1980 Hague Convention: „If the judicial or administrative authority concerned has not reached a decision within *six weeks from the date of commencement of the proceedings*, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay." (our underline)

[48] Concluded in Rome, 04.11.1950, ratified by Romania through Law no. 30/18.05.1994, published in the Official Gazette of Romania no. 135/31.05.1994.

[49] E.g., in adoption cases the legislator expressly excepted this type of litigations from application of Article 200 of the Romanian Procedural Civil Code (Article 87 of Law. no. 273/2004 concerning adoption procedure, lastly republished in the Official Gazette of Romania no. 283/14.04.2016).

[50] Should the period for receiving citation not be respected, the case must be postponed for a regular citation, which takes generally one month if the domicile of parties is not in Bucharest.

[51] According to Article 159 of the Romanian Civil Procedural Code, the first date of session in court is established as to ensure respect of a period of 5 days before the date of the hearing.

law and institutional framework of fifty-one jurisdictions and the European Union, Report for Congress, June 2004, James Madison Memorial Building; 101 Independence Avenue, S.E.; Washington, DC
- Standley Kate, *Family Law*, 6th Edition, Palgrave Macmillan Publishing House, New York, 2008
- Welstead Mary & Edwards Susan, *Family Law*, Oxford University Press, 2nd Edition, 2008
- ECtHR, Decision adopted on 29 April 2003, Application no. 56673/00, case *Gil and Aui v. Spain*
- ECtHR, Decision adopted on 26 June 2003, Application no. 48206/99, case *Maire v. Portugal*
- ECtHR, Decision adopted on 6 July 2010, Application no. 41615/07, case *Neulinger and Shuruk v. Switzerland*
- ECJ, Decision adopted on 22 December 2010, C-491/10, case *Aguirre Zarraga v. Pelz*
- Judecătoria Sector 3 București, case no. 36836/301/2015, judgement pronounced on 30.03.2016
- Judecătoria Sector 3 București, case no. 37303/301/2015, judgement pronounced on 15.01.2016
- The Fourth Circuit Tribunal for Knox County, Tennessee, USA, case no. 131115, judgement pronounced on 17.07.2017
- Bucharest Tribunal, case no. 24670/3/2017, judgement pronounced on 27.10.2017
- Botoşani Tribunal, case no. 14153/193/2017, judgement pronounced on 01.11.2017
- Judecătoria Sector 1 București, case no. 16819/299/2017, judgement pronounced on 17.01.2018
- European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 04.11.1950, ratified by Romania through Law no. 30/18.05.1994, published in the Official Gazette of Romania no. 135/31.05.1994
- Hague Convention on the Civil Aspects of International Child Abduction concluded at The Hague on October 25, 1980
- Explanatory Report on the 1980 Hague Child Abduction Convention drafted by Eliza Pérez-Vera, Madrid, April 1981, published in 1982
- Law no. 100/1992 for Romania's accession to 1980 Hague Convention on the Civil Aspects of International Child Abduction, published in the Official Gazette of Romania no. 243/30.09.1992
- Council Regulation (EC) no. 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) no. 1347/2000, OJ L338/1 (12/23/2003)
- Treaty on the Functioning of the European Union, Official Journal C 326, 26/10/2012
- Law no. 369/2004 on the application of 1980 Hague Convention on the Civil Aspects of International Child Abduction, published in the Official Gazette of Romania no. 888/29.09.2004 and republished in the Official Gazette of Romania no. 468/25.06.2014
- Law no. 272/2004 concerning protection and promotion of children's rights, published in the Official Gazette of Romania no. 557/23.06.2004, successively modified and lastly republished in the Official Gazette of Romania no. 159/05.03.2014
- Law. no. 273/2004 concerning adoption procedure, lastly republished in the Official Gazette of Romania no. 283/14.04.2016
- Romanian Civile Code, Law no. 287/2009 concerning Romanian Civil Code, published in the Official Gazette of Romania no. 511/24.07.2009 and republished per Article 218 from Law no. 711/2011, published in the Official Gazette of Romania no. 409/10.06.2011
- Romanian Procedural Civil Code, Law no. 134/2010, published in the Official Gazette of Romania no. 606/ 23.08. 2012

PARENTAL AUTHORITY VERSUS COMMON CUSTODY

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Abstract

The notion of parental authority introduced to Romanian legislation by the New Romanian Civil Code is totally distinct from the notion of custody specific to other domestic legislations both in theory, as in practical consequences implied.

The purpose of the article is to make a comparative presentation of the two different notions mentioned above, as they are (still) constantly confused, even though a significant period of time has elapsed since the New Romanian Civil Code entered into force. Confusion comes mainly from the fact that Romanian Civil Code was inspired from Quebec Civil Code, where the legislation formally refers to the notion of parental authority, but in substance this notion presents nevertheless the caharacteristics of the concept of custody.

Therefore, the objectives of the present study are to identify the content and forms regulated in legislation for each of the notions, by studying legal provisions relevant for parental authority in Romanian legislation, respectively custody in national legislations of other states. As a result, the main theoretical resemblances and differences between the two concepts will be decelated.

Furthermore, the study will identify the practical consequences generated by their common points (important decisions are to be taken by agreement of both parents, whereas routine decisions can be made individually) and main differences (domicile of the child/alternate domicile and rights of access).

Keywords: *parental authority, custody, domicile of the child, rights of access, best interests of the child.*

1. Introduction

The present study aims to make a comparative presentation of two different notions – parental authority and custody – by identifying from a theoretical point of view their content and forms prescribed in legislation, but also the practical consequences generated by their differences.

The subject has great importance, as the two notions are still confused by practitioners of law, although a significant period has elapsed since Romanian Civil Code[1] (which introduced to our domestic legislation the concept of parental authority) entered into force.

To reach this aim, the study will identify legal provisions relevant for parental authority in Romanian legislation and custody in national legislation of other states. Furthermore, it wil concentrate on clarifying the content and forms regulated in legislation for each of the notions.

Also, case – law relevant for the subject will be presented, both domestic and foreign, as it reflects how these notions were understood and applied in practice.

Doctrinal opinions will also be identified and systematized, with the necessary mention that preponderence goes to studies from abroad, as in Romanian juridical literature the subject has scarcely been discussed.

Coroborating all these different, but interconnected perspectives, the article will conclude over the main theoretical resemblances and differences between the two concepts.

At the same time, it will point out practical aspects reflected in case – law in close connection to parental authority and common custody (specially domicile of the child /alternate domicile and rights of acces/„equal time" for the child with both parents).

2. Content

2.1. Content and forms of parental authority in Romanian legislation

Article 483 of Romanian Civil Code („Parental Authority") provides the definition and main characteristics of the notion of parental authority[2].

According to the above-mentioned article: „ (1) Parental authority is the set of rights and obligations concerning both person and property of the child which belong equally to both parents. (2) Parents exercise parental authority only in the best interests of the child,

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[1] Law no. 287/2009 concerning Romanian Civil Code, published in the Official Gazette of Romania no. 511/24.07.2009 and republished per Article 218 from Law no. 711/2011, published in the Official Gazette of Romania no. 409/10.06.2011, in force from 01.10.2011.

[2] References to parental authority are to be found also in other legislations, e.g. Articles 371-373 of French Civil Code or Articles 597-612 of Quebec Civil Code. Despite of the formal title („parental authority"), the concept corresponds more to the notion of custody, whereas parental authority and custody cannot be assimilated in substance. Likewise, Civil Code of Luxemburg (Title IX) refers to „parental authority". Therefore, this notion is not new in Romanian law (details to this respect in A.-G. Gavrilescu, *Drepturile și obligațiile părintești. Drept român și comparat*, Universul Juridic Publishing House, 2011, p. 242).

with due respect to his person, and associate the child in all decisions affecting him, considering the age and maturity of the child. (3) Both parents are responsible for bringing up their minor children." (our underline)

Subsequently, Article 487 of Romanian Civil Code („Content of parental authority") offers details about the content of the concept of parental authority in our domestic law: „Parents have the right and duty to raise the child, taking care of the child's health, physical, mental and intellectual upbringing, and also the child's education and training, according to their own beliefs, characteristics and needs of the child; they are bound to give the child guidance and advice needed in order to properly exercise the rights granted by the law".

General provisions of Romanian Civil Code must be corroborated to special legislation, respectively Law no. 272/2004[3] (Article 36), according to which: „ (1) Both parents are responsible for raising their children. (2) *Exercise of parental rights and obligations must be in the best interests of the child and ensure material and spiritual welfare for the child, especially by providing care, maintaining personal relationships and providing growth, education and maintenance, as well as legal representation and administration of patrimony*" (our underline).

In case of divorce, the general rule is common parental authority[4], whereas sole/exclusive parental authority is the exception, in cases stipulated both by Romanian Civil Code (objective exceptions[5]), respectively Romanian Civil Code and Law no. 272/2004 (subjective exceptions[6]).

In each of the cases, the decision to grant exclusive parental authority belongs to the court, which will establish, considering the specificities of the case, if the best interests of the child recommend common or sole parental authority; in the latter case, it is also for the court to choose the parent who presents the guarantees for exercising sole parental authority.

From corroboration of legal provisions detailed above, it results that parental authority (either joint or sole), deals with rights and obligations of the parents that must be exercised only in the best interests of the child[7]. To reach this aim, parents take decisions on behalf of the child, by common consent or unilaterally (depending on exercise of parental authority - joint or exclusive).

In this context, it is important to underline a major distinction between the notion of parental authority introduced by Romanian Civil Code and the notion of „încredinţare" legiferated by the former Romanian Family Code[8].

The notion of „încredinţare" implied both domicile of the child and right to make unilaterally decisions for the parent who had the domicile[9]. According to actual legislation, the notion of parental authority encompasses the right to make decisions (jointly or exclusively)[10], but does not include domicile of the child (which is to be decided over different criteria from parental authority[11]).

Although common parental authority was introduced to our domestic legislation to encourage maintenance of parental responsibility after divorce, in certain cases it may give rise to abuses/perpetuate the conflict between parents, and the consequences are inflicted directly and primarily on the child.

In this case, we consider that the recommended solution is sole parental authority. Despite a significant resistance against exclusive parental authority in the beginning (save for the objective situations limitedly

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[3] Law no. 272/2004 concerning protection and promotion of children's rights, published in the Official Gazette of Romania no. 557/23.06.2004, successively modified and lastly republished in the Official Gazette of Romania no. 159/05.03.2014.

[4] Per Article 397 of Romanian Civil Code: „After divorce, parental authority rests jointly to both parents, unless the court decides otherwise".

[5] Article 507 of Romanian Civil Code („Exclusive parental authority") provides an exhaustive list of objective exceptions: "If one parent is *deceased*, *declared dead* by judgment, under *interdiction*, *deprived of the exercise of parental rights* or if, for any reason, it is *impossible* for him or her to express his or her will, the other parent exercises parental authority alone". (our underline)

[6] Article 398 of Romanian Civil Code („Exclusive parental authority") opens the possibility for the court to appreciate in favour of sole parental authority in subjective situations, depending on circumstances specific to each case: „For *serious reasons*, given the interests of the child, the court decides that parental authority is exercised exclusively by a parent. (2) The other parent retains the right to watch over the child's care and education and the right to consent to adoption" (our underline). Subsequently, Article 36 Para 7 of Law no. 272/2004 exemplifies in a nonexhaustive list the subjective reasons mentioned by Civil Code in a general manner, as follows: „There are considered serious grounds for the court to decide that parental authority is exercised by a single parent *alcoholism*, *mental illness*, *drug addiction* of the other parent, *violence* against children or against the other parent, *convictions* for human trafficking, drug trafficking, crimes concerning sexual life, crimes of violence, as well as *any other reason related to risks for the child* that would derive from the exercise by that parent of parental authority." (our underline)

[7] M. Welstead & S. Edwards, *Family Law*, Oxford University Press, 2nd Edition, 2008, p. 242: „ (…) parental rights and parental responsabilities (…) have been displaced in favour of the responsabilities of parents towards their children, and (…) under certain circumstances the rights of children prevail. Parental rights have been reframed as responsabilities (…)".

[8] Law no. 4/1953, published in the Official Gazette of Romania no. 4/04.01.1954, amended by Law no. 4/1956 published in the Official Gazette of Romania no. 11/ 04.04.1956, republished in the Official Gazette of Romania no. 13/18.04.1956, succesively amended, lastly by Law no. 59/1993, published in the Official Gazette of Romania no. 177/26.07.1993.

[9] M. Avram, *Drept civil. Familia*, 2nd Edition revised and completed, Hamangiu Publishing House, 2016, p. 152.

[10] M. Avram, *op. cit.*, p. 160: „ (…) exercise of parental authority does no longer split by entrusting the child to one of the divorced parents, situation which does not exclude the possibility for the court to decise otherwise, but nevertheless these measures of splitting parental authority operate only in exceptional situations".

[11] For the same conclusion, F. Emese, *Dreptul Familiei. Căsătoria. Regimuri matrimonial. Filiaţia,* 5th Edition, C.H. Beck Publishing House, Bucharest, 2016, p. 521.

prescribed by Article 507 of Romanian Civil Code), present case-law[12] accepts exclusive authority.

A parent who, by his own behavior, comes to present a significant risk for the child (even appreciated by subjective standards offered by Article 398 of Romanian Civil Code and Article 36 Para 7 of Law no. 272/2004), must not be allowed to exercise parental authority.

Also, not all parents are suitable for joint authority. Parents should respond in an analogous way to the child's needs (physical, material, emotional, spiritual, etc.) and must be able to handle a functional and non-conflictual communication.

We consider that at least the following criteria are important in deciding over exercise of parental authority: parents have no difficulty in working together; they both agree on joint parental authority and take their share of responsibility; there is no violence, resentment or revenge between the parents; they agree on domicile of the child; they have similar style education and values; in case of divergence, they are ready to negotiate and give in; they are supporting each other as partners equal to raise and educate the child; they are able to maintain a stable environment including extended family (grandparents, uncles, aunts, cousins) and even reconstituted families (stepmothers or stepfathers may represent distinct forms of attachment for children).

If these criteria are not met, we consider that joint parental authority becomes only the means to continue and expand after divorce the conflict between parents and child is caught between different (even opposite) systems of education and values.

2.2. Content and forms of custody

By contrast to Romanian legislation which recognizes the notion of parental authority, domestic legislations of other states refer to the notion of custody[13], which encompasses two forms (legal custody and physical custody).

Legal custody considers the authority to make major (important) decisions on behalf of the child and includes sole legal custody and common (joint) legal custody.

The parent who has sole legal custody is the only person who has legal authority to make major decisions concerning the child.

On the contrary, joint legal custody means that both parents have legal authority to make important decisions for the child.

There are certain advantages of sole legal custody, such as: it is easier to make major decisions when there is only one parent legally responsible; it may result in greater consistency for the child; for situations when one parent is completely absent, it is necessary for the other (present) parent to be able to make important decisions without having to consult and decide with a parent who is not available.

In case of joint legal custody, the major disadvantage is that, when disagreements arise over various decisions, it is often the case that neither of the parents compromises on his or her convictions, and the court must be seized to take the decision for them. The inevitable consequence is that decisions cannot be taken but at the end of litigation, whereas it is well known that celerity is very important in taking decisions concerning children[14].

Physical custody refers to the aspect where the child lives most of the time (it is sometimes referred to as „residential custody").

Similar to legal custody, physical custody encompasses two forms: sole physical custody and joint physical custody.

In case of sole physical custody, the child physically resides in one location (with „custodian parent"). In most cases, „non-custodial" parent is awarded generous visitation rights, including sleepovers.

In case of joint physical custody (also called „shared custody", „shared parenting" or „dual residence"), the child lives with one parent for part of the week (or month/even year), and with the other parent during the remaining time. The division of time spent at each location is approximately equal.

It is important to note that parents can potentially share joint legal custody without having joint physical custody.

There is also a third option, called „*bird's nest custody*". This appears when the children live in one central location, and the parents rotate in and out of the children's home on a regular schedule[15].

While this child-centered approach can ease transitions for the children, it can be costly (to impossible) to maintain three separate residences and difficult for parents to constantly move from one

[12] Bucharest Tribunal, Fourth Civil Section, decision no. 938/A pronounced on 22.10.2012 (the court appreciated that exclusive parental authority was justified in the situation where one of the parents encountered real difficulties to obtain the consent of the other parent for important decisions concerning the child, such as participation of the child in crossborder sport competitions with the national team).

[13] S.P. Gavrilă, *Instituții de dreptul familiei în reglementarea Noului Cod Civil*, Hamangiu Publishing House, 2012, p. 205: „ (…) notion borrowed from other legal systems, which does not overlap identically to exercise of parental authority (…)".

[14] This might be the reason why some legislations prescribed an original (and very practical) solution for situations where parents cannot reach an agreement concerning a certain type of important decisions. According to B. D. Moloman, L.-C. Ureche, *Noul Cod Civil. Cartea a II-a. Despre familie. Art. 258-534. Comentarii, explicații și jurisprudență*, Universul Juridic Publishing House, Bucharest, 2017, p. 671, Article 1628 of German Civil Code stipulates that in such situations, at the request of parent(s), the court may transfer authority to take that type of decisions to one of the parents. Romanian legislation does not have such a solution, and thus it is necessary to seize the court every time parents do not agree over an important decision (even if the situation is repetitive) - Article 264 of Romanian Civil code and Article 36 Para 8 of Law no. 272/2004.

[15] For example, parents spend alternate weeks at the children's home.

residence to another[16] (this type of custody remains just a proposal that we have never met in practice).

2.3. Important decisions/routine decisions

As a common point between parental authority and custody (when they are jointly exercised, and in addition custody encompasses the form of joint legal custody[17]), major decisions concerning the child are to be taken by agreement of both parents.

On the contrast, decisions concerning routine aspects of the child's every day life can be made individually by the parent who is currently exercising his or her parenting time.

In this context, it is of high importance to identify if a decision is major or merely routine.

If not prescribed by the domestic law or clarified in the judgment governing parental authority/custody, it can sometimes be difficult to determine whether a specific decision is important or routine.

As a general rule, major decisions are distinguished from day-to-day decisions by their importance and their nonrepetitive nature[18]; likewise, major decisions are those which „exceed daily needs of the child"[19].

Important decisions are, in general, decisions regarding education, religion, and healthcare.

Examples of major decisions include e.g., where the child should go to school, what type of religious upbringing he or she will have, non-emergency medical decisions.

As consequence, routine decisions encompass all the other aspects that do not enroll in the area of major decisions.

This type of decisions is to be taken individually and the other parent cannot interfere[20].

In conclusion, the general rule is that important decisions shall be made jointly by applying what was called „principle of codecision"[21] and routine decisions shall be made individually.

Should both parents not agree on an important issue, one parent will have to petition the court to make the decision for them, based on the child's best interests.

If important decisions are made unilateraly by one parent or if a parent believes that the other parent is engaging in harmful routine decisions regarding the child, he or she may ask the court to modify rights of access (parenting time) or even the domicile of the child (or custody).

In Romanian legislation, the initial form of Law no. 272/2004 did not prescribe which types of decisions were important. Therefore, it was often the case that parents seized courts to decide over this aspect and the case-law was quite diverse, generated by lack of even general criteria that at least should have been regulated by the legislator.

This is the reason why, in 2013, among other modifications, the legislator decided to expressly and limitatively state which decisions are important[22].

Article 36 Para 3 of Law no. 272/2004 (actual form) provides that: „If both parents exercise parental authority, but do not live together, important decisions, such as type of education or training, complex medical treatment or surgery, residence of the child or administration of property shall be taken only with the consent of both parents."

Also, to avoid non-implication/abuse in making important decisions, the legislator stipulated two limits.

The first limit regards the non-responsive parent, who does not provide any answer on important decisions needed to be taken, even specifically asked by the other parent. In this case, the decision is to be made by the parent who has been entrusted with the domicile of the child.

The second limit concerns the abusive parent, who makes important decisions that are not in the interests of the child, taking advantage of the non-interested conduct of the other parent. In this case, the decision cannot be taken unilaterally, and most often will be decided by the court[23].

2.4. Alternate domicile

As already pointed out, under Romanian Civil Code, the domicile of the child does not fall in the area of parental authority, and this is the first and most important distinction between parental authority and custody[24].

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[16] Nevertheless, it is far more difficult for children to move from one location to another in case of alternate domicile (joint physical custody).

[17] Physical custody, as already pointed out, does not deal with making decisions on behalf of the child, but with periods of time spent by the child with each of the parents.

[18] J. S. Ehrlich, Family *Law for Paralegals,* 7th Edition, Wolters Kluwer Publishing House, New York, 2017, p. 202.

[19] D. Lupașcu, C. M. Crăciunescu, *Dreptul Familiei*, 3rd Edition amended and actualized, Universul Juridic Publishing House, 2017, p. 557.

[20] „If the other parent is interrogating you about the way you handle routine matters related to the children, you should feel comfortable politely telling him/her to back off. It is YOUR parenting time. YOUR rules apply. If the court determined you were fit to have parenting time, the court also determined that you were fit to make routine decisions regarding the children without your ex-wife's or ex-husband's unwanted input". (D.M. Germain, *Joint Legal Custody & Decision-Making during your visitation*, available on-line at http://www.bestinterestlaw.com/joint-legal-custody, last accession on 28.02.2018; 19:12).

[21] F. Emese, *op. cit.*, p. 523.

[22] Article 31 Para 2^1 of Law no. 272/2004, introduced by Law no. 257/2013, in force from 03.10.2013.

[23] The premise for this situation is a non-responsive behaviour of one parent, and therefore the decision cannot be taken in common. At the same time, decision cannot be taken unilaterally by the other parent, as it is against the best interests of the child. By consequence, the only solution is asking the court to make the decision.

[24] Physical custody implies alternate domicile of the child. Alternate domicile of the child is legiferated, for example, in United Kingdom (Children Act, 1989), Belgium (Law from 18.07.2006), Spain (Law from 08.07.2005), Italy (Law from 08.02.2006). Even in countries where the law allows alternate domicile, this subject generated intense discussion with extensive arguments in favour or against it (L. Briad, *Résidence alternée et conflit parental,* A.J. Famille no. 12/2011, p. 570-573; M. Juston, *De la coparentalité à la déparentalité,* A.J. Famille no. 12/2011,

As consequence, in case of divorce and absence of agreement between parents[25], the court must decide separately and under different criteria on the one hand regarding exercise of parental authority (common or sole) and on the other hand concerning domicile of the child (which is to be established at one of the parents)[26].

According to Article 400 of Romanian Civil Code: „ (1) In the absence of agreement between the parents or if it is contrary to the best interests of the child, the guardianship court shall decide, at the same time with divorce, the domicile of the child to the parent with whom he or she lives constantly. (2) In case that before pronouncement of divorce the child lived with both parents, the court shall establish the domicile of the child to one of them, given the child's best interests."

The criteria under which the court decides which parent should have the domicile of the child are prescribed by Article 21 of Law no. 272/2004:

„ (1) If parents do not agree on domicile of the child, the guardianship court will establish the domicile to one of them, according to Article 496 Para (3) of the Civil Code. In evaluating the interest of the child, the court may consider, in addition to the items stipulated in Article 2 Para (6), issues such as:

a) availability of each parent to involve the other parent in decisions related to child and to respect parental rights of the latter;
b) availability of parents to allow each other to maintain personal relationships;
c) housing conditions in the last three years of each parent;
d) history of parents' violence against children or other persons;
e) distance between the house of each parent and education institution of the child."

In conclusion, alternate domicile under Romanian Civil Code is not possible[27].

Nevertheless, a natural question appears: if it were possible (as it is in other national legislations), would it be a satisfactory solution for the child?

Our opinion is that, even in absence of legal arguments presented above which operate in the context of our domestic legislation, alternate domicile is not an option in the best interests of the child.

Juridical literature sustains our opinion: „We doubt that from the child's point of view the idea of alternate domicile is, as a rule, the happiest choice, whatever the rhythm of alternance in hosting child, and even if geographical proximity of the two locations would exempt additional shortcomings"[28].

2.5. Rights of access

According to Article 496 Para 5 of Romanian Civil Code: „The parent with whom the child does not live constantly has rights of access to the child at the latter's domicile. Guardianship court may limit the exercise of this right if it is in the best interests of the child".

Article 17 Para 4 of Law no. 272/2004 states that: „In case of disagreement between parents on exercise access rights to the child, the court will set out a schedule based on the child's age, needs care and education of the child, intensity of affection between child and parent who does not have the domicile of the child, the behavior of the latter, as well as other relevant issues in each case."

Subsequently, Article 18 of Law no. 272/2004 details different forms of rights of access: „a) meetings between the child and parent or other person who, per law, has the right to a personal relationship with the child; b) visiting the child at his domicile; c) hosting child, for a limited period, by the parent or other person with whom the child does not live habitually."

The rights of access as described above by Romanian legislation cannot come to application in practice of the idea of „equal time" of child with both parents, specific to common physical custody and consisting, in reality, in alternate domicile[29].

Also, alternate domicile the child (not allowed by Romanian law) can not be confused with a large programme of personal ties, because the two concepts are distinct and, as a rule, rights of access imply a prior establishment of the domicile of the child (not alternating) to one of the parents.

3. Conclusions

Parental authority legiferated by Romanian Civil Code and (common) custody prescribed by other

p. 579-583; A. Gouttenoire, *Autorité parentale*, in P. Murat (coord.) *Droit de la Famille*, 5ème Édition, Dalloz, Paris, 2010, p. 803-807, in F. Emese, *op. cit.*, p. 532).

[25] Nonetheless, in the light of Article 8 of Law no. 272/2004, agreements between parents must be verified by court as follows: „In all cases concerning children's rights, the court verifies that agreements between parents or concluded by parents with other persons should fulfill the best interests of the child."

[26] By consequence, the other parent has only rights of access.

[27] For the same conclusion, M. Avram, *op. cit.*, p. 165; D.F. Barbur, *Autoritatea părintească*, Hamangiu Publishing House, 2016, p. 126, p. 170; D. Lupașcu, C. M. Crăciunescu, *op. cit.*, p. 568.

[28] F. Emese, *op. cit.*, p. 532. The author explains as follows: „Fulfilling parental duties is a daily task, and implies continue and sustained involvement, without the inevitable gaps of „exchange of shifts" between parents. Ensuring stability and continuity in care, upbringing and education of the child (…) cannot be done sequentially (…) we are not of the opinion that the right of the child to be raised by his parents (…) implies alternance of domicile".

[29] For example, case no. 54/4/2013 registered at Bucharest Tribunal, Fourth Civil Section, decision no. 648A/19.05.2014, where the court denied alternate domicile (presented as „equal time" of child with both parents).

domestic legislations remain two entirely different concepts[30].

At large, one may consider that parental authority as regulated in Romanian legislation may be approached to legal common custody, where the child lives most of the time with one parent („resident parent") and the other parent („non-resident parent") has right of decision over important matters concerning the child and relatively large rights of access.

Thus, under Article 400 of Romanian Civil Code and Article 21 of Law no. 272/2004, the court has the obligation to establish the domicile of the child after divorce to one of the parents (different from physical common custody, associated to alternate domicile).

Nevertheless, parental authority in our national legislative system remains different even from legal common custody.

We argue this point of view as, according to clarifications brought by Article no. 36 of Law no. 272/2004, important decisions to be taken by agreement of both parents are limited in number and expressly regulated by our domestic law (and not to be decided from case to case, as in case of common custody).

On the other hand, rights of access for the parent who has not been entrusted with the domicile of the child are to be established, in the light of Article 17 Para 4 of Law no. 272/2004, from case to case, depending on factual circumstances specific to each litigation, and not considered *de plano* to be large (the case of legal common custody).

As a first consequence of this conclusion according to which parental authority and (common) custody are different notions, it results that under parental authority in Romanian law alternate domicile of the child after divorce of parents is not legally possible.

In adition to this legal point of view, alternate domicile is not a solution in the best interests of the child also considering the effort it would impose (only) on the child, forced to adapt and readapt continuously to different environment, rules, etc. and with serious psychological consequences on long term basis.

In conclusion, common parental authority decided/agreed in case of divorce implies only that important decisions are to be taken by mutual consent, whereas the domicile of the child will be established in favour of one parent (and the other parent will have access rights).

A second consequence resides in the fact that rights of access organized on the so-called principle „equal time" also are not possible, mainly because „equal time" means shared residence of the child and is frequently used in practice as a disguised form of alternate domicile.

We identified a single real common point between notions of parental authority and custody, namely that in case they are exercised by both parents, important decisions necessarily imply agreement of both parents, whereas day-to-day decisions are to be taken by the parent who takes care of the child at that moment.

We consider that this firm theoretical distinction between parental authority and custody and its practical consequences reflecting in application of other notions of family law (as detailed above) could help to ensure a unified case-law, most necessary to be reached in an area as sensible as measures concerning children.

In the light of specificity of issues generated by family law (some of them presented above), given the fact that at present family cases often encompass cross-border implications and necessarily specific training of judges, we consider that the legislator should seriously ponder the idea of a reasonable number of courts in Romania specialised in family law.

To this respect, we argue that there is already such a specialised court, namely Brașov Family and Minors Tribunal.

Also, in the area of international child abductions[31], the legislator unified territorial competence in Bucharest[32].

In both cases, the benefice of unified jurisprudence is evident and immediate and therefore a „network" of family courts should be construed.

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[30] Confusion comes mainly from the fact that Romanian Civil Code was inspired from Quebec Civil Code, where the notion of parental authority, as already pointed out, corresponds in substance to the concept of custody. Still, even according to Quebec legislation, common custody implying alternate domicile of the child is considered to be a solution only if it is in the best interests of the child and considering the need of stability, relations between parents are good, the opinion of the child is in favour of this type of arrangement (J. Dutil, *La garde partagée au Québec*, A.J. Famille no. 12/2011, p. 596-597; M. Castelli, D. Goubau, *Le droit de la famille au Québec*, 5ème Édition, Presses Université Laval, 2005, p. 331-333, as presented by F. Emese, *op. cit.*, p. 531). In a similar manner, French legislation allows alternate domicile of the child only based on agreement of parents or, in absence of it, disposed by the court as a provisional measure for a limited period; at the end of the „trial period" the issue of child domicile should to get a final solution (L. Delprat, *L'autorité parentale et la loi*, Studyrama, 2006, p. 78, as presented by F. Emese, *op. cit*., p. 531).

[31] The specific legal instrument in this area is the Hague Convention on the Civil Aspects of International Child Abduction concluded at The Hague on October 25, 1980, during the 14th Session of the Hague Conference on Private International Law. Participation of Romania to 1980 Hague Convention was ensured by Law no. 100/1992 for Romania's accession to 1980 Hague Convention on the Civil Aspects of International Child Abduction, published in the Official Gazette of Romania no. 243/30.09.1992.

[32] Law no. 369/2004 on the application of 1980 Hague Convention on the Civil Aspects of International Child Abduction, published in the Official Gazette of Romania no. 888/29.09.2004 and republished in the Official Gazette of Romania no. 468/25.06.2014 prescribes that international abduction cases are to be solved by Bucharest Tribunal as first instance and Bucharest Court of Appeal as second instance.

References

- Avram Marieta, *Drept civil. Familia*, 2nd Edition revised and completed, Hamangiu Publishing House, 2016
- Barbur Diana Flavia, *Autoritatea părintească*, Hamangiu Publishing House, 2016
- Briad L., Résidence alternée et conflit parental, A.J. Famille no. 12/2011
- Castelli M., Goubau D., *Le droit de la famille au Québec*, 5ème Édition, Presses Université Laval, 2005
- Delprat L., *L'autorité parentale et la loi*, Studyrama, 2006
- Dutil J., *La garde partagée au Québec*, A.J. Famille no. 12/2011
- Ehrlich J. Shoshanna, *Family Law for Paralegals*, 7th Edition, Wolters Kluwer Publishing House, New York, 2017
- Emese Florian, *Dreptul Familiei. Căsătoria. Regimuri matrimonial. Filiația,* 5th Edition, C.H. Beck Publishing House, Bucharest, 2016
- Gavrilă Simona Petrina, *Instituții de dreptul familiei în reglementarea Noului Cod Civil*, Hamangiu Publishing House, 2012
- Gavrilescu Alin-Gheorghe, *Drepturile și obligațiile părintești. Drept român și comparat*, Universul Juridic Publishing House, 2011
- Germain Dennis M., Joint Legal Custody & *Decision-Making during your visitation*
- Gouttenoire A., *Autorité parentale*, in P. Murat (coord.) *Droit de la Famille*, 5ème Édition, Dalloz, Paris, 2010
- Juston M., De la coparentalité à la déparentalité, A.J. Famille no. 12/2011
- Lupașcu Dan, Crăciunescu Cristiana Mihaela, *Dreptul Familiei*, 3rd Edition amended and actualized, Universul Juridic Publishing House, 2017
- Moloman Bogdan Dumitru, Ureche Lazăr-Ciprian, Noul Cod Civil. Cartea a II-a. Despre familie. Art. 258-534. Comentarii, explicații și jurisprudență, Universul Juridic Publishing House, Bucharest, 2017
- Welstead Mary & Edwards Susan, *Family Law*, Oxford University Press, 2nd Edition, 2008
- Bucharest Tribunal, Fourth Civil Section, decision no. 938/A pronounced on 22.10.2012
- Bucharest Tribunal, Fourth Civil Section, decision no. 648A/19.05.2014, case no. 54/4/2013
- Hague Convention on the Civil Aspects of International Child Abduction concluded at The Hague on October 25, 1980
- Law no. 100/1992 for Romania's accession to 1980 Hague Convention on the Civil Aspects of International Child Abduction, published in the Official Gazette of Romania no. 243/30.09.1992
- Law no. 272/2004 concerning protection and promotion of children's rights, published in the Official Gazette of Romania no. 557/23.06.2004, successively modified and lastly republished in the Official Gazette of Romania no. 159/05.03.2014
- Law no. 369/2004 on the application of 1980 Hague Convention on the Civil Aspects of International Child Abduction, published in the Official Gazette of Romania no. 888/29.09.2004 and republished in the Official Gazette of Romania no. 468/25.06.2014
- Romanian Family Code, Law no. 4/1953, published in the Official Gazette of Romania no. 4/04.01.1954, amended by Law no. 4/1956 published in the Official Gazette of Romania no. 11/ 04.04.1956, republished in the Official Gazette of Romania no. 13/18.04.1956, succesively amended, lastly by Law no. 59/1993, published in the Official Gazette of Romania no. 177/26.07.1993
- Romanian Civile Code, Law no. 287/2009, published in the Official Gazette of Romania no. 511/24.07.2009 and republished per Article 218 from Law no. 711/2011, published in the Official Gazette of Romania no. 409/10.06.2011
- French Civil Code
- Quebec Civil Code
- Luxemburg Civil Code
- German Civil Code

REFLECTIONS REGARDING THE ENFORCEMENT OF THE PREVENTION LAW IN THE AREA OF EMPLOYMENTS RELATIONSHIPS

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Abstract

The Law no 270/2017 - Prevention Act is an inedited step in the Romanian legislation. For the first time in Romanian legislation, the ascertaining agent of a contravention has the obligation to establish several remedial measurements in order to clarify the legal framework of their specific activity. Because of the numerous contraventions regulated by the labor legislation, the Prevention Act concerns all the employers. Within the present paper, the author indicates the specific Labor law contraventions which permit the application of the Prevention Act and the contraventions which are incompatible with this Law.

In the matter of contraventional liability, the relation between the public body responsible for control and enforcement, on the one hand, and the subject of law whose activity is to be checked in order to make sure that it complies with the law, on the other hand, involves a median element between the full compliance situation (abiding by the applicable legal provisions) and the non-compliance situation (not abiding by the rules is punishable by a civil fine).

As in other areas covered by contraventional sanctioning, as far as employment relationships are concerned, the legislator elected a small number of contraventions to which the special rules provided for by the Prevention Law could be applied.

Keywords: *prevention, prevention measures, contraventional liability, labour law, labour legislation.*

I.

1. Law no. 270/2017 on prevention[1] represents a unique regulatory approach to legislation in Romania. For the first time in the history of national regulations, the legislator lays down a set of measures and instruments aimed at ensuring the prevention of committing contraventions.

Basically, in the matter of contraventional liability, the relation between the public body responsible for control and enforcement, on the one hand, and the subject of law whose activity is to be checked in order to make sure that it complies with the law, on the other hand, involves a median element between the full compliance situation (abiding by the applicable legal provisions) and the non-compliance situation (not abiding by the rules is punishable by a civil fine). This median element is represented by the very measures and instruments that are used in the event of a situation of non-compliance with legal rules, in order to remedy the non-compliance situation and, thus, to avoid the enforcement of a legal sanction for a contravention.

2. The remedy is, according to art. 2 let. a) of the Law, any measure taken by the investigating official included in the remedial plan which aims to make the person having committed a contravention fulfil his obligations under the law.

The remedial plan represents the annex to the report on the contravention committed and the enforceable sanction, completed as provided for in art. 4 of the Law, by means of which the investigating official sets out measures and remedial terms. The remedial term is the period of time, no longer than 90 calendar days since the date of delivery or, where appropriate, since communicating the report on the contravention committed and applying the legal sanction for the contravention thereof consisting of warning, concluded under art. 4 of the law, which specifies that the person having committed the contravention has the opportunity to remedy the irregularities which have been found and fulfil legal obligations; the length of the remedial term is determined taking into account the circumstances of committing the offense and the length of time necessary to fulfil legal requirements. The length of the remedial term established by the control body cannot be changed.

3. According to art. 3 para. (1) of Law no. 270/2017, all public authorities and institutions with powers to control, determine and sanction contraventions shall, in accordance with the areas under their responsibility, within three months of the entry into force of the law, draft and disseminate reference materials and guides and allocate special sections dedicated to public information on their website, regarding:

a) legislation in force relating to determining and legally sanctioning contraventions;
b) the rights and obligations of these public authorities / institutions in carrying out the activities related to determining contraventions and applying legal sanctions, as well as the rights and obligations of persons subject to these activities;
c) providing separate detailed information about each contravention for which the public authority /

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[1] Published in The Official Gazette of Romania, part I, issue 1037, December 28th, 2017.

institution has capacity to determine and apply the legal sanctions and / or other applicable measures.

According to their areas of competence, public authorities and institutions with control powers shall direct interested persons so that the legal provisions are fairly and unitarily enforced. In carrying out these guiding activities, public authorities and institutions with control powers shall:

a) a) draft guidance and control procedures to be used by all the persons having the capacity to carry out control activities;
b) b) display on their sites highly frequent court cases and guidance solutions issued in these cases, as well as guidance and control procedures;
c) c) actively exercise their role of guiding the persons being controlled in each control activity, offering, according to the procedures, the necessary instructions and guidance so that future abuse of the legal provisions could be avoided. The fulfilment of this obligation will be expressly stated in the control report, showing the instructions and guidance that have been offered.

Central public administration authority having nationwide powers to coordinate the business environment shall, within six months of the entry into force of this Law, develop and operate a portal providing, in a centralized way, online services and resources in order to disseminate information regarding the matters referred to in art. 3 para. (1) of the Law.

4. The Prevention Law does not have a general area of applicability, in the sense that it does not concern, hypothetically, all the contraventions regulated by national legislation. The solution of the legislator was to establish by means of a separate low-level legislative act, the list of contraventions for which the Prevention Law applies. Thus, by means of the Government Decision (GD) no. 33/2018 on the establishment of the contraventions covered by the Prevention Law no. 270/2017, as well as the model for the remedial plan[2], this list of contraventions was approved.

According to art. 4 para. (1) of the Law, in case of determining that one of the contraventions laid down by GD no. 33/2018 was committed, the investigating official concludes a report of the contravention by means of which he enforces a warning sanction, enclosing a corrective plan. In this situation, no complementary contaventional sanctions are enforced.

Exceptionally, the investigating official does not prepare a remedial plan, in which case only the warning sanction is enforced, in the following circumstances:

a) if, during the control, the person having committed a contravention fulfils his legal obligation;
b) if the contravention committed is not continuous.

The warning sanction is also enforced if the sanctioning of contraventions, as provided in GD no. 33/2018 expressly stipulates the exclusion of the warning from being applied.

The responsibility for fulfilling the remedial measures is reserved to the person who, by law, is contraventionally liable for the determined facts.

If a person commits multiple contraventions, from the ones provided in GD no. 33/2018, determined at the same time by the same investigating official, it is concluded only one report on ascertaining the contravention committed and the sanction being enforced, to which a corrective plan is enclosed, as appropriate.

5. The investigating official shall check in the control ledger, as well as in the records of the authority / public institution the person having committed the contravention is part of, if the latter has previously benefited from the measure provided in art. 4 of the Law.

For those persons who are not required to keep a control ledger (document regulated by Law no. 252/2003 on the control ledger[3]), the official investigator shall check the records of the public institution / authority the person having committed the contravention is part of, if the latter has benefited from the provisions comprised by art. 4 of the Law.

The investigating official shall make entries in the control ledger referring to the remedial plan. After completing the control, the number and date of the control document are entered in the control ledger.

6. The violation of the provisions in art. 4 para. (1) and (2) of the Law no. 270/2017 causes nullity of the report on the contravention committed. If the violation of the provisions in art. 4 para. (1) and (2) covers only a part of the contraventions determined and sanctioned by means of the report, this document is void only in respect to the contraventions thereof (partial nullity).
7. According to the art. 8 para. (1) of Law no. 270/2017, within 10 working days since the closing date of the remedial term, the public authority / institution with control powers shall resume the control activity and complete the second part of the remedial plan enclosed to the report on the contravention committed and the sanctions enforced and, where appropriate, the control ledger, with details on how to respect the remedy measures set.

If, when resuming control, it is ascertained that the person having committed the contravention failed to fulfil his legal obligations under the remedial measures set, within the timeframe allowed, the investigating official concludes another report of the contravention committed and sanctions enforced, by means of which the contraventions are determined and the legal sanction(s) enforced, other than warning, complying with the legislation which lays down and sanctions the contraventions provided for by GD no. 33/2018.

If, within three years since the date the report of the contravention committed and the sanctions

[2] Published in The Official Gazette of Romania, part I, issue 107, February 5th, 2018.
[3] Published in The Official Gazette of Romania, part I, issue 429, June 18th, 2003, as amended and supplemented.

enforced as provided for in art. 4 of the Law, the person having committed the contravention commits the same contravention again, the legal provisions in force, regulating the way in which petty offences are determined and sanctioned, are directly applicable, and it is no longer possible to enforce the Prevention Law.

If, within three years since the date the report on the contravention committed and the sanctions enforced as provided for in art. 5 of the Law, the person having committed the contravention commits one or more of the contraventions provided for in GD no. 33/2018, the legal provisions in force, regulating the way in which contraventions are determined and sanctioned, are directly applicable.

8. In accordance with art. 10 para. (1) of the Prevention Law, since the entry into force of this regulation (January 17, 2018), notwithstanding the provisions in Government Ordinance (GO) no. 2/2001 on the legal regime of contraventions[4], approved with amendments and supplements by Law no. 180/2002[5], as amended and supplemented, so as to determine and sanction the contraventions included in the GD no. 33/2018, the provisions of the Prevention Law are enforced.

Regarding the sanctions enforced under the provisions comprised by the Prevention Law, the sanctions thereof complement the provisions of the GO no. 2/2001, approved with amendments and supplements by Law no. 180/2002, as amended and supplemented.

When enforcing the Prevention Law, the contraventions, as well as the model for the remedial plan to be enclosed to the report on the contravention committed and the sanctions enforced were also laid down by GD no. 33/2018.

II.

1. With reference to the branch of law named labour law, the contraventional liability is a form of legal liability in its own right, but it is not part of the labour legislation (law) [6].

The Labour Code - Law no. 53/2003[7] refers only to sanctioning certain contraventions (covering facts, circumstances which are generic, focusing on expressing legal employment relationships). Law no. 62/2011 on social dialogue[8] is similar in this respect. Otherwise, in about 40 pieces of legislation in various fields, over 180 contraventions are regulated, which require as a prerequisite the existence of a legal employment relationship (which usually stems from the conclusion of an individual contract of employment)[9].

2. The legislative acts regulating contraventions related to employment relationships, other than those of the Labour Code and Law no. 62/2011 can be grouped into two categories: a) legislative acts which partially or totally belong to employment legislation; b) legislative acts which do not belong to employment legislation[10].

a) Legislative acts which partially or totally belong to employment legislation:

- Law no. 142/1998 regarding the granting of meal vouchers;
- Law no. 108/1999 on the establishment and organization of Labour Inspection;
- GO no. 25/2014 on the employment and secondment of foreigners in Romania and on amending and supplementing some legislative acts on the regime of foreigners in Romania;
- Law no. 202/2002 on equality of chances between women and men;
- Law no. 217/2005 regarding the establishment, organization and functioning of the European Works Council;
- Law no. 279/2005 on apprenticeship in the workplace;
- Law no. 67/2006 on the protection of employees' rights in case of transfer of the undertaking, the units or parts thereof;
- Law no. 193/2006 regarding the granting of gift and childcare vouchers;
- Law no. 200/2006 on the establishment and use of the Guarantee Fund for payment of wage debts;
- Law no. 319/2006 on job safety and health;
- Law no. 448/2006 on the protection and promotion of the rights of disabled persons;
- Law no. 467/2006 on establishing the general framework for informing and consulting employees;
- G.O. no. 137/2000 on preventing and sanctioning all forms of discrimination;
- G.D. no. 905/2017 on the general registry of employees[11];
- GD no. 846/2017 for establishing the gross minimum basic wage guaranteed for payment[12].

b) Legislative acts which do not belong to employment legislation:

- Law no. 82/1991 on accounting;
- Law no. 76/2002 on the unemployment security system and on the stimulation of employment;
- G.O. no. 37/2007 on the establishment of the application of the rules on driving times, breaks and rest periods for drivers and the use of equipment to record

[4] Published in The Official Gazette of Romania, part I, issue 410, July 25, 2001.
[5] Published in The Official Gazette of Romania, part I, issue 268, Aprilie 22, 2002.
[6] See I.T. Ştefănescu, Tratat teoretic şi practic de drept al muncii (Theoretical and Practical Treatise of Labour Law), ediţia a IV-a, revăzută şi adăugită, Editura Universul Juridic, Bucureşti, 2017, p. 915.
[7] Republished in the The Official Gazette of Romania, part I, issue 345, May 18, 2011, as amended and supplemented.
[8] Republished in the The Official Gazette of Romania, part I, issue 625, August, 31, 2012, as amended and supplemented.
[9] See, for a presentation in extenso of these contraventions, A. Ţiclea, Tratat de dreptul muncii. Legislaţie. Doctrină. Jurisprudenţă (Labour Law Treatise. Legislation. Doctrine. Caselaw), Ediţia a VIII-a, revizuită şi adăugită, Editura Universul Juridic, Bucureşti, 2014, p. 922-990.
[10] See I.T. Ştefănescu, op. cit., p. 920-921.
[11] Published in The Official Gazette of Romania, part I, issue 1005, December 19th, 2017.
[12] Published in The Official Gazette of Romania, part I, issue 950, November 29th, 2017.

their work;

– Government Emergency Ordinance no. 158/2005 on leave and social security allowances.

In legal literature dedicated to labour law, it is shown that a successive timely ordering of the statutes which provide for and contraventionally sanction employment related acts, as well as the excessive number of these contraventions raise the question of the need for a thorough substantive analysis, which should result in narrowing down (by grouping them, if this is the case) the contraventions in this area and to integrate, following the logic of their seriousness and that of the protected issues, those that must remain in the Labour Code and in the Law on Social Dialogue[13].

This approach is all the more necessary now, given the option of the legislator to regulate the preventive measures to (directly) apply a pecuniary contraventional sanction.

III.

As in other areas covered by contraventional sanctioning, as far as employment relationships are concerned, the legislator elected a small number of contraventions to which the special rules provided for by the Prevention Law could be applied.

According to GD no. 33/2018, in the matter of legal employment relationships only the following eight contraventions are enumerated:

1. Art. 23, for violation of the provisions of art. 5, art. 7 para. (1), art. 8 para. (2), art. 9, para. (1) and (4), art. 11 and art. 12 of Law no. 279/2005 on apprenticeship in the workplace, republished in the Official Gazette of Romania, Part I, issue 498 of August 7, 2013, as amended.

The acts considered are:

– art. 5: The employer shall appoint an apprenticeship coordinator who shall guide the apprentice so that the latter could acquire the professional competencies necessary to obtain the qualification for which the apprenticeship in the workplace is organized;

– art. 7 para. (1): The person who cumulatively meets the following conditions may enter into a contract of apprenticeship:

a) he takes the necessary steps towards finding a job by himself or by applying for a job at the employment agency in whose jurisdiction he is domiciled, or, where appropriate, he is a resident, or at another employment services provider accredited under the law;
b) he reached the age of 16;
c) he is not qualified for the occupation in which apprenticeship is organized in the workplace;
d) he meets the access requirements to be trained through apprenticeship in the workplace, on qualification levels, according to GO no. 129/2000 on adult professional training, republished, as amended and supplemented;

– - art. 8 para. (2): The registered sole trader or, where applicable, the designated representative of the family owned and operated business trains apprentices, acting at the same time as apprenticeship coordinator;

– - art. 9 para. (1) and (4):

- Para. (1) The duration of the apprenticeship contract is determined by the qualification level for which the apprentice is going to be prepared, and may not be less than:

a) 12 months, if the apprenticeship in the workplace is organized to achieve the competencies corresponding to a level 2 qualification;
b) 24 months if the apprenticeship in the workplace is organized to achieve the competencies corresponding to a level 3 qualification;
c) 36 months, if the apprenticeship in the workplace is organized to achieve the competencies corresponding to a level 4 qualification;

- Para. (4) The timeframe necessary for the theoretical training of the apprentice is included in the normal hours of work;

– art. 11:

- Para. (1): The apprentice status gives him all the rights and obligations under Labour Law, this Law and, where appropriate, all the special laws governing the occupation.

- Para. (2): The apprentice benefits from legal provisions applicable to the other employees, to the extent that they are not contrary to the apprentice status;

– art. 12: In order to professionally train the apprentice, the employer shall provide the apprentice with access to theoretical and practical training, as well as all the necessary conditions so that the authorized training provider and the coordinator would fulfil their duties as far as the training of the apprentice is concerned.

2. Art. 217 para. (1) let. c) of the Law on Social Dialogue no. 62/2011, republished in the Official Gazette of Romania, Part I, issue 625 of August 31st, 2012, as amended and supplemented.

According to art. 217 para. (1) let. c) of Law no. 62/2011, it is a contravention and is thus sanctioned with a fine amounting to 3,000 lei, the failure of the parties signing the collective labour agreement at unit group or industry level to submit the agreement thereof for publication. Responsibility is equally shared by the parties.

3. Art. 13 para. (1) of Law no. 67/2006 on the protection of employees' rights in case of transfer of the undertaking, the unit or parts thereof, published in the Official Gazette of Romania, Part I, issue 276 of 28 March 2006.

The rule states that failure by the transferor or transferee to fulfil the obligations of this law is a contravention and is sanctionable by a fine amounting from 1,500 to 3,000 lei.

4. Art. 113 let. a), b), e), h) of the Law no. 76/2002 on the unemployment security system and on the stimulation of employment, published in the

[13] See I.T. Ştefănescu, op. cit., p. 921.

Official Gazette of Romania, Part I, issue 103, February 6th, 2002, as amended and supplemented.

According to art. 113, it is a contravention if:

- let. a) there is no compliance with art. 10 of the Law concerning the obligation of employers and providers of employment services, respectively, to communicate the number of job vacancies or, where appropriate, the number of the unemployed who were counselled and employed;
- let. b) they do not use the Classification of Occupations in Romania under the provisions of art. 15 of the law;
- let. e) there is no compliance with art. 41 para. (2) of the Law - employers who employed, according to the law, individuals among the recipients of unemployment benefits shall notify, within 3 days, the employment agencies where they were registered;
- let. h) there is failure to communicate the data and information requested in writing by the National Agency for Employment or the local employment agencies in order to fulfil the duties provided by the law other than those regarding the communication of data, information, as well as if there is failure to produce all the documents and any other information and documents requested by the official bodies which control local employment agencies, while conducting control activities and so as to meet statutory duties.

5. Art. 9 of Law no. 467/2006 on establishing a general framework for informing and consulting employees, published in the Official Gazette of Romania, Part I, issue 1006, December 18th, 2006.

According to art. 9, it is a contravention to fail to fulfil obligations under the art. 5 of the Law, which provides:

- para. (1): Employers shall inform and consult employees' representatives, according to the laws in force concerning:

a) the recent and probable development and economic situation of the company;
b) the situation, structure and probable development of employment within the company, as well as regarding any anticipatory measures envisaged, especially when there is a threat to employment;
c) the decisions which can lead to substantial changes in labour organization, contractual relations or employment relationships, including those covered by Romanian legislation on specific procedures for information and consultation on collective redundancies and the protection of employees' rights, in case of company transfer;

- para. (2) Information shall be given at a time, in a manner and with a content appropriate to enable employees' representatives to examine the issue properly and prepare, where appropriate, consultation;
- para. (3) Consultation shall take place:

a) at an appropriate time, in an appropriate manner and with an appropriate content to enable employees' representatives to examine the issue properly and develop a point of view;
b) at a relevant representation level for the management and the employees' representatives, depending on the subject being discussed;
c) based on the information supplied by the employer and on the view that employees' representatives are entitled to express;
d) so as to allow the employees' representatives to meet the employer and obtain a reasoned response to any point of view that they might express;
e) so as to negotiate an agreement on the decisions falling within an employer's obligations referred to in para. (1) let. c).

6. Art. 35 para. (1) of Law no. 335/2013 regarding the traineeship for higher education graduates, published in the Official Gazette of Romania, Part I, issue 776, December 12th, 2013, as amended.

According to art. 35 para. (1), it is a contravention and is sanctionable by a fine amounting from 1,000 lei to 2,000 lei, the violation of the provisions relating to:

- the use of trainees to carry out other activities and / or perform other tasks than those provided in the job description and the traineeship contract;
- the experience of the mentor supervising the trainees' activity and the fact that a mentor can coordinate and monitor at the same time, no more than 3 trainees;
- the activity of the trainee evaluation committee, under the provisions of the art. 8 para. (1) and (3) of the Law;
- the fact that the report of the committee evaluating the traineeship period is made known to the trainee on the date of its completion by the evaluation committee;
- the fact that within five days from the completion of the traineeship, the employer is required to issue the certificate of completion of the traineeship;
- maximum duration of the traineeship contract;
- the fact that the trainee's basic monthly salary, established by the individual employment contract, is the one negotiated by the parties, for an average schedule of 8 hours per day or 40 hours per week, under the law, which is to be completed by provisions included in the applicable collective labour contract;
- the trainee's obligation not to resign within a period determined by addendum to the individual employment contract.

7. Art. 39 para. (2) for the violation of the provisions of art. 13 let. c) art. 39 para. (6) let. a) for the violation of the provisions in art. 9 para. (1), art. 39 para. (6) let. b) for the violation of the provisions of art. 14 and 15, art. 39 para. (8) let. a) for the violation of the provisions of art. 12 para. (1) let. d), art. 13 let. g) and art. 18 para. (6), as well as art. 40 of the Law on Job Safety and Health no. 319/2006 published in the Official Gazette of Romania, Part I, issue 646, July 26th, 2006, as amended.
8. Art. 23 para. (1) of Law no. 200/2006 on the establishment and use of the Guarantee Fund for payment of wage debts, published in the Official

Gazette of Romania, Part I, issue 453, May 25th, 2006, as amended.

IV.

The conclusion that can be expressed after considering the option of the legislator on indicating the contraventions in the area of employment relationships is that none of the general acts contraventionally sanctioned under the Labor Code and the Law on Social Dialogue was considered.

The enumeration in Appendix 1 to the G.D. no. 33/2018 is limitative. The special rules governing the norms that regulate preventive measures cannot be applied by analogy to other contraventions, even if it could be argued that they are less serious than the contraventions for which the Prevention Law is applied.

References

- 1. I.T. Ştefănescu, Tratat teoretic şi practic de drept al muncii (Theoretical and Practical Treatise of Labour Law), ediţia a IV-a, revăzută şi adăugită, Editura Universul Juridic, Bucureşti, 2017
- 2. A. Ţiclea, Tratat de dreptul muncii. Legislaţie. Doctrină. Jurisprudenţă (Labour Law Treatise. Legislation. Doctrine. Caselaw), Ediția a VIII-a, revizuită şi adăugită, Editura Universul Juridic, Bucureşti, 2014

THE CONSTITUTIONAL PRINCIPLE OF EQUALITY

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Abstract

The equality in human rights and obligations, the equality of citizens before the law are fundamental categories of the theories on social democracy but also conditions of the lawful state, without which constitutional democracy cannot be conceived. In Romanian Constitution, this principle is consecrated in the form of equality of the citizens before the law and public authorities. There are also particular aspects of this principle consecrated in the Fundamental Law. The equality before the law and public authorities cannot imply the idea of standardizing, uniformity, enlisting of all citizens under the same legal regime, regardless of their natural or socio-professional situation. The constitutional principle of equality requires that equal treatment be applied to equal situations. This social and legal reality implies numerous interferences between the principle of equality and other constitutional principles: the principle of identity and diversity, the principle of pluralism, principle of unity and, in particular, the principle of proportionality.

In this study, by using theoretical and jurisprudential arguments, we intend to demonstrate that, in relation to contemporary social reality, equality, as a constitutional principle, is a particular aspect of the principle of proportionality. The latter one expresses in essence the ideas of: fairness, justice, reasonableness and fair appropriateness of state decisions to the facts and legitimate aims proposed.

Keywords: *Equality as a constitutional principle, philosophical and legal content of the principle of proportionality, interference between the principles of equality and proportionality, Equitable balance, Principle of equality and tax obligations.*

1. Introduction

The analysis of the link between the two principles of law must start from their meanings. The purpose is to determine their sphere of interference.

The principle of equality is consecrated in Article 16 of Romanian Constitution, in the form of equality of citizens before the law and public authorities. These provisions are corroborated with Art. 4, paragraph (2), which prohibits discrimination, according to the criteria mentioned. There are other Romanian constitutional provisions involving the principle of equality (Articles 4, 6, 38, 41, 44, 56 and 62). The Romanian constitutional provisions are in line with international regulations in the field. To remember the provisions of Articles 14 and 26 of the International Convention on Civil and Political Rights, that consecrates this principle and Article 24 regulating the causes of discrimination. The principle of equality is also stipulated by Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

In the literature in specialty was shown that the constitutional principle of equality is characterized by polyformism. "Whether we consider it as an objective principle of law or a fundamental subjective right, it expresses itself through a series of pair - values that have already become commonplace, strict equality (relative equality, formal equality), material equality, equality before the law, equality by law, etc[1]." This polyformism explains the difficulty of defining this principle. The legal nature of the constitutional principle of equality is considered different in the comparative law: a principle of law, which is a means of guaranteeing the citizens' rights and freedoms, or as a subjective right. Also, the doctrinal and jurisprudential definitions are different, depending on the significance and peculiarities of the principle[2]. Regarding the juridical nature of the constitutional principle of equality in Romanian doctrine, we remember the view according to which "the formulation of the present Romanian Constitution makes of the constitutional principle of equality a fundamental right, with the value of a general principle for the fundamental rights matter"[3].

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[1] Simina Elena Tănăsescu, Principiul egalităţii în dreptul românesc; "Principle of Equality in Romanian Law", AllBeck Publishing House, Bucharest1999., p. 3

[2] For the analysis of the juridical nature of the principle of equality and the definition of the principle, see Simina Elena Tănăsescu, *quoted works.*, pg. 6 – 72; Ioan Muraru, Simina Elena Tănăsescu, Drept constitutional şi instituţii politice, "Constitutional Law and Political Institutions", Ch Beck Publishing House, Bucharest, vol. I, pp. 163-165; Tudor Drăganu, Tratat elementar de drept constituţional, Constitutional Law - Elementary Treaty, Lumina Lex Publishing House Bucharest ,1998 ., pp. 185 – 187, Andreescu Marius , Andra Nicoleta Puran, Drept constituţional –Teoria general, Constitutional Law – General Theory, Sitech Publishing House, Craiova, 2014,pp. 204-231, Andreescu Marius, Principiul proporţionalităţii în dreptul constituţional, Principle of Proportionality in the Constitutional Law, Ch. Beck Publishing House , Bucharest 2007, pp. 288-312

[3] Simina Elena Tănăsescu, *quoted works.*, p. 11

The general principle of equality, regulated by Article 16 of Constitution, refers to a formal legal equality and not to an equality of conditions. However, the equality before the law and public authorities does not involve the idea of uniformity, in the sense of applying to all citizens the same legal regime, regardless of their natural or socio-professional situation. The principle of equality implies that equal treatment should apply to equal situations. At the same time, it also supposes the right to differentiation in legal treatment, if the situations of citizens are different. In other words, to equal situations should correspond an equal legal treatment and, to the different situations, the legal treatment must be different. In this sense, the doctrine admits the existence of a *positive discrimination*, regulated even by some constitutional texts, imposing certain social protection measures. The Constitutional Court jurisprudence on the limits of the constitutional principle of equality "varies between a strict equality, sometimes assimilated with the non-discrimination principle, and a relative equality, a treatment equality which accepts the differentiation of the legal regime, according to the objective particularities of the concrete situations[4]."

As a general principle of law, proportionality evokes the idea of correspondence or balance. The comparative logic, which is the essence of the proportionality reasoning, assumes the comparing of some objective situations and the ascertaining of their degree of identity. Should the situations be different, the applicable legal regime must be different. The general principle of proportionality, in this case, expresses the needed appropriation of the legal treatment with the objective situations to which it applies. In this way, *the reasoning of proportionality* requires an objective and reasonable motivation, in order not to reach to a *disproportion* between the purpose pursued, through an unequal legal treatment and the means used. Thus, the purpose of the law becomes the criterion according to which the situations are compared and in relation to which, the difference in the legal regime must be established[5].

Therefore, the logic of the egalitarian reasoning, in which the factual situations are so similar that they necessarily require the identity of the legal treatment, is a particular aspect of the reasoning of proportionality, based on different situations comparison and, implicitly, the recognition of a right to difference. It can be said that the principle of equality is a particular case of the principle of proportionality. Therefore, the Romanian constitutional provisions, that consecrate equality as a general principle (Article 16), or the specific equalities, imply also the principle of proportionality.

2. Interference between the principles of equality and proportionality

The uniformity has been consistently rejected by the Constitutional Court's jurisprudence, in relation to the interpretation and application of the principle of equality. The strict equality before the law implies that, in equal situations, the treatment must be equal, without discrimination. If the situations are different, the treatment can only be differentiated, which implies the principle of proportionality. Consequently, a breach of the principle of equality arises when different treatment is applied to similar situations or when the same legal treatment is applied to situations which by their nature are different. Also, the breaching of this principle may also occur in situations where there is no objective and reasonable reasoning for a differentiated treatment of identical situations, or if the unequal legal treatment is not appropriate to the purpose of the law.

The jurisprudence of the Constitutional Court has evolved in this respect, starting from accepting that different situations may be treated differently, up to the recognition of new constitutional principles, namely the right to difference[6]. The Constitutional Court ruled as inadmissible a difference of legal treatment on social criteria or categories of officials, as it would constitute a discrimination[7]. It admitted that there may be situations that allow for particularities, but not every such case justifies a difference in the legal treatment, especially if the different legal treatment would be discriminatory. The Constitutional Court has established as unconstitutional the provisions of the War Veterans Act concerning the conditioning of the war veterans' quality, on the fact of not having fought against the Romanian army. In this case, there is an unjustified discrimination between the Romanian citizens and it is therefore necessary to ensure an "equal treatment for all those who have joined in foreign armies"[8]. These are identical situations, which involve identical treatment. The Constitutional Court also applied the principle of equality in other situations, considering either that the situations are so similar that there is no justification for the legal treatment differentiation or, if it exists, it represents a discrimination related to the criterion used[9].

The rejection of uniformity and the need to differentiate the legal treatment according to different objective situations, without being discriminatory, is

[4] Simina Elena Tănăsescu, *quoted works.*, p. 17

[5] Ibid, *quoted works.*, pg 40

[6] Ioan Muraru, Mihai Constantinescu, Curtea Constituțională a României, Constitutional Court of Romania, Albatros Publishing House, Bucharest, 1997, pp 113-114; Simina Elena Tănăsescu, *quoted works.*, p. 41

[7] Decision nr.6/1993, published in the Official Gazette No. 01/1993

[8] Decision nr.47/1994, published in the Official Gazette No.139/1994

[9] Decision nr.124/1995, published in the Official Gazette No.293/1995; Decision nr.35/1993, published in the Official Gazette No.218/1993; Decision nr.3/1994, published in the Official Gazette No..155/1994; Decision no.114/1994, published in C.D.H. – 1994, pg. 324-328; Decision no.30/1998, published in the Official Gazette No.113/1998

reflected in the jurisprudence of the Constitutional Court. Referring to the different situation of the students in private education and, on the other hand, of those in state education, the Court found that once they entered the chosen system, they are subjected to the rules of each system. So, in reality, the contested provisions do not discriminate, but offer different solutions for different situations[10]. In other words, the necessary adequacy of legal treatment to the objective situation considered is an application of the principle of proportionality.

This rule is formulated in the jurisprudence of the Court of Justice with a value of principle: "The principle of equality before the law requires establishing an equal treatment for situations which, depending on the purpose pursued, are not different. Consequently, a different treatment cannot be the sole expression of the judge's exclusive appreciation, but must be rationally justified, in respecting the principle of equality of citizens before the law and public authorities[11]."

The recent jurisprudence of our Constitutional Court confirms this interpretation of the principle of equality which refers to the equality of citizens before the law and public authorities and not to the equality of legal treatment applied to a category of citizens compared to another. Since the fundamental rights "represent a constant of the personality of the citizen, an equal chance granted to any individual", art.16, paragraph (1) of the republished Constitution aims the equality of rights between the citizens, and not the identity of legal treatment on the application of some measures, regardless of their nature. In this way, the Constitutional Court justifies not only the constitutionality of administering a different legal regime to certain categories of persons, but also the need for such legal treatment[12].

By applying this reasoning of proportionality, the Constitutional Court has come to the recognition of a fundamental right: *the right to difference.* "In general, it is appreciated that violation of the principle of equality and non-discrimination exists when a differential treatment is applied to equal cases without objective and reasonable motivation or if there is a *disproportion (s.n.)* between the aim pursued by unequal treatment and the means used. In other terms, the principle of equality does not prohibit specific rules. That is why the principle of equality leads to emphasize on the existence of a fundamental right, *the right to difference* (s.n.), and to the extent that equality is not natural, it imposing would mean the establishing of the discrimination[13]."

The applying of the principle of proportionality has as legal consequences the relativizing of equality as a principle[14]. The jurisprudence of the Court confirms that the principle of equality is a particular case of the general principle of proportionality, since the uniqueness of the legal treatment can be justified only in a particular hypothesis, that is, when the situations are the similar or the identical. Starting from the need to differentiate the legal treatment for different situations, the Constitutional Court has consistently considered that a protection measure applied to social or professional categories, in special situations, does not have the meaning of a privilege: "A measure of protection cannot have the meaning neither of a privilege nor of a discrimination and it is intended precisely to ensure, in certain specific situations, the equality of the citizens that would be affected in its absence[15]." In these situations, the principle of proportionality imposes the necessary adequacy of the protection measures to the proposed purpose, namely, the ensuring, in special situations, of the equality of citizens.

Applying the same reasoning, which is based on the principle of proportionality, the Constitutional Court found that a derogatory regime from the common law regarding the execution of tax receivables is justified, by the fact that it foresees non-expiring of the forced execution of these debts (art. 137, paragraph Fiscal procedure). These special procedural rules are appropriate to some special situations, namely that the object of a forced enforcement is to collect the tax receivables that are sources of the state budget, "which is of a general interest[16]."

In accordance with the principle of proportionality, applied in this matter, the difference in legal treatment must have a rational and objective basis. The provisions of Art II from O.U.G. no.22 / 2003[17] are constitutional because, the difference in the legal treatment, in regard to the granting of compensatory payments introduced by criticized text, between the companies exempted category with majority state capital and other companies is justified by a rational and objective criterion, which lies in the existence of different situations, but also in the real possibility of the

[10] Decision no.70/1993, published in the Official Gazette No.307/1993. This Decision is invoked constantly in the Constitutional Court Jurisprudence, in matter.

[11] Reason 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.85/1994, in C.D.H. – 1994, pp 68 - 74

[12] See Decision nr.213/2004, published in the Official Gazette No..519/2004 and Decision nr.240/2004, published in the Official Gazette No.562/2004.

[13] Decision nr.107/1995, published in the Official Gazette No.85/1996. See Decision nr.6/1996, published in the Official Gazette No..23/1996; Decision nr.198/2000, published in the Official Gazette No..702/2000; Decision nr.54/2000, published in the Official Gazette No..310/2000; Decision nr.263/2001, published in the Official Gazette No..762/2001

[14] Simina Elena Tănăsescu, *quoted works.*, pg. 41 - 44

[15] Decision nr.104/1995, published in the Official Gazette No.40/1996

[16] Decision no.432/2004, published in the Official Gazette No.1176/2004.

[17] Published in the Official Gazette No.252/2003

Government to bear such compensatory payments[18]. The different legal treatment, objectively and rationally determined by different situations, cannot create privileges or discriminations. The Constitutional Court rejected the exception of unconstitutionality of the provisions of Article 4, paragraph 2, letter a, Section 12 of Law no.543 / 2002[19], noting that, according to legal provisions criticized all offenders in the same circumstances, benefit or are exempted from the pardoning "related to the nature of the offense and its content, in the legal formulation in force at the offense date." According to the Constitutional Court, the convicts that committed offences at different times, when the criminal law regulated in various drafting the contents of the respective offenses, are in different situations which justify the application of a different legal treatment "according to the legislator's free choice, without instituting of some privileges or discriminations[20]."

In the same sense, the Constitutional Court has ruled that the withdrawal by the issuing authority of the visa, authorization or attestation, which would result in the rightful termination of the individual labor contract, for which concluding the existence of these documents is a mandatory condition, does not constitute a discriminatory legal treatment, but the application of differentiated legal treatment in relation to a different situation in which certain categories of employees are, that choose to exercise certain occupations or trades[21].

Unlike these situations where the principle of proportionality was observed, among others the Constitutional Court found that the difference in legal treatment has no longer a rational and objective justification, which fact results in disproportionate and discriminatory treatment between persons in the same situation.

Thus, our Constitutional Court noticed the unconstitutionality of the provisions of Article 15, paragraph 1 of Law no. 80/1995, on the Status of Military Staff[22], which allows paying the parental leave for bringing up a child up to 2 years only to active military women, and not male military staff[23]. The legislator may establish derogating measures from the common rules, subjected to respecting the following conditions: the existence of different situations; to be a rational and objective justification; the different legal treatment should not create a clear disproportion between different categories of persons; the derogating measures should not be discriminatory. Or, in the present case, the Constitutional Court rightly found that the complete abolition of certain categories of persons from the benefit of a form of insurance prescribed by law for all insured persons violates the constitutional principle of equality, representing discrimination, because the military staff in activity is not different from other categories of insured. Applying the same legal reasoning, the Constitutional Court found the unconstitutionality of art. 362, paragraph 1, letter d of Criminal Procedure[24]. The legal provisions criticized, which stipulate that the injured party may appeal in regard to the criminal aspect of the case, and the civil party only in regard to the civil side, are contrary to the constitutional principle of equality. These two parties of the criminal trial are in an identical situation, namely in the situation of a person wronged in own rights by committing the offense. Therefore, the inequality of treatment in regard to the access to the attack ways is t unjustified, including the proportionality criterion, since the defendant, the injured party, the civil party and the civilly responsible party have the same quality, respectively are parties to the criminal proceedings.

The interference between the principle of equality and the principle of proportionality also exists in case of national minorities' protection.

As stated in the Explanatory Report on the Frame - Convention for the Protection of National Minorities[25], the states may adopt special measures to promote full and effective equality between the national minorities and those belonging to the majority. Such measures must be appropriate to the intended purpose. This requirement expresses the principle of proportionality, which is applied in order to avoid violating the rights of others or discrimination of other persons. The principle of proportionality requires that these safeguards are not to be extended, in time and in the sphere of application, beyond what is necessary to achieve the intended purpose.

The Constitutional Court applied the principle of proportionality by analyzing the constitutionality of some provisions of the Education Law no. 84/1995[26].

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[18] Decision nr.457/2003, published in the Official Gazette No..49/2004.

[19] Published in the Official Gazette No.726/2002.

[20] Decision nr.546/2004, published in the Official Gazette No..107/2005. See Decision no.200/2004, published in the Official Gazette No..420/2004, also Decision nr.240/2004, previously quoted, through which the Constitutional Court noticed that dispositions of art.81, paragraph.3, art.86[1], paragraph.3 and art.86[7], paragraph.3 Criminal Code are constitutional. The legislator didn't violate the dispositions of art.16 of Constitution, because the different juridical regime is justified by the different situation in which certain categories of persons are.

[21] Decision no.545/2004, published in the Official Gazette No.85/2005.

[22] Published in the Official Gazette No. 155/1995.

[23] Decision nr.90/2005, published in the Official Gazette No..245/2005. Instead the Constitutional Court ascertained the constitutionality of the dispositions art.38, paragraph.4, art.50, paragraph.1[1] and art.194 of Law no.19/2000, because the right of the citizens to pension is regulated both through general laws as through special laws in regard to certain social-professional categories that are found in particular situations. Therefore, the regime instituted through the criticized regulations is reasonable and justified, because the persons to which it refers to are in different situations. (Decision nr.116/2005, published in the Official Gazette No.228/2005).

[24] Decision no. 482/2004, published in Official Gazette 1200/2004.

[25] Adopted by the Ministries Committee of European Council in Strasbourg on 10.11.1994

[26] Published in the Official Gazette No. 167/1995 and republished in the Official Gazette No. 1/1996. See Decision nr.139/1999, published in the Official Gazette No..353/1999

The Romanian village in areas traditionally inhabited or in a substantial number of persons belonging to national minorities, if there is a sufficient demand, should, as far as possible, endeavor to ensure that persons belonging to the national minorities "have adequate learning opportunities for their minority language. The application of these measures shall be without prejudice to the learning of the official language or teaching in that language."

The measures taken by the State for the national minorities' protection must not contravene the requirements of the principle of equality of rights of the citizens and therefore should be "a reasonable ratio of proportionality between demand and possibilities, between demand and the means used or between the means employed and the aim pursued[27].

The principle of equality, applied to the exercise of the right to vote, may also involve proportionality. The material conditions for exercising the right to vote may vary according to the diversity of situations. This involves a differentiated legal treatment, appropriate to every concrete solution, which is a proportionality relationship. It is stated in the doctrine that "the legislator can arrange so many different legal regimes, how many particular situations he encounters, without respecting the strict equality imposed on him with regard to the right to vote[28]."

The constitutional principle of equality has applications in electoral, judicial, fiscal, etc[29]. In all these areas, is applied the principle of proportionality, which assumes the right to differentiation in the equal treatment, if the situations in which are the citizens, are different.

For our research we have chosen to analyze the application of the constitutional principle of proportionality in tax matters for two reasons: the constitutional text (Article 56 paragraph (2)), recalls the general principle of justice and equity, and secondly the jurisprudence of the Constitutional Court is richer in this field than in other areas, with regard to the interference between the principle of equality and the principle of proportionality.

The application of the principle of proportionality in the field of taxation arises from the provisions of Article 56, paragraph (2) of the revised Constitution. "The statutory system of taxation must ensure the *correct* settlement of tax burdens."

The provisions of Article 56, paragraph (2) of the Romanian Constitution have the meaning of a social justice and equity principle. As a principle of social justice, the correct setting of the fiscal burdens corresponds to the social character of the state, taking into account the need to protect the most disadvantaged social strata. As a principle of fairness is not intended to distort the equality of opportunities, that excludes any privilege or discrimination.[30] The Law on Public Finance (Law no. 10/1991), [31] states in Article 5 that at the elaboration and execution of the budget are principles of universality, balance and reality, which is the materialization of the constitutional provisions above.

The provisions of Article 56, paragraph (2) of Constitution imply a necessary adjustment between the contribution of each and his possibilities. This adequacy can be imagined either in the form of a strict equality of everyone's contribution, or in the form of a necessary proportionality between each person's income and own share of burden.[32]

In the literature in specialty was shown that the specificity of the tax, regardless of its form, "exists in the *proportionality* ratio that is established between the taxable amount and the levying, because in matter of taxation, proportionality is the true image of the principle of equality[33]."

In this case, proportionality is a mathematical ratio, which can realize the idea of social justice, which results in a fair distribution of tax burdens, depending on the possibilities of each taxpayer. The progressivity of the tax is a particular aspect of the principle of proportionality applied in this area in the sense that the fair distribution of tax burdens means: the higher is a person's income, the more his tax contribution increases. Accordingly, proportionality is an expression of material equality, "when the quota increases at the same time with the taxable mass, we find ourselves in the presence of a progressive rate of material equality that seeks to equalize the real income through tax[34].

The Constitutional Court has applied the principle of proportionality as a relationship between the taxation base and the tax. Regarding the provisions of art.7, par. 6 of the Law no. 32/1991, the Court finds that by indexing, the tax grid does not change, but the level of the taxable income is updated, correlated with the increase of the inflation index. "It is true that the tax increases, but only as a result of the increase of the taxation base."[35] In this respect, the doctrine stated: "Also as the taxpayer's criterion for equality before the tax law, the taxable mass is the criterion according to which varies the legal regime of the tax. But the principle of tax justice, imposed by Article 53 (2) of the Constitution (Article 56 (2) of the Revised Constitution

[27] Ibid.
[28] Simina Elena Tănăsescu, quoted works., p. 219
[29] Simina Elena Tănăsescu, quoted works., p.169-253.
[30] Ibid, *quoted works.*, p. 127
[31] Published in the Official Gazette No.23/1991
[32] Simina Elena Tănăsescu, quoted works., p. 194
[33] Ibid, p. 194
[34] Ibid, p. 203
[35] Decision nr.53/1994, published in C.D.H. – 1994, pp. 222 – 225.

n.n.) imposes the uniformity of the legal regime of taxation as soon as the taxable amount is the same[36]."

The Constitutional Court has determined that the tax should not be abusive. Thus, it must correspond to the purpose pursued by the legislator and be appropriate to the taxable mass. As we have seen, the taxable amount is the criterion by which the legal regime of the tax varies. Moreover, "the tax is based on a strict conception of proportionality, which refers exclusively to the notion of an arithmetical proportion[37]." Accordingly, the establishing of a tax without having a taxable amount in the objective sense, that is, an income that cannot be achieved, is abusive. "In order to eliminate any possibility of abusive taxation and taking into account the intention of the legislator ... it follows that the extension of the obligation to pay the tax, in considering some uncultivable lands, is unconstitutional, contravening art.53, paragraph (2) of the Constitution (2) of the revised Constitution *n.n.*), on which grounds no income tax can be established on an income impossible to achieve[38]."

3. Conclusion

This constant orientation of our constitutional court, regarding the constitutionality of the legal provisions in the matter of tax duties, through the prism of principle of proportionality, is also confirmed by the previous jurisprudence, we would say a historical one, of the Constitutional Court, contrary to the present social and legal realities that refuse to appeal to the great natural principles, coming out immutable from the very nature of human being. Thus, the establishing of a higher tax in charge of individuals that own two or more buildings used as dwellings, does not violate the provisions of Article 16, paragraph (1) of Constitution[39]. To justify this solution, the Constitutional Court applies the principle of proportionality. It is ascertained that there is no discrimination against taxpayers who own several buildings compared to those who own a single building. There is sufficient reason for the introduction of the progressive tax in relation to the number of buildings owned in property, a reason which is expressed by the provisions of Article 56, paragraph (2) of the Constitution and implies a particular form of the principle of proportionality. This is also the opinion of the Court, which considers that the formula "the right settlement of the tax burdens" implies that the legislator must take into account when determining the categories of taxes, both the material situation of taxpayers, but also the increased availability of those who hold more properties to contribute more, through taxes, to public spending.

The current legislation setting a single tax rate irrespective of revenues, we believe is contrary to the principles of social justice, proportionality and equality, but also to the previous jurisprudence of our Constitutional Court, which, in the older jurisprudence, has given effect not only to constitutional texts in the field, but mostly, to the principles of justice and equity, true natural rights of man, superior to the force of the norms established by legal law, which reflects the temporal interests of the governors, and not the essence of the human nature that can be expressed in the realms of social realities only through the natural, immutable, absolute principles of: Justice, Equity (opposed to formal legal equality), Proportionality, Truth, Good and Freedom.

In theological and moral law, these principles can be considered imperatives which derive from the *"Commandment of Love"* considered by us to be the source of the authenticity and legitimacy of the moral law and juridical law, because it raises them from the narrow and limited sphere of constraint, as a factum exterior to human nature, transfiguring them in the natural dimension of freedom, the man being considered not only as an individual subjected to law enforcement, but as a person benefiting from the law. Freedom cannot characterize the individual who lives in the world of juridical law and even in the moral law, within the limits of reason, but only the *man as a person*, sovereign on himself, because he is governed by God, not by the world or by the individual "ego".

References

- Andreescu Marius , Andra Nicoleta Puran, Drept constituţional –Teoria general, Constitutional Law – General Theory, Sitech Publishing House, Craiova, 2014
- Andreescu Marius, Principiul proporţionalităţii în dreptul constituţional, Principle of Proportionality in the Constitutional Law, Ch. Beck Publishing House , Bucharest 2007
- Decision no. 482/2004, published in Official Gazette 1200/2004
- Decision no.114/1994, published in C.D.H. – 1994
- Decision no.200/2004, published in the Official Gazette No..420/2004
- Decision no.30/1998, published in the Official Gazette No.113/1998
- Decision no.432/2004, published in the Official Gazette No.1176/2004
- Decision no.545/2004, published in the Official Gazette No.85/2005
- Decision no.70/1993, published in the Official Gazette No.307/1993
- Decision no.85/1994, in C.D.H. – 1994

[36] Simina Elena Tănăsescu, *quoted works.*, p. 205.
[37] Simina Elena Tănăsescu, quoted work., pg. 195.
[38] Decision nr.102/1995, published in C.D.H. 1995 – 1996, pp. 118 – 125.
[39] Decision nr.62/.1999, published in the Official Gazette No.308/1999.

- Decision nr.102/1995, published in C.D.H. 1995 – 1996
- Decision nr.104/1995, published in the Official Gazette No.40/1996
- Decision nr.107/1995, published in the Official Gazette No.85/1996
- Decision nr.116/2005, published in the Official Gazette No.228/2005
- Decision nr.124/1995, published in the Official Gazette No.293/1995
- Decision nr.139/1999, published in the Official Gazette No.353/1999
- Decision nr.198/2000, published in the Official Gazette No.702/2000
- Decision nr.213/2004, published in the Official Gazette No.519/2004
- Decision nr.240/2004, published in the Official Gazette No.562/2004
- Decision nr.263/2001, published in the Official Gazette No.762/2001
- Decision nr.3/1994, published in the Official Gazette No.155/1994
- Decision nr.35/1993, published in the Official Gazette No.218/1993
- Decision nr.457/2003, published in the Official Gazette No.49/2004
- Decision nr.47/1994, published in the Official Gazette No.139/1994
- Decision nr.53/1994, published in C.D.H. – 1994
- Decision nr.54/2000, published in the Official Gazette No.310/2000
- Decision nr.546/2004, published in the Official Gazette No.107/2005
- Decision nr.6/1993, published in the Official Gazette No. 01/1993
- Decision nr.6/1996, published in the Official Gazette No.23/1996
- Decision nr.62/.1999, published in the Official Gazette No.308/1999
- Decision nr.90/2005, published in the Official Gazette No.245/2005
- Education Law no. 84/1995, published in the Official Gazette No. 167/1995 and republished in the Official Gazette No. 1/1996
- Ioan Muraru, Mihai Constantinescu, Curtea Constituţională a României, Constitutional Court of Romania, Albatros Publishing House, Bucharest, 1997
- Ioan Muraru, Simina Elena Tănăsescu, Drept constitutional şi instituţii politice, "Constitutional Law and Political Institutions", Ch Beck Publishing House, Bucharest
- Law no. 80/1995, published in the Official Gazette No. 155/1995
- Reason 5 of the Decision of Constitutional Court Plenum no.1/1994, published in the Official Gazette No.69/1994
- Simina Elena Tănăsescu, Principiul egalităţii în dreptul românesc; "Principle of Equality in Romanian Law", AllBeck Publishing House, Bucharest 1999
- The Law on Public Finance no. 10/1991, published in the Official Gazette No.23/1991
- The provisions of Art II from O.U.G. no.22 / 2003, published in the Official Gazette No.726/2002
- Tudor Drăganu, Tratat elementar de drept constituţional, Constitutional Law - Elementary Treaty, Lumina Lex Publishing House Bucharest ,1998

SUPREMACY OF THE CONSTITUTION THEORETICAL AND PRACTICAL CONSIDERATIONS

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Abstract

Regarding the term of supremacy of the constitution, many authors consider that it is notorious and therefore does not require a special scientific analysis. There are taken under consideration the characteristics of the fundamental law, such as its legal force and normative content, through which it expresses its superordinate position in the normative system of the state. In our analysis, we demonstrate that the supremacy of the constitution is a quality of the fundamental law that has complex, social, political, historical and normative determinations and relates to the role of the constitution in the state social system. The supremacy of constitution can not be reduced only to the formal significance resulting from its legal force. In this context we consider the concept of supremacy as a constitutional obligation with specific legal consequences. There are analyzed the consequences and guarantees of the supremacy of the constitution, the role of the Constitutional Court in fulfilling the main function of guarantor of the supremacy of the Constitution, as well as the competence of the courts, to guarantee through specific procedures this quality of the fundamental law. In this aspect, jurisprudential issues are presented and analyzed.

The relationship between the supremacy of the constitution and the principle of the priority of the European Union law is another aspect of the research carried out in this study.

Keywords: *The notion of constitution and the supremacy of the constitution, legality and legitimacy, consequences and guarantees of constitutional supremacy, relationship between stability and constitutional reform, the correspondence between the law and the constitutional principles.*

1. Introduction

In order to understand the relation between the two principles, i.e. Constitution's supremacy on the one hand, and primacy of European Union law on the other hand, there are a few considerations that are useful in connection to this quality of the Basic Law of being supreme in the rule of law, internal and social policy.

Constitution's supremacy expresses the upstream position of Basic law both in the system of law, as well as in the entire political and social system of every country. In the narrow sense, constitution supremacy's scientific foundation results from its form and content. Formal supremacy is expressed by the superior legal force, procedures derogating from common law on adopting and amending the constitutional rules, and material supremacy comes from the specificity of regulations, their content, especially from the fact that, by constitution, premises and rules for organization, operation and duties of public authorities are set out.

In that connection, it has been stated in the literature that the principle of Basic law's supremacy "Can be considered a *sacred*, intangible precept (…) it is at the peak of the pyramid of all legal acts. Nor would it be possible otherwise: Constitution legitimizes power, converting individual or collective will into State will; it gives power to the government, justifying its decisions and ensuring their implementation; it dictates the functions and duties incumbent on public authorities, enshrining the fundamental rights and duties, it has a leading role in relations between citizens, them and public authorities; it indicates the meaning or purpose of State activity, that is to say political, ideological and moral values under which the political system is organized and is functioning; Constitution is the fundamental background and essential guarantee of the rule of law; finally, it is the decisive benchmark for assessing the validity of all legal acts and facts. All these are substantial elements converging toward one and the same conclusion: *Constitution's material supremacy.* However, Constitution is supreme in a *formal sense* as well. The adoption procedure for the Constitution externalizes a particular, specific and inaccessible force, attached to its provisions, as such that no other law except a constitutional one may amend or repeal the decisions of the fundamental establishment, provisions relying on themselves, postulating their supremacy"[1].

The concept of Constitution supremacy may not, however, be reduced to a formal and material significance. Professor Ioan Muraru stated that: "Constitution's supremacy is a complex notion in whose content are comprised political and legal elements (values) and features expressing the upstream position of the Constitution not only in the system of law, but in the whole socio-political system of a

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[1] Deleanu I., Instituţii şi proceduri constituţionale - în dreptul roman şi în dreptul comparat , Ed. C. H. Beck, Bucureşti 2006, pp. 221-222

country"[2]. Thus, Constitution's supremacy is a quality or trait positioning the Basic law at the top of political and juridical institutions in a society organized as a State and expresses its upstream position, both in the system of law and in the social and political system.

The legal basis for Constitution's supremacy is contained by provisions of Art. 1 paragraph 5) of the Basic law. Constitution supremacy does not have a purely theoretical dimension within the meaning it may be deemed just a political, juridical or, possibly moral concept. Owing to its express enshrining in the Basic law, this principle has a normative value, from a formal standpoint being a constitutional rule. The normative dimension of Constitution's supremacy involves important legal obligations whose failure to comply with may result in legal penalties. In other words, in terms of constitutional principle, enshrined as legislation, supremacy of Basic law is also a constitutional obligation having multiple legal, political, but also value meanings for all components of the social and State system. In this regard, Cristian Ionescu would highlight: "From a strictly formal point of view, the obligation (to respect the primacy of the Basic law n.n,) is addressed to the Romanian citizens. In fact, observance of Constitution, including its supremacy, as well as laws was an entirely general obligation, whose addressees were all subjects of law – individuals and legal entities (national and international) with legal relations, including diplomatic, with the Romanian State"[3].

The general significance of this constitutional obligation relates to compliance of all law to the Constitution's rules. It is understood by "law" not just the legal system's component, but also the complex, institutional activity of interpretation and enforcement of legal rules, beginning with those of the Basic Law. "It was the derived Constituent Parliament's intention in 2003 to mark the decisive importance of the principle of Constitution supremacy over any other normative act. A clear signal was given, particularly as regards the public institution with a governing role to strictly respect the Constitution. Compliance with the Constitution is included in the general concept of lawfulness, and the term of respecting Constitution supremacy requires a pyramid-like hierarchy of normative acts at the top of which is the Basic law"[4].

2. The notion of constitution and the supremacy of the constitution

Among the many social, political and, last but not least, legal issues that the principle of the supremacy of the Constitution has and implies, we analyze in this study two:

a) the relationship between stability and constitutional reform; and b) the correspondence between the law and the constitutional principles applying to Criminal Codes.

A) An important aspect of the principle of the constitution's supremacy is the content of the relationship between stability and constitutional reform

One of the most controversial and important juridical problems is represented by the relationship between the stability and innovation in law. The stability of the juridical norms is undoubtedly a necessity for the predictability of the conduct of the law topics, for the security and good functioning of the economical and juridical relationships and also to give substance to the principles of supremacy of law and constitution.

On the other hand it is necessary to adapt the juridical norm and in general the law to the social and economical phenomenon that succeed with such rapidity. Also the internal juridical norm must answer to the standards imposed by the international juridical norms in a world in which the 'globalization" and "integration" become more conspicuous and with consequences far more important in the juridical plan also. It is necessary that permanently the law maker be concerned to eliminate in everything that it is "obsolete in law", all that do not correspond to the realities.

The report between stability and innovation in law constitutes a complex and difficult problem that needs to be approached with full attention having into consideration a wide range of factors that can determine a position favorable or unfavourable to legislative modification[5].

One of the criterions that help in solving this problem is the principle of proportionality. Between the juridical norm, the work of interpretation and its applying, and on the other hand the social reality in all its phenomenal complexity must be realized with an adequate report, in other words the law must be a factor of stability and dynamism of the state and society, to correspond to the scope to satisfy in the best way the requirements of the public interest but also to allow and guarantee to the individual the possibility of a free and predictable character, to accomplish oneself within the social context. Therefore, the law included in its normative dimension in order to be sustainable and to represent a factor of stability, but also of progress, must be adequate to the social realities and also to the scopes for which a juridical norm is adapted, or according to the case to be interpreted and applied. This is not a new observation. Many centuries ago Solon being asked to elaborate a constitution he asked the leaders of his city the question:" Tell me for how long and for which people" then later, the same wise philosopher asserted

[2] Muraru I., Tănăsescu E.S., Constituţia României - Comentariu pe articole, Ed. C.H.Beck, Bucureşti, 2009, p.18
[3] Ionescu C., Constituţia României. Titlul I. Principii generale art. 1-14. Comentarii şi explicaţii, Ed. C.H.Beck, Bucureşti, 2015, p. 48
[4] Ionescu C., *quoted work,* p. 48
[5] Victor Duculescu, Georgeta Duculescu, „Constitution's revising" „Revizuirea Constituţiei", Lumina Lex Publishing House, Bucureşti, 2002 p. 12

that he didn't give to the city a constitution perfect but rather one that was adequate to the time and place.

The relationship between stability and innovation has a special importance when the question is to keep or to modify a constitution because the constitution is the political and juridical foundation of a state[6] based on which is being structured the state and society's entire structure.

On the essence of a constitution depends its stability in time because only thus will be ensured in a great extent the stability of the entire normative system of a state, the certitude and predictability of the law topics' conduct, but also for ensuring the juridical, political stability of the social system, on the whole[7].

The stability is a prerequisite for the guaranteeing of the principle for the supremacy of constitution and its implications. On this meaning, professor Ioan Muraru asserts that the supremacy of constitution represents not only a strictly juridical category but a *political-juridical* one revealing that the fundamental law is the result of the economical, political, social and juridical realities. "It marks (defines, outlines) a historical stage in the life of a country, it sanctions the victories and gives expression and political-juridical stability to the realities and perspectives of the historical stages in which it has been adopted" [8].

In order to provide the stability of the constitution, varied technical modalities for guaranteeing a certain degree of rigidity of the fundamental law, have been used, out of which we enumerate: a) the establishing of some special conditions for exercising of an initiative to revise the constitution, such as the limiting of the topics that may have such an initiative, the constitutionality control ex officio upon the initiative for the constitution's revising; b) the interdiction of contitution's revising by the usual legislative assemblies or otherwise said by the recognition of the competence for the constitution's revising only in favour of a Constituent assembly c) the establishing of a special procedure for debating and adopting of the revising initiative; d) the necessity to solve the revising by referendum; e) the establishing of some material limits for the revising, specially by establishing of some constitutional regulations that cannot be subjected to the revising[9].

On the other hand a constitution is not and cannot be eternal or immutable. Yet from the very appearance of the constitutional phenomenon, the fundamental laws were conceived as subjected to the changes imposed inevitably with the passing of time and dynamics of state, economical, political and social realities. This idea was consecrated by the French Constitution on 1971 according to which "A people has always the right to review, to reform and modify its Constitution, and in the contemporary period included the "International Pact with regard to the economical, social and cultural rights" as well as the one regarding the civil and political rights adopted by U.N.O. in 1966 - item 1 - is stipulating:"All nations have the right to dispose of themselves. By virtue of that right they freely determine their legal status.

The renowned professor Constantin G. Rarincescu stated on this meaning:" A constitution yet is meant to regulate in future for a longer or a shorter time period, the political life of a nation, is not destined to be immobile, or perpetuum eternal, but on the other hand a constitution in the passing of time can show its imperfections, and no human work is being perfect, imperfections to whose some modifications are being imposed, on the other side a constitution needs to be in trend with the social necessities and with the new political concepts, that can change more frequently within a state or a society[10]". Underlying the same idea the professor Tudor Drăganu stated: "The constitution cannot be conceived as a perennial monument destined to outstand to the viccisitudes of the centuries, not even to the ones of the decades. Like all other juridical regulations, the constitution reflects the economical, social and political conditions existing in a society at a certain time of history and aims for creating the organizational structures and forms the most adequate to its later development. The human society is in a continuous changing. What it is valid today tomorrow can become superannuated. On the other side, one of the characteristics of the juridical regulations consists in the fact that they prefigure certain routes meant for chanelling the society's development in one or another direction. These directions as well as the modalities to accomplish the targeted scopes may prove to be, in their confronting with the realities, inadequate. Exactly for this very reason, the constitutions as all other regulations, cannot remain immutable but must adapt to the social dynamics[11]".

In the light of those considerents we appreciate that relationship between the stability and the constitutional revising needs to be interpreted and solved by the requirements of principle of proportionality[12]. The fundamental law is viable as long

[6] Ion Deleanu, ","Constitutional Law and Public Institutions", Europa Nova Publishing House, Bucharest, 1996, vol. I, p. 260.

[7] Elena Simina Tănăsescu, în Romania's Constitution , Comments on articles, coordinators I. Muraru, E.S. Tănăsescu, All Bach Publishing House, Bucharest, 2008, pp.1467-1469.

[8] Ioan Muraru, Simina Elena Tănăsescu, "Constitutional Law and the Political Institutions" XI th edition, All Bach Publishing House, Bucharest, 2003, p.80.

[9] For the development see : Ioan Muraru,Simina Tănăsescu, quotted works pp.52-55,Tudor Drăganu,, „Constitutional Law and the Political Institutions. Elementary Treaty" Lumina Lex Publishing House, Bucharest,1998,Vol I,pp. 45-47, Marius Andreescu, Florina Mitrofan, „Constitutional Law. General Theory" Publishing House of Pitești University, 2006,pp. 43-44,Victor Duculescu ,Gergeta Duculescu, quotted works. pp.28-47, Ion Deleanu , quotted works.,pp.275-278.

[10] Constantin G. Rarincescu,, « Constitutional Law Course » Bucharest, 1940, p. 203.

[11] Tudor Drăganu, quotted works pp. 45-47

[12] For development see Marius Andreescu „The Principle of Proportionality in the Constitutional Law" CH Beck Publishing House ,Bucharest,2007.

as it is adequated to the realities of the state and to a certain society at a determined historical time. Much more – states professor Ioan Muraru – "a constitution is viable and efficient if it achieves the balance between the citizens (society) and the public authorities (state) on one side, then between the public authorities and certainly between the citizens. Important is also that the constitutional regulations realize that the public authorities are in the service of citizens, ensuring the individual's protection against the state's arbitrary attacks contrary to one's liberties"[13].In situations in which such a report of proportionality no longer exists, due to the imperfections of the constitution or due to the inadequacy of the constitutional regulations to the new state and social realities, it appears the juridical and political necessity for constitutional revising.

Nevertheless in the relationships between the stability and constitutional revising, unlike the general relationship stability – innovation in law the two terms have the same logical and juridical value. It is about a contrariety relationship (and not a contradiction one) in which the constitution's stability is the dominant term. This situation is justified by the fact that the stability is a requirement essential for the guaranteeing of the principle of constitution supremacy with all its consequences. Only through the primacy of the stability against the constitution's revising initiative one can exercise its role to provide the stability, equilibrium and dynamics of the social system's components, of the stronger and stronger assertion of the principles of the lawful state. The supremacy of the constitution bestowed by its stability represents a guarantee against the arbitrary and discretionary power of the state's authorities, by the pre-established and predictable constitutional rules that regulate the organization, functioning and tasks of the state authorities. That's why before putting the problem of constitution's revising, important is that the state's authorities achieve the interpretation and correct applying of the constitutional normative dispositions in their letter and spirit. The work of interpretation of the constitutional texts done by the constitutional courts of law but also by the other authorities of the state with the respecting of the competences granted by the law, is likely to reveal the meanings and significances of the principles for regulating the Constitution and thus to contribute to the process for the suitability of these norms to the social, political and state reality whose dynamics need not be neglected. The justification of the interpretation is to be found in the necessity to apply a general constitutional text to a situation in fact which in factum is a concrete one"[14].

The decision to trigger the procedure for revising a country's Constitution is undoubtedly a political one, but at the same time it needs to be juridically fundamented and to correspond to a historical need, of the social system stately organized from the perspective of its later evolution. Therefore, the act for revising the fundamental law needs not be subordinated to the political interests of the moment, no matter how nice they will be presented, but in the social general interest, well defined and possible to be juridically expressed. Professor Antonie Iorgovan specifies on full grounds:" in the matter of Constitution's revising, we dare say that where there is a normal political life, proof is given of restraining prudence, the imperfections of the texts when confronting with life, with later realities, are corrected by the interpretations of the Constitutional Courts, respectively throughout the parliamentary usance and customs, for which reason in the Western literature one does not speak only about the Constitution, but about the block of constitutionality"[15].

The answer to the question if in this historical moment is justified the triggering of the political and juridical procedures for the modifying of the fundamental law of Romania can be stressed out in respect with the reasons and purpose targeted. The revising of Constitution cannot have as finality the satisfying of the political interests of the persons holding the power for a moment, in the direction of reinforcing of the discretionary power of the Executive, with the inacceptable consequence of harming certain democratical constitutional values and principles, mainly of the political and institutional pluralism, of the principle of separation of powers in the state, of the principle of legislative supremacy of the Parliament.

On the other hand, such as the two decades lasting history of democratical life in Romania has shown, by the decisions taken for many times, were distorted the constitutional principles and rules by the interpretations contrary to the democratical spirit of the fundamental law, or worse, they didn't observe the constitutional dispositions because of the political purposes and their support in some conjunctural interests. The consequences were and are obvious: the restraining or violation of some fundamental rights and liberties, generating some political tensions, the nonobservance of the constitutional role of the state's institution, in a single word, due to political actions, some dressed in juridical clothes, contrary to the constitutionalism that needs to characterize the lawfull state in Romania. In such conditions, an eventual approach of the revising of the fundamental law should be centered on the need to strengthen and enhance the constitutional guarantees for respecting the requirements and values of the lawfull state, in order to avoid the power excess specific to the politician subordinated exclusively to a group interests, many time conjunctural and contrary to the Romanian people, which in accordance to Constituion item 2 paragraph (1) of the one who is the holder of the national sovereignity.

[13] Ioan Muraru, "The Constitutional Protection of the Liberties for Oppinion" Lumina Lex Publishing House, Bucharest, 1999, p.17.

[14] Ioan Muraru, Mihai Constantinescu, Simina Tănăsescu, Marian Enache, Gheorghe Iancu, „Interpreting of the Constitution" Lumina Lex Publishing House, Bucharest, 2002, p.14

[15] Antonie Iorgovan, „The Revising of Constitution and Bicameralism" in the l the Public Law Journal no. 1/2001, p. 23.

In our opinion, the preoccupation of the political class and state's authorities in the current period, in relation to the actual contents of the fundamental law, should be oriented not so for the modification of the Constitution, but especially into the direction of interpreting and correct applying and towards the respecting of the democratical finality of the constitutional institutions. In order to strengthen the lawfull state in Romania, it is necessary that the political formations, mostly those that hold the power, all authorities of the state to act or to exercise its duties within the limits of a *loyal constitutional behavior* that involve the respecting of the meaning and demoratical significances of the Constitution.

B) Another aspect relates to the relationship between the Constitution and the law, meaning "law" the sphere of inferior normative acts as a legal force to the Basic Law, analyzed in accordance with the requirements and consequences of the principle of the supremacy of the Constitution, reveals two dimensions:
- The first concerns the constitutionality of inferior normative acts as a legal force to the Fundamental Law, and in the general sense the constitutionality of the whole law. Essentially, this requirement corresponds to one of the consequences of the supremacy of the Basic Law, namely the compliance of the whole right with constitutional norms. The fulfillment of this constitutional obligation, a direct consequence of the principle of the supremacy of the Basic Law, is mainly an attribute of the infra-constitutional legislator in the elaboration and adoption of normative acts. The fulfillment of the requirement of constitutionality of a normative act presupposes first the formal and material adequacy of the law to the norms, principles, values and reasons of the Constitution. The formal aspect of this report expresses the obligation of the legislator to observe the rules of material jurisdiction and the legislative procedures, which are explicitly derived from the constitutional norms or from other normative acts considered to be the formal sources of constitutional law.

The formal compliance of normative acts with the Basic Law implies a strict adherence of the premiums to the norms and principles of the Constitution, and there is no margin of appreciation or interpretation by the legislator.

The material dimension of this report is more complex and refers to the compliance of the normative content of a law with the principles, values, norms, but also with the constitutional grounds. And this aspect of law compliance with constitutional norms is a constitutional obligation generated by the principle of the supremacy of the Basic Law. The fulfillment of this obligation is a main attribute of the infra-constitutional legislator, who in the act of legislating is called to achieve not only a simple legislative function, but also a legal act, , we would say new, value and scientific, to elaborate and adopt the law according to the rationale, the normative content and the principles of the Constitution. In this way, in order to give effect to the principle of the supremacy of the Basic Law, in the act of legislating the legislator must carry out a complex activity of interpretation of the Constitution, which must not lead to circumvention of the meanings, meanings and especially the concrete content of the constitutional norms . This complex process of adequacy of the normative content of a law to constitutional norms is no longer strictly formal and procedural because it implies a certain margin of appreciation specific to the work of interpretation performed by the legislator and at the same time corresponds to the freedom of law which, Parliament's case, is found in the very legal nature of this institutional forum defined in art. 61 par. 1 of the Basic Law: "The Parliament is the supreme representative body of the Romanian people and the sole legislator of the country". This is the expression of what in the literature is defined as the principle of parliamentary autonomy.

A second aspect of achieving the requirement of constitutionality of the law, which is very important in our opinion, refers to the obligation of the infra-constitutional legislator to transpose and develop in normative acts elaborated and adopted, depending on their specificity, normative content, principles and values constitutional. We can say that in the activity of drafting the normative acts, understood as the main attribution of the Parliament and the Government, after the accession of Romania to the European Union, the preoccupation to concretize principles and constitutional values, which would give individuality to the elaborations normative, especially for the important areas of state activity and social and political life. As demonstrated by legislative practice and unfortunately also happened in the case of the recently adopted Criminal Code and the Code of Criminal Procedure, "models" are often sought in the legislation of other states or in the legal system of EU law European. Refusing to give effect to the Romanian legal traditions, but also to the principles and values enshrined in the Basic Law, and last but not least to the concrete social political realities of the state and society, often the legislator, by adopting a complex normative act for important fields of activity, performs an eclectic, formal, activity with significant negative consequences on the interpretation and application of such a normative act, especially in the judicial activity.

We emphasize that observance of the principle of the supremacy of the Constitution can not be limited to formal compliance

In the new Criminal Codes there are many omissions regarding the reception and transposition of the principles and norms of the Constitution of Romania, and especially the inadequacies of the content of certain legal norms with the regulations of the Basic Law, the latter being fully perceived and censored by the Constitutional Court. Undoubtedly, verifying the constitutionality of the law as regards the fulfillment of the requirements of formal and material compliance with the constitutional norms is an

exclusive attribute of the Constitutional Court, if the constitutional control is constituted by the laws of the Parliament and the ordinances of the Government. According to the provisions of art. 142 para. 1 of the Basic Law, "the Constitutional Court is the guarantor of the supremacy of the Constitution". However, this fundamental institution of the rule of law is not the only one called to contribute to guaranteeing the supremacy of the Basic Law. For the other categories of normative acts, it is necessary to recognize the competence of the courts to carry out such a constitutionality review in accordance with the rules of competence and the powers laid down by law.

The constitutionalisation of the normative system and generally of law is another reality of the application and observance of the principle of the supremacy of the Basic Law and which, in a narrow sense, can be understood as the complex activity carried out mainly by the Constitutional Court and by the courts, within the limits of the law to interpret the normative act in force, in whole or in part, with reference to the norms, principles, values and reasons of the Constitution. In the procedural sense, the constitutionalisation of law and law is the operation by which the constitutionality of a legal norm below the constitutional norms is invalidated or confirmed, and has the effect of setting or, more correctly, re-establishing the law within the value and normative framework of the Constitution. The constitutionalisation of the law is the result of the constitutional control of the laws in force, carried out by the Constitutional Court of Romania on the path of the unconstitutionality exception, a procedure regulated by the provisions of art. 146 lit. d) of the Constitution, as well as by the subsequent provisions of the Law no. 47/1992, republished, on the organization and functioning of the Constitutional Court.

In a broad sense, the constitutionalisation of law has a complex significance, which is not limited to constitutional control, in fact it is a permanent activity expressing the dynamics of law in relation to the dynamics of the state system and the social system. It is a permanent work of lawfulness to the evolutionary, social and state reality, through a judicious interpretation and valorization of the constitutional reasons within the limits provided by the normative content of the Basic Law. Without this, we emphasize the important role of the courts in the complex work of constitutionalizing the law through their specific attribute, interpreting and applying the law, but also the constitutional norms, with the obligation to respect the normative content, the values and the reasons of the Constitution. In the literature it is argued that, by its role in the constitutionalisation of law, materialized in the procedural attributions specific to the act of the court, the judge from the common law courts becomes, in fact, a constitutional judge.

The constitutionalisation of law and law is an evolutionary process determined not only by legal reasons, but also by social, political and economic factors outside the law. This dialectic process in concrete terms, referring to a certain normative act, lasts as long as the law in question is in force. In some cases, the constitutionalisation of a normative act may continue even after it is abrogated in the case of ultra-activation.

Applying these considerations to the normative reality of the new Criminal Codes, we note that, within a relatively short period of time since their adoption, the Constitutional Court admitted numerous exceptions of unconstitutionality, finding the unconstitutionality of a significant number of norms in the Code and the Criminal Procedure Code, which, in our opinion, raises three issues: The first concerns the constitutionality of Parliament's legislative activity, which resulted in the adoption of the Criminal Codes. The question arises as to how much the legislator respected the principle of the supremacy of the Fundamental Law and its degree of concern in order to ensure the material compliance of the norms of the Criminal Codes with the norms of the Constitution. Given the large number of admissible exceptions of unconstitutionality, we consider that the legislator's concern to respect the principle of the supremacy of the Basic Law in its simplest form, namely the compliance of the norms of the Criminal Code and the Criminal Procedure Code with the Basic Law of the country was not a priority the law-making process in this area; the second issue concerns the concrete process of constitutionalisation of the criminal legislation through the decisions of our constitutional court. We have in mind both the decisions of the Constitutional Court which rejected exceptions of unconstitutionality regarding the norms of the criminal codes and which, through the arguments put forward, contribute to the process of constitutionalisation of the law, but above all the decisions that found the unconstitutionality of some normative provisions. In the latter situation, the legal effect of the decisions of the Constitutional Court, which found the unconstitutionality of provisions of the two Criminal Codes, was raised. For the courts that are called upon to apply the rules of the Criminal Codes, as well as the Constitutional Court's decisions, the aspect raised is very important, especially in the rather frequent situation in which the Parliament or, as the case may be, the Government did not intervene, according to the Basic Law, to agree the normative provisions found to be unconstitutional with the decisions of the Constitutional Court; A third issue concerns the reception of the constitutional normative provisions, the principles and the rationale of the Basic Law, important for the entire coding work in criminal matters, in the drafting of the two Criminal Codes by the infra-legislative legislator.

The legislator did not show any particular interest in enshrining in the Criminal Code and the Code of Criminal Procedure general principles of law, especially those whose origin is formed by constitutional norms, which give systemic and explanatory cohesion of the entire normative content of

the codes and to which one can report who applies and interprets criminal law.

We consider that the normative expression in the two Criminal Codes of general principles of law, which by their nature are also constitutional principles, would have resulted in a high level of constitutionality for the two normative acts through a better harmonization of the content normative with the norms of the Basic Law. This high level of constitutionality would have resulted in the functional stability of codes by avoiding the unconstitutionality of some important legal norms, as has been the case so far.

The importance of the principles of law for the cohesion and harmony of the entire normative system has been analyzed and emphasized in the literature. The principles of law give value and legitimacy to the norms contained in the law. In this respect, Mircea Djuvara remarked: "All the science of law is not really, for a serious and methodical research, than to release from their multitude of laws their essence, that is, precisely these ultimate principles of justice from which all the other provisions derive. In this way, this entire legislation becomes very clear and what is called the legal spirit. Only in this way is the scientific elaboration of a law ". Equally significant are the words of the great philosopher Immanuel Kant: "It is an old desire, who knows when ?, will happen once: to discover in the place of the infinite variety of civil laws their principles, for only in this can be the secret of simplify, as they say, the legislation. "

From the normative point of view, the source of the principles of any legal branch, and especially of a code, must be primarily the constitutional norms which, by their nature, contain rules of maximum generality, which constitute a basis but also a source of legitimacy for all other legal rules.

Conclusions

The supremacy of the Constitution would remain a mere theoretical issue if there were no adequate safeguards. Undoubtedly, the constitutional justice and its particular form, the constitutional control of the laws, represent the main guarantee of the supremacy of the Constitution, as expressly stipulated in the Romanian Basic Law.

Professor Ion Deleanu appreciated that "constitutional justice can be considered alongside many others a paradigm of this century." The emergence and evolution of constitutional justice is determined by a number of factors to which the doctrine refers, among which we mention: man, as a citizen, becomes a cardinal axiological reference of civil and political society, and fundamental rights and freedoms only represent a simple theoretical discourse, but a normative reality; there is a reconsideration of democracy in the sense that the protection of the minority becomes a major requirement of the rule of law and, at the same time, a counterpart to the principle of majority; "Parliamentary sovereignty" is subject to the rule of law and, in particular, to the Constitution, therefore the law is no longer an infallible act of Parliament, but subject to the norms and values of the Constitution; not least, the reconsideration of the role and place of the constitutions in the sense of their qualification, especially as "fundamental constitutions of the governors and not of the governors, as a dynamic act, further modeling and as an act of society[16]."

The constitutionalisation of law and law is primarily the work of the Constitutional Court and the courts but, in a broader sense, the entire state institutional system according to the rules of competence contributes to the process by interpreting and applying the constitutional norms complex of continuous approximation of the normative content of laws and other categories of normative acts, principles, values and reasons of constitutional norms. It is obvious that the infra-constitutional legislator plays a very important role in the constitutionalisation of law and law, especially by taking into account in the normative acts elaborated and adopted what we call the reasons and values found in the normative content of the Basic Law.

In our opinion, the role of the Constitutional Court as the guarantor of the Fundamental Law must be amplified by new powers in order to limit the excess power of state authorities. We disagree with what has been stated in the literature that a possible improvement of constitutional justice could be achieved by reducing the powers of the constitutional litigation court. It is true that the Constitutional Court has made some controversial decisions regarding the observance of the limits of the exercise of its attributions Constitution, by assuming the role of a positive legislator. . Reducing the powers of the constitutional court for this reason is not a legal solution. Of course, reducing the powers of a state authority has as a consequence the elimination of the risk of misconduct of those attributions. Not in this way it is realized in a state of law the improvement of the activity of a state authority, but by seeking legal solutions to better fulfill the attributions that prove to be necessary for the state and social system.

It is useful in a future revision of the fundamental law that art. 1 of the Constitution to add a new paragraph stipulating that "The exercise of state power must be proportionate and non-discriminatory". This new constitutional regulation would constitute a genuine constitutional obligation for all state authorities to exercise their powers in such a way that the adopted measures fall within the limits of the discretionary power recognized by the law. At the same time it creates the possibility for the Constitutional Court to sanction the excess of power in the activity of the Parliament and the Government by way of the constitutionality control of laws and ordinances, using as a criterion the principle of proportionality.

[16] Deleanu I., Constitutional Justice, Ed. Lumina Lex, Bucharest, 1995, p.5

The Constitutional Court may also include the power to rule on the constitutionality of administrative acts exempt from the legality control of administrative litigation. This category of administrative acts, to which Article 126 paragraph 6 of the Constitution refers and the provisions of Law no. 544/2004 of the contentious-administrative are of great importance for the entire social and state system. Consequently, a constitutional review is necessary because, in its absence, the discretionary power of the issuing administrative authority is unlimited with the consequence of the possibility of an excessive restriction of the exercise of fundamental rights and freedoms or the violation of important constitutional values. For the same reasons, our constitutional court should be able to control the constitutionality and the decrees of the President to establish the referendum procedure.

The High Court of Cassation and Justice has the power to take decisions in the appeal procedure in the interest of the law that are binding on the courts. In the absence of any check of legality or constitutionality, practice has shown that in many situations the supreme court has exceeded its duty to interpret the law, and through such decisions has amended or supplemented normative acts by acting as a true legislator in violation of the principle of separation of powers in the state. In these circumstances, in order to avoid the excess power of the Supreme Court, we consider it necessary to assign to the Constitutional Court the power to rule on the constitutionality of the decisions of the High Court of Cassation and Justice adopted in the appeal procedure in the interest of the law.

References

- Antonie Iorgovan, „The Revising of Constitution and Bicameralism" in the l the Public Law Journal no. 1/2001
- Constantin G. Rarincescu,, « Constitutional Law Course » Bucharest, 1940
- Deleanu I., Constitutional Justice, Ed. Lumina Lex, Bucharest, 1995
- Deleanu I., Instituţii şi proceduri constituţionale în dreptul roman şi în dreptul comparat, Ed. C.H. Beck, Bucureşti 2006
- Elena Simina Tănăsescu, în Romania's Constitution , Comments on articles, coordinators I. Muraru, E.S. Tănăsescu, All Bach Publishing House, Bucharest, 2008
- Ioan Muraru, "The Constitutional Protection of the Liberties for Oppinion", Lumina Lex Publishing House, Bucharest, 1999
- Ioan Muraru, Mihai Constantinescu, Simina Tănăsescu, Marian Enache, Gheorghe Iancu, „Interpreting of the Constitution", Lumina Lex Publishing House, Bucharest, 2002
- Ioan Muraru, Simina Elena Tănăsescu, "Constitutional Law and the Political Institutions" XIth edition, All Bach Publishing House, Bucharest, 2003
- Ion Deleanu, "Constitutional Law and Public Institutions", Europa Nova Publishing House, Bucharest, 1996, vol. I.
- Ionescu C., Constituţia României. Titlul I. Principii generale art. 1-14. Comentarii şi explicaţii, Ed. C.H.Beck, Bucureşti, 2015
- Marius Andreescu „The Principle of Proportionality in the Constitutional Law" CH Beck Publishing House, Bucharest, 2007
- Marius Andreescu, Florina Mitrofan, „Constitutional Law. General Theory" Publishing House of Piteşti University, 2006
- Muraru I., Tănăsescu E.S., Constituţia României - Comentariu pe articole, Ed. C.H.Beck, Bucureşti, 2009
- Tudor Drăganu,, „Constitutional Law and the Political Institutions. Elementary Treaty" Lumina Lex Publishing House, Bucharest, 1998, Vol I
- Victor Duculescu, Georgeta Duculescu, „Constitution's revising" „Revizuirea Constituţiei", Lumina Lex Publishing House, Bucureşti, 2002

WORKPLACE SURVEILLANCE: BIG BROTHER IS WATCHING YOU?

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Abstract

Only recently workplace surveillance has become a real concern of the international community. Very often we hear about employers who monitor and record the actions of their employees, in order to check for any breaches of company policies or procedures, to ensure that appropriate behaviour standards are being met and that company property, confidential information and intellectual property is not being damaged. Surveillance at workplace may include inter alia monitoring of telephone and internet use, opening of personal files stored on a professional computer, video surveillance. But what if this monitoring or recording breaches human rights?

In order to give practical examples for these means, we shall proceed to a chronological analysis of the most relevant cases dealt by the European Court of Human Rights along the time, in which the Strasbourg judges decided that the measures taken by the employers exceed the limits given by Article 8 of the Convention. After providing the most relevant examples from the Court's case-law in this field, we shall analyse the outcome of the recent Grand Chamber Barbulescu v. Romania judgment.

The purpose of this study is to offer to the interested legal professionals and to the domestic authorities of the Member States the information in order to adequately protect the right of each individual to respect for his or her private life and correspondence under the European Convention on Human Rights.

Keywords: *ECHR, employee, human rights, workplace surveillance.*

1. Introductive Remarks

We all have been in the situation, at one point, of using at work the company resources for personal interest. What did you do? Did you stop before doing it and thought you are not allowed to use them? Did you remember that the internal regulations prohibited the use of company resources by the employees? Or does your company have a policy for employee personal use of business equipment or a code of ethics and business conduct? Did you go to the management and asked for permission? Did you use them and thought that nobody else will find out? What if your employer decided to monitor the employees' communications and you did not even know? What if you knew, and you still have decided to use them anyhow? And if we would tell you that certain workplace surveillance techniques could violate your human rights? Most probably you will ask us: what does surveillance in the workplace have to do with human rights?

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 cosmopolite threat: workplace surveillance. The purpose of this study is to strengthen human protection at the national level, having in mind that the European Court for Human Rights (hereinafter the "*ECtHR*" 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 in which workplace surveillance has been considered to breach the Convention.

It is indisputable that "*human rights concern the universal identity of the human being and are underlying on the principle of equality of all human beings*"[2], therefore all individuals have the right to complain if the domestic authorities[3], 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[4],

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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] Augustin Fuerea, *Introducere in problematica dreptului international al drepturilor omului – note de curs*, Editura ERA, Bucuresti, 2000, p. 4.

[3] 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.

[4] 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, Pro Universitaria Publishing House, Bucharest, 2012, p. 999-1008.

arguing that a breach of the Convention rights has resulted from workplace surveillance which can track an employee's every move. As it is easy to imagine, this is possible because each individual has the right to privacy.

Please note that Article 8 (right to respect for private and family life, home and correspondence) of the Convention provides that:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others"[5].

In order to determine whether the interference by the authorities with the applicants' private life or correspondence was necessary in a democratic society and a fair balance was struck between the different interests involved, the European Court of Human Rights examines whether the interference was in accordance with the law, pursued a legitimate aim or aims and was proportionate to the aim(s) pursued.

According to this article, "*the respect for the right to private life, family life, the respect for the domicile of a person and the secrecy of his/her correspondence impose, first of all, negative obligations on the part of the state authorities*[6]". Besides these negative obligations, the public authorities have positive obligations, which are necessary for ensuring effective respect for private and family life.

What should we understand by the notion "private life"? Can it be defined precisely or is it blurred? We totally agree that "*it is a notion whose content varies depending on the age to which it relates, on the society in which the individual lives, and even on the social group to which it belongs*"[7]. 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"[8], fact that raises many challenges for its judges.

Even in the Court's opinion, the notion of "private life" is a broad term which is not susceptible to exhaustive definition. Everyone has the right to live privately, away from unwanted attention. In a famous judgment, *Niemietz v.* Germany[9], the Court also considered that "*it would be too restrictive to limit the notion of "private life" to an "inner circle" in which the individual may live his or her own personal life as he or she chooses, thus excluding entirely the outside world not encompassed within that circle*"[10].

The notion of "private life" may include professional activities[11] or activities taking place in a public context[12].

2. ECHR's Relevant Case-law on Incompatibility Between Workplace Surveillance and Article 8 of the Convention

According to the experts, nowadays employers use many technologies to monitor their staff at work in order to discover their web-browsing patterns, text messages, screenshots, social media posts, private messaging applications. Are all these technologies compatible with the right to respect for private and family life, home and correspondence?

Surveillance at workplace may include *inter alia* monitoring of telephone and internet use, opening of personal files stored on a professional computer, video surveillance. In order to give practical examples for these means, we will proceed to a chronological analysis of the most relevant cases dealt by the Court along the time, in which the Strasbourg judges decided that the measures taken by the employers exceeds the limits given by the Article 8 of the Convention.

One interesting case in monitoring of telephone and internet use is *Halford v. the United Kingdom*[13]. The applicant, Ms Halford, was the highest-ranking female police officer in the United Kingdom (Assistant Chief Constable with the Merseyside police). She decided to bring discrimination proceedings in front of the British courts of law because she had been denied promotion during the years: on eight occasions in seven years, she applied unsuccessfully to be appointed to the rank of Deputy Chief Constable, in response to vacancies arising within Merseyside and other police authorities. One of her allegations before the ECtHR in this respect was that her office and home telephone calls had been intercepted in order to obtain

[5] Please see the European Convention on Human Rights, available at http://www.echr.coe.int/Documents/Convention_ENG.pdf, p. 10.

[6] Corneliu Birsan, *Conventia europeana a drepturilor omului. Comentariu pe articole*, second edition, C.H. Beck Publishing House, Bucharest, 2010, p. 597.

[7] *Idem*, p. 602.

[8] *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.

[9] Application no. 13710/88, Judgment dated 16 December 1992, available at http://hudoc.echr.coe.int/eng?i=001-57887.

[10] *Idem*, para. 29.

[11] Case of *Fernández Martínez v. Spain*, application no. 56030/07, judgment dated 12 June 2014, para. 110, available at http://hudoc.echr.coe.int/eng?i=001-145068, and case of *Oleksandr Volkov v. Ukraine*, application no. 21722/11, judgment dated 27 May 2013, paras. 165-66, available at http://hudoc.echr.coe.int/eng?i=001-115871.

[12] Case of *Von Hannover v. Germany (no. 2)*, application nos. 40660/08 and 60641/08, judgment dated 7 February 2012, para. 95, available at http://hudoc.echr.coe.int/eng?i=001-109029.

[13] Application no. 20605/92, judgment dated 25 June 1997, available online at http://hudoc.echr.coe.int/eng?i=001-58039.

information against her in the course of the domestic proceedings.

Because of her job, Ms Halford was provided with her own office and two telephones (one for private use) which were part of the Merseyside police internal telephone network (*i.e.* a telecommunications system outside the public network). Since she was frequently "on call", a substantial part of her home telephone costs was paid by the Merseyside police. Unfortunatelly, no restrictions were placed on the use of these telephones and no guidance was given to the applicant.

The Court held that, in this case, there had been a violation of Article 8 of the Convention as regards the interception of telephone calls made on the *applicant's office telephones*. The Court considered that there was a reasonable likelihood that this interception was made by the police with the primary aim of gathering material against the applicant in the defence of the sex-discrimination proceedings she instituted. The Court noted that this interception made by a public authority represented an interference with the exercise of the applicant's right to respect for her private life and correspondence. Additionally, after analyzing the domestic applicable law, the Court noted that there was no legal provision regulating interception of telephone calls made on internal communications systems operated by public authorities, therefore the respective measure could not have been interpreted as being in accordance with the law.

Aditionally, the Court considered that the United Kingdom violated Article 13 (right to an effective remedy) of the Convention, since the applicant had been unable to seek relief at national level in relation to her complaint concerning her office telephones.

On the other hand, surprisingly, the Court held that there had been no violations of Articles 8 and 13 of the Convention as regards the interception of telephone calls made on the *applicant's home telephone*, since it did in particular not find it established that there had been interference regarding those communications. The Court observed that the only item of evidence which tended to suggest that the home calls were being intercepted had been the information concerning the discovery of the Merseyside police checking transcripts of conversations. The applicant provided to the Court with more specific details regarding this discovery (*i.e.* that it was made on a date after she had been suspended from duty), but the Court noted that this information might be unreliable since its source has not been named. Even if it had been assumed to be true, the fact that the police had been discovered checking transcripts of Ms Halford's telephone conversations "*on a date after she had been suspended does not necessarily lead to the conclusion that these were transcripts of conversations made from her home*"[14].

Judge Russo filed a dissenting opinion to this judgment for the non-violation of Article 13 of the Convention in relation to the applicant's complaint that telephone calls made from her home telephone were intercepted. We also consider that Ms Halford had an arguable claim of a violation of Article 8 in respect of her home telephone and she was entitled to an effective remedy in the United Kingdom in respect to this point.

In another interesting case against the United Kingdom, *Copland*[15], the applicant, Ms Copland complained that during her employment in a statutory body administered by the state (the Carmarthenshire College), her telephone, e-mail and internet usage had been monitored. She was appointed personal assistant to the College Principal and from the end of 1995 she was required to work closely with the newly appointed Deputy Principal, with whom at one point it was supposed to have an improper relationship. The Deputy Principal ordered that the applicant's telephone, e-mail and Internet usage to be monitored, during her employment (although at the College there was no policy in force regarding the monitoring of telephone, e-mail or Internet usage by employees).

The Court held that there had been a violation of Article 8 of the Convention since the collection and storage of personal information obtained from the telephone calls, e-mails and internet usage, without he knowledge, had amounted to an interference with her right to respect for her private life and correspondence. The applicant had not been given a warning that her calls, e-mails and personal internet usage would be monitored, fact which created a reasonable expectation as to the privacy of her correspondence.

In *Antović and Mirković v. Montenegro*[16], the Court was asked to decide if an invasion of privacy complaint brought by two university lecturers (University of Montenegro's School of Mathematics) after installing in the university amphiteatres video surveillance, at the dean's decision.

The applicants filed a complained with the Montenegrin Personal Data Protection Agency which upheld their complaint and ordered the removal of the respective cameras, particularly on the grounds that the reasons for the introduction of video surveillance had not been met, since no evidence existed regarding a danger to the safety of people and property and the university's further stated aim of surveillance of teaching was not among the legitimate grounds for video surveillance. The domestic courts overturned this decision in the civil proceedings on the grounds that the university was a public institution, carrying out activities of public interest, including teaching. Therefore, the amphitheatres were a working area, where professors were together with students, and they could not invoke any right to privacy that could be

[14] *Idem*, para. 59.

[15] Case of *Copland v. the United Kingdom*, application no. 62617/00, judgment dated 3 April 2007, available at http://hudoc.echr.coe.int/eng?i=001-79996.

[16] Case of *Antović and Mirković v. Montenegro*, application no. 70838/13, judgment dated 28 November 2017, available at http://hudoc.echr.coe.int/eng?i=001-178904.

violated because of the video surveillance. It is also implied that the professors could not invoke the fact that the respective data collected with such surveillance cameras be considered personal data.

The professors argued that they had no effective control over the information collected through the surveillance system and that the surveillance had been unlawful. Since the cameras had been installed in public areas, the Montenegrin courts of law rejected a compensation claim arguing that the question of private life had not been at issue.

The Court held that there had been a violation of Article 8 (right to respect for private life) of the Convention, considering that the camera surveillance had amounted to an interference with the applicants' right to privacy and that the evidence showed that that surveillance had violated the provisions of domestic law.

In the very recent judgment of *López Ribalda and Others v. Spain*[17], dated 9 January 2018, the Court held that there had been a violation of Article 8 of the Convention, finding that the Spanish courts had failed to strike a fair balance between the applicants' right to privacy and the employer's property rights. This case concerned the covert video surveillance of a Spanish supermarket chain's (*i.e.* M.S.A., a Spanish family-owned supermarket chain) employees after suspicions of theft had arisen. After noting some irregularities between the supermarket stock levels (losses in excess of EUR 7,780 in February, EUR 17,971 in March, EUR 13,936 in April, EUR 18,009 in May and EUR 24,614 in June 2009), the employer installed surveillance cameras (visible for customer thefts and hidden for employee thefts – zoomed in on the checkout counters). The employees were informed only about the installation of the visible cameras. After ten days of surveillance, all the employees suspected of theft were called to individual meetings, where the applicants admitted their implication in the thefts. The applicants were dismissed on disciplinary grounds mainly based on the video material, which they alleged had been obtained by breaching their right to privacy.

The Court underlined that under Spanish law the applicants should have been informed that they were under surveillance, but in fact they had not been. The employer's rights could have been safeguarded by other means and it could have provided the applicants at the least with general information about the surveillance.

3. *Barbulescu v Romania*, the Milestone in the ECHR's Recent Case-Law on Workplace Surveillance

This case concerns the surveillance of Internet usage in the workplace and was brought to the attention of the Court on 15 December 2008[18]. The applicant born in 1979, lived in Bucharest and from 01 August to 06 August 2007 was employed in the Bucharest office of a Romanian private commercial company as a sales engineer. For the purpose of responding to the customers' enquiries, at his employer's request, Mr Barbulescu had to create an instant messaging account using Yahoo Messenger, an online chat service offering real-time text transmission over the internet (while he already had another personal Yahoo Messenger account).

The internal regulations prohibited the use of company resources by the employees, but it did not contain any reference to the possibility for the employer to monitor employees' communications.

From the evidence submitted by the Romanian Government to the Court, it appears that the applicant had been informed of the employer's internal regulations and had signed a copy of those internal regulations, after acquainting himself with their contents.

From the evidence it appears that from 05 to 13 July 2007, the employer recorded the applicant's Yahoo Messenger communications in real time, and on 13 July 2007 (at 4.30 p.m.), the applicant was summoned to give an explanation. The relevant notice was worded as follows: "*Please explain why you are using company resources (internet connection, Messenger) for personal purposes during working hours, as shown by the attached charts*". The charts attached indicated that his internet activity was greater than that of his colleagues. It is interesting that at that stage, he was not informed whether his communications monitoring activities had also concerned their content.

On that same day, the applicant informed the employer in writing that he had used Yahoo Messenger for work-related purposes only. In the afternoon (at 5.20 p.m.), the employer again summoned him to give an explanation in a notice worded as follows: "*Please explain why the entire correspondence you exchanged between 5 to 12 July 2007 using the S. Bucharest [internet] site ID had a private purpose, as shown by the attached forty-five pages*". The forty-five pages mentioned in the notice consisted of a transcript of the messages which the applicant had exchanged with his brother and his fiancée during the period when he had been monitored; those messages related to personal matters and some were of an intimate nature. The

[17] Cases of *Isabel López Ribalda against Spain*, *María Ángeles Gancedo Giménez and Others against Spain*, applications nos. 1874/13 and 8567/13, available at http://hudoc.echr.coe.int/eng?i=001-179881.

[18] Case of *Barbulescu v Romania*, application no. 61496/08, Judgment of the Grand Chamber dated 05 September 2017, available at https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Barbulescu%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-177082%22]}.

transcript also included five messages that the applicant had exchanged with his fiancée using his personal Yahoo Messenger account, which did not contain any intimate information.

Later that same day, the applicant informed the employer in writing that in his view it had committed a criminal offence, namely breaching the secrecy of correspondence.

On 01 August 2007 the employer terminated the applicant's contract of employment.

The applicant challenged his dismissal in an application to the Bucharest County Court, asking to:

1. set aside the dismissal,
2. order his employer to pay him the amounts he was owed in respect of wages and any other entitlements and to reinstate him in his post,
3. order the employer to pay him 100,000 Romanian lei (approx. 30,000 euros) in damages for the harm resulting from the manner of his dismissal,
4. reimburse his costs and expenses.

As to the merits, relying on the case Copland v. the United Kingdom[19], he argued that an employee's telephone and email communications from the workplace were covered by the notions of "*private life*" and "*correspondence*", being therefore protected by Article 8 of the Convention. He also underlined that the dismissal decision was unlawful and that his employer had breached the Romanian criminal law, by monitoring his communications and accessing their contents.

The applicant noted the manner of his dismissal and alleged that he had been subjected to harassment by his employer through the monitoring of his communications and the disclosure of their contents "*to colleagues who were involved in one way or another in the dismissal procedure*"[20]. For this reason, we consider that the highly sensitive messages obtained from the transcripts should have been restricted to the disciplinary proceedings, fact which exposes his employer to the accusal that it went far beyond what was necessary with its interference.

In a judgment of 07 December 2007, the Bucharest County Court rejected the applicant's application and confirmed that his dismissal had been lawful.

The relevant parts of the judgment read as follows:

*"*In the present case, since the employee maintained during the disciplinary investigation that he had not used Yahoo Messenger for personal purposes but in order to advise customers on the products being sold by his employer, the court takes the view that an inspection of the content of the [applicant's] conversations was the only way in which the employer could ascertain the validity of his arguments.

The employer's right to monitor employees in the workplace, [particularly] as regards their use of company computers, forms part of the broader right, governed by the provisions of Article 40 (d) of the Labour Code, to supervise how employees perform their professional tasks.

Given that it has been shown that the employees' attention had been drawn to the fact that, shortly before the applicant's disciplinary sanction, another employee had been dismissed for using the internet, the telephone and the photocopier for personal purposes, and that the employees had been warned that their activities were being monitored (see notice no. 2316 of 3 July 2007, which the applicant had signed [after] acquainting himself with it – see copy on sheet 64), the employer cannot be accused of showing a lack of transparency and of failing to give its employees a clear warning that it was monitoring their computer use.

Internet access in the workplace is above all a tool made available to employees by the employer for professional use, and the employer indisputably has the power, by virtue of its right to supervise its employees' activities, to monitor personal internet use.

Such checks by the employer are made necessary by, for example, the risk that through their internet use, employees might damage the company's IT systems, carry out illegal activities in cyberspace for which the company could incur liability, or disclose the company's trade secrets.

The court considers that the acts committed by the applicant constitute a disciplinary offence within the meaning of Article 263 § 2 of the Labour Code since they amount to a culpable breach of the provisions of Article 50 of S.'s internal regulations ..., which prohibit the use of computers for personal purposes.

The aforementioned acts are deemed by the internal regulations to constitute serious misconduct, the penalty for which, in accordance with Article 73 of the same internal regulations, [is] termination of the contract of employment on disciplinary grounds.

Having regard to the factual and legal arguments set out above, the court considers that the decision complained of is well-founded and lawful, and dismisses the application as unfounded"[21].

As the Bucharest County Court underlined, the employer was obliged to inspect the content of the applicant's conversations since the employee affirmed that he had not used Yahoo Messenger for personal purposes. The Court confirmed that the employer had ther right to monitor employees and the employees had been previously informed about the prohibition of the use of computers for personal purposes.

Unsatisfied by the reasoning of the Bucharest County Court, the applicant then appealed the respective judgment to the Bucharest Court of Appeal, by adding that the court had not struck a fair balance between the interests at stake, unjustly prioritising the employer's interest in enjoying discretion to control its employees' time and resources. He further argued that

[19] Cited above.
[20] Case of *Barbulescu v Romania*, application no. 61496/08, Judgment of the Grand Chamber dated 05 September 2017, para. 26.
[21] *Idem*, para. 28.

neither the internal regulations nor the information notice had contained any indication that the employer could monitor employees' communications.

The Bucharest Court of Appeal dismissed the applicant's appeal in a judgment of 17 June 2008, by underlying that:

"In conclusion, an employer who has made an investment is entitled, in exercising the rights enshrined in Article 40 § 1 of the Labour Code, to monitor internet use in the workplace, and an employee who breaches the employer's rules on personal internet use is committing a disciplinary offence that may give rise to a sanction, including the most serious one.

There is undoubtedly a conflict between the employer's right to engage in monitoring and the employees' right to protection of their privacy. This conflict has been settled at European Union level through the adoption of Directive no. 95/46/EC, which has laid down a number of principles governing the monitoring of internet and email use in the workplace, including the following in particular. (...)

In view of the fact that the employer has the right and the duty to ensure the smooth running of the company and, to that end, [is entitled] to supervise how its employees perform their professional tasks, and the fact [that it] enjoys disciplinary powers which it may legitimately use and which [authorised it in the present case] to monitor and transcribe the communications on Yahoo Messenger which the employee denied having exchanged for personal purposes, after he and his colleagues had been warned that company resources should not be used for such purposes, it cannot be maintained that this legitimate aim could have been achieved by any other means than by breaching the secrecy of his correspondence, or that a fair balance was not struck between the need to protect [the employee's] privacy and the employer's right to supervise the operation of its business.

Accordingly, having regard to the considerations set out above, the court finds that the decision of the first-instance court is lawful and well-founded and that the appeal is unfounded; it must therefore be dismissed, in accordance with the provisions of Article 312 § 1 of the C[ode of] Civ[il] Pr[ocedure]"[22].

Additionally, on 18 September 2007, the applicant had lodged a criminal complaint against the statutory representatives of the Romanian company, alleging a breach of the secrecy of correspondence (a right enshrined in Article 28 of the Romanian Constitution). On 09 May 2012, the Directorate for Investigating Organised Crime and Terrorism (DIICOT) of the prosecutor's office attached to the Supreme Court of Cassation and Justice of Romania ruled that there was no case to answer, on the grounds that the company was the owner of the computer system and the internet connection and could therefore monitor its employees' internet activity and use the information stored on the server, and in view of the prohibition on personal use of the IT systems, as a result of which the monitoring had been foreseeable. The applicant did not avail himself of the opportunity provided for by the applicable procedural rules to challenge the prosecuting authorities' decision in the domestic courts.

After exhausting all the domestic remedies relevant to the alleged violations, Mr Barbulescu filed an application to the ECtHR, relying on Article 8 of the Convention. The applicant complained, in particular, that his employer's decision to terminate his contract (after discovering that he was using their internet for personal purposes during work hours) had been based on a breach of his right to respect for his private life and correspondence as enshrined in Article 8 of the Convention and that the domestic courts had failed to comply with their obligation to protect his right.

The application was allocated to the Fourth Section of the Court, and on 12 January 2016 a Chamber of that Section unanimously declared the complaint concerning Article 8 of the Convention admissible and the remainder of the application inadmissible.

The Court analysed the relevant domestic law (the Romanian Constitution, the Criminal Code, the Civil Code, the Labour Code, and the Law no. 677/2001 on the protection of individuals with regard to the processing of personal data and on the free movement of such data), as well as the international law and practice (the United Nations standards[23], the Council of Europe standards[24], the European Union law[25], the comparative law[26]).

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[22] *Idem*, para. 30.

[23] The Guidelines for the regulation of computerized personal data files, adopted by the United Nations General Assembly on 14 December 1990 in Resolution 45/95 (A/RES/45/95), the Code of Practice on the Protection of Workers' Personal Data issued by the International Labour Office in 1997, the Resolution no. 68/167 on the right to privacy in the digital age, adopted by the United Nations General Assembly on 18 December 2013 (A/RES/68/167).

[24] The Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, which entered into force on 1 October 1985, the Recommendation CM/Rec(2015)5 of the Committee of Ministers to member States on the processing of personal data in the context of employment, which was adopted on 1 April 2015.

[25] The Charter of Fundamental Rights of the European Union (2007/C 303/01), Directive 95/46/EC of the European Parliament and of the Council of the European Union of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC published in OJ 2016 L 119/1, entered into force on 24 May 2016 and will repeal Directive 95/46/EC with effect from 25 May 2018.

[26] The Court analysed the legislation of the Council of Europe member States, in particular a study of thirty-four of them, which indicate that all the States concerned recognise in general terms, at constitutional or statutory level, the right to privacy and to secrecy of correspondence. However, only Austria, Finland, Luxembourg, Portugal, Slovakia and the United Kingdom have explicitly regulated the issue of workplace privacy, whether in labour laws or in special legislation. With regard to monitoring powers, thirty-four Council of Europe member States require employers to give employees prior notice of monitoring (e.g. notification of the personal data-protection authorities or of workers'

In its judgment of 12 January 2016, the Chamber held that Article 8 of the Convention was applicable and found that the case differed from Copland v. the United Kingdom[27] and Halford v. the United Kingdom[28]. The significant difference was that the internal regulations in this case strictly prohibited employees from using company computers and resources for personal purposes. Since a transcript of the applicant's communications had been used as evidence in the Romanian court proceedings, the Chamber concluded that his right to respect for his private life and correspondence was involved.

The Chamber also acknowledged that Romania had positive obligations towards Mr Barbulescu because the dismissal decision had been taken by a private-law entity. From this perspective, the Chamber analised if the domestic authorities had struck a fair balance between, on one part, Mr Barbulescu's right to respect for his private life and correspondence and, on the other part, his employer's interests. The Chamber noted that Mr Barbulescu had been able to bring an action before the competent court of law which found that he committed a disciplinary offence.

The Chamber retained the fact that the employer had accessed the contents of the applicant's communications only after Mr Barbulescu had declared that he had used the respective Yahoo Messenger account for work-related purposes.

It then held, by six votes to one, that there had been no violation of Article 8 of the Convention (except for the Portuguese judge Paulo Pinto de Albuquerque, who's partly dissenting opinion was annexed to the Chamber judgment[29]).

On 12 April 2016, the applicant requested the referral of the case to the Grand Chamber[30] and on 06 June 2016 a panel of the Grand Chamber accepted the request. Considering that the respective case presents interest for all the Member States, President Guido Raimondi allowed the French Government[31] and the European Trade Union Confederation[32] to intervene in the written procedure of this case.

A hearing took place in public in the Human Rights Building, Strasbourg, on 30 November 2016.

By eleven votes to six, the Court held that there had been a violation of Article 8 of the Convention, finding that the domestic authorities had not adequately protected the applicant's right to respect for Mr Barbulescu's correspondence and private life. This violation was due to the failure to strike a fair balance between the interests at stake, *i.e.* determining if the applicant had received a prior notice from his employer regarding the possibility that his communications might be monitored, or if he had been informed of the nature or the extent of the monitoring, or the degree of the intrusion into his private life and correspondence. Additionally, the Romanian courts of law had failed to determine the reasons justifying such monitoring measures, if the employer could have used certain measures less intruding into his private life and correspondence and if the communications might have been accessed without his knowledge.

The Grand Chamber acknowledged the delicate character of the *Barbulescu* case which was heightened by the nature of certain of the applicant's messages (referring to the sexual health problems affecting the applicant and his fiancée and to his uneasiness with the hostile working environment), requiring protection under Article 8. The employer incorrectly proceeded when decided to access not only Mr Barbulescu's professional Yahoo Messenger account created by the applicant at his employer's request, but also Mr Barbulescu's own personal account (entitled "Andra loves you" which is obvious that has no relationship with performing the applicant's professional duties).

representatives). The existing legislation in Austria, Estonia, Finland, Greece, Lithuania, Luxembourg, Norway, Poland, Slovakia and the former Yugoslav Republic of Macedonia requires employers to notify employees directly before initiating the monitoring. In, Austria, Denmark, Finland, France, Germany, Greece, Italy, Portugal and Sweden, employers may monitor emails marked by employees as "private", without being permitted to access their content. In Luxembourg employers may not open emails that are either marked as "private" or are manifestly of a private nature. The Czech Republic, Italy and Slovenia, as well as the Republic of Moldova to a certain extent, also limit the extent to which employers may monitor their employees' communications, according to whether the communications are professional or personal in nature. In Germany and Portugal, once it has been established that a message is private, the employer must stop reading it.

[27] Cited above.

[28] Cited above.

[29] Please see the Partly Dissenting Opinion of Judge Pinto De Albuquerque, available at https://hudoc.echr.coe.int/eng#{%22appno%22:[%2261496/08%22], %22itemid%22:[%22001-159906%22]}. The judge shared the majority's starting point (interference with Article 8 of the Convention), but disagreed with their conclusion, since he considered that Article 8 was violated.

[30] In his observations before the Grand Chamber, Mr Barbulescu complained for the first time about the 2012 rejection of the criminal complaint filed in connection with an alleged breach of the secrecy of correspondence. Since this new complaint was not mentioned in the decision of 12 January 2016 as to admissibility, which establishes the boundaries of the examination of the application, it therefore falls outside the scope of the case as referred to the Grand Chamber, which did not have jurisdiction to deal with it.

[31] The French Government gave a comprehensive overview of the applicable provisions of French civil law, labour law and criminal law in this sphere. The authorities referred to the settled French Court of Cassation's case-law to the effect that any data processed, sent and received by means of the employer's electronic equipment were presumed to be professional in nature unless the employee designated them clearly and precisely as personal.

The French Government argued that the employer could monitor employees' professional data and correspondence to a reasonable degree, provided that a legitimate aim was pursued, and could use the results of the monitoring operation in disciplinary proceedings. However, the employees have to be given advance notice of such monitoring. In addition, where data clearly designated as personal by the employee were involved, the employer could ask the courts to order investigative measures and to instruct a bailiff to access the relevant data and record their content.

[32] The European Trade Union Confederation stated that internet access should be regarded as a human right and that the right to respect for correspondence should be strengthened. At least the employee's prior notification is required, before the employer could process employees' personal data.

We also consider that the employer did not have any proprietary rights over this second account, even though the computer used by the employee for this account belonged to the employer.

Hence judge Pinto de Albuquerque was right! He strongly expressed his disagreement with the majority opinion of the Chamber. He warned that unless companies clearly stipulate their Internet usage policy, "*Internet surveillance in the workplace runs the risk of being abused by employers acting as a distrustful Big Brother lurking over the shoulders of their employees, as though the latter had sold not only their labor, but also their personal lives to employers*"[33].

The importance of this rulling is not only for Romania, but for all the forty-seven countries which have ratified the European Convention on Human Rights, because the Court's rulings are binding for all of them. Mr Barbulescu is not a solitary case, therefore many employers have had to change their internal policies in order to conform themselves with this recent rulling. The lesson the Court taught the Contracting States with this Grand Chamber judgment was that Internet surveillance in the workplace is not at the employer's discretionary power.

It is obvius that a comprehenive Internet usage policy in a workplace should be put in place, mentioning specific rules on the use of instant messaging, web surfing, social networks, email and blogging. Employees must be informed of their clear rights and obligations, of the rules on using the internet, of the Internet monitoring policy, of the procedure to secure, use and destroy data, as well as of the persons having access to the respective data.

Every employee should be informed of such policy and should consent to it explicitly. It is obvious that breaches of the internal usage policy expose the employer[34] and the employee[35] to sanctions.

3. Concluding Remarks

It is undisputed that the Convention rights and freedoms have a horizontal effect, being directly binding on domestic public authorities and indirectly on private persons or entities. The Contracting States have the obligation to protect the victims of workplace surveillance, otherwise their legal responsibility may be invoked[36]. Employees do not give up to their rights to data protection and privacy every day when coming to the workplace.

Unfortunatelly, work surveillance is a hot topic, arguments and counterarguments could be brought in discussion. For example, companies that sell packages of employee monitoring tools can offer an interesting part for their clients.

Certain restrictions on an individual's professional life, which influence the way that individual constructs his/her identity, may fall under the scope of Article 8 of the Convention.

It is obvious that "*enforcing the right to respect for private and family life seeks to defend the individual against any arbitrary interference by the public authorities in the exercise of the prerogatives that provide the very content of this right*"[37].

Under the Convention, communications from home or from business premises may be covered by Article 8 of the Conventions, through the notions of "private life" and "correspondence": by mail, by email, by telephone calls, information derived from the monitoring of a person's internet use.

Nowadays, the Internet plays an important role in enhancing the public's access to news and, in general, facilitating the dissemination of information.

In such cases involving Article 8 of the Convention, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, subject in any event to the margin of appreciation enjoyed by the State.

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*"[38]. As it is stated in the legal doctrine, "*the human being is the central area of interest for the lawmaker*"[39].

Despite the concerted efforts of the national public authorities[40] with the international organizations, in the following years we will still

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[33] Please see the Partly Dissenting Opinion of Judge Pinto De Albuquerque, available at https://hudoc.echr.coe.int/eng#{%22appno%22:[%2261496/08%22],%22itemid%22:[%22001-159906%22]}, para. 15.

[34] If the employer's Internet monitoring policy breaches the internal data protection policy or the relevant law, it may entitle the employee to terminate the employment agreement and claim constructive dismissal, in addition to pecuniary and non-pecuniary damages.

[35] Depending on the breaches of the internal policy, the employer should start with a verbal warning, and increase gradually to a written reprimand, a financial penalty, demotion and, for serious repeat offenders, termination of the employment agreement.

[36] 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.

[37] Corneliu Birsan, *Conventia europeana a drepturilor omului. Comentariu pe articole*, second edition, C.H. Beck Publishing House, Bucharest, 2010, p. 597.

[38] 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.

[39] 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.

[40] 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.

encounter many varieties of innacurate or illegal workplace surveillance, and many States that do not act with responsibility[41] towards their nationals or other categories of individuals found on their territory[42].

The importance of the *Barbulescu* case has been confirmed by the President of the European Court of Human Rights, during the Solemn Hearing of the new judicial year, on 26 January 2018[43]. This was the first case cited by the President during his speech, therefore its value of precedent is undisputed.

We leave you with a conclusion drawn by President Raimondi regarding this case: "[i]t is illustrative of the ubiquitous nature of new technologies, which have pervaded our everyday lives. They regulate our relationships with others. It was thus inevitable that they should permeate our case-law. As was quite rightly observed by Professor Laurence Burgorgue-Larsen: "New technologies have led to an implosion of the age-old customs based on respect for intimacy". What is the point of communicating more easily and more quickly if it means being watched over by a third party or if it entails an intrusion into our private lives? (…) In Barbulescu the Court thus lays down a framework in the form of a list of safeguards that the domestic legal system must provide, such as proportionality, prior notice and procedural guarantees against arbitrariness. This is a kind of "vade mecum" for use by domestic courts"[44].

The public authorities and the companies should understand that, without an accurate and consistent Internet policy in accordance with the principles mentioned in the *Barbulescu* case, "*Internet surveillance in the workplace runs the risk of being abused by employers acting as a distrustful Big Brother lurking over the shoulders of their employees, as though the latter had sold not only their labour, but also their personal lives to employers*"[45].

References

- 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
- Elena Anghel, *The responsibility principle*, in the Proceedings of CKS eBook, 2015, Pro Universitaria Publishing House, Bucharest, 2015
- Bogdan Aurescu, *Sistemul jurisdictiilor internationale*, 2nd edition, C.H. Beck Publishing House, Bucharest, 2013
- Corneliu Birsan, *Conventia europeana a drepturilor omului. Comentariu pe articole*, second edition, C.H. Beck Publishing House, Bucharest, 2010
- Marta Claudia Cliza, *Drept administrativ*, Partea a 2-a, Pro Universitaria Publishing House, Bucuresti, 2011
- Marta Claudia Cliza, *Revocation of administrative act*, in the Proceedings of CKS eBook, 2012, Pro Universitaria Publishing House, Bucharest, 2012
- Augustin Fuerea, Introducere in problematica dreptului international al drepturilor omului – note de curs, Editura ERA, Bucuresti, 2000
- Raluca Miga-Besteliu, *Drept international public*, 1st volume, 3rd edition, C.H. Beck Publishing House, Bucharest, 2014
- Raluca Miga-Besteliu, *Drept international public*, 2nd volume, 3rd edition, C.H. Beck Publishing House, Bucharest, 2014
- Nicolae Popa coordinator, Elena Anghel, Cornelia Beatrice Gabriela Ene-Dinu, Laura-Cristiana Spataru-Negura, *Teoria generala a dreptului. Caiet de seminar*, 3rd edition, revised and enlarged, C.H. Beck Publishing House, Bucharest, 2017
- 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, Pro Universitaria Publishing House, Bucharest, 2012
- Elena Emilia Stefan, *Disputed matters on the concept of public authority*, in the Proceedings of CKS eBook, 2015, Pro Universitaria Publishing House, Bucharest, 2015
- Elena Emilia Stefan, Raspunderea juridica. Privire speciala asupra raspunderii in Dreptul administrativ, Pro Universitaria Publishing House, Bucharest, 2013
- Robin C.A. White and Clare Ovey, *The European Convention on Human Rights*, fifth edition, Oxford University Press, 2010
- The European Convention on Human Rights, available at http://www.echr.coe.int/Documents/Convention_ENG. pdf
- http://echr.coe.int
- http://hudoc.echr.coe.int

[41] 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.

[42] Please see Nicolae Popa coordinator, Elena Anghel, Cornelia Beatrice Gabriela Ene-Dinu, Laura-Cristiana Spataru-Negura, *Teoria generala a dreptului. Caiet de seminar*, 3rd edition, revised and enlarged, C.H. Beck Publishing House, Bucharest, 2017, p. 129-130.

[43] Please see President Guido Raimondi's opening speech available at http://www.echr.coe.int/Documents/Speech_ 20180126_Raimondi_ JY_ ENG. pdf.

[44] *Idem*, p. 5.

[45] Please see the Partly Dissenting Opinion of Judge Pinto De Albuquerque, available at https://hudoc.echr.coe.int/eng#{%22appno%22:[%2261496/08%22],%22itemid%22:[%22001-159906%22]}, para. 15.

WHITEHEAD´S IDEAS WITHIN SOME ROMANIAN JURIDICAL THINKERS

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Abstract

Alfred North Whitehead (1861 – 1947) was a mathematician, logician and English philosopher, being the most important representative of the philosophical school of thought known as "process philosophy," which today has found application to a wide variety of disciplines such as: ecology, theology, physics, education, biology, economics, psychology.

The main ideas of Whitehead's thinking can be circumscribed to the following:

-every real-life object can be understood as a series of events and similarly constructed processes;

-if philosophy is successful, it must explain the link between the objective, scientific and logical discourses of the world and the present world of subjective experience;

-all experience is a part of nature;

-a good life is best thought of as an educated and civilized life;

-recognizing that the world is organic rather than materialistic is essential for anyone who wants to develop a complete description of nature and so on.

Regarding Whitehead's work, we appreciate that, even in our country, there have been and are authors whose views, if not overlapping with Whitehead's thinking, at least present a series of common elements.

As far as the present study is concerned, we propose to bring, from this perspective, in the analysis, the conceptions of the most important philosophers of Romanian law: Eugeniu Speranţia and Mircea Djuvara.

Eugeniu Speranţia's philosophical work is characterized by a strong biological, social and metaphysical trait.

Speranţia admits that none of the fundamental philosophical problems can be resolved unless life is taken into account – which is the original principle of existence – and social reality. What seems to stand in the way of the foundation of a single science that deals with both organic and psychic facts is individuality or discontinuity, on the one hand, and, on the other hand, the fluid continuity of states of the soul.

What characterizes every living being is unity and its synthesized activity, which assimilates amorphous and disparate elements, thus portraying itself as a continuous process of synthesis in analogous forms (expansion, conquest, construction).

Regarding the philosophy of law, Speranţia maintains – in an obviously Kantian spirit – that it must investigate the a priori or transcendent foundations of law in general. Because a philosophy of law must fit into a broad view of the world, it must be preceded by a philosophy of the Spirit.

The philosophy of law has as an aim the spiritual justification of law which, encompassing science, offers it the opportunity to rise to the principles or the first causes.

Regarding Mircea Djuvara, we agree with the statement that no one up to Mircea Djuvara brought the legal phenomenon under the eyes of the philosophers, and no one offered the practitioners such a broad horizon, the horizon he considers necessary: «the philosophy of law contains one of the indispensable elements of a true culture».

In short, Mircea Djuvara's thinking can be qualified as dialectical idealism; it is not a subjective idealism but obviously an idealism whose epistemological way requires experience, a conception in which matter and spirit are mixed, forming two simple aspects of the experience, the deontological result of which reduces everything to objective relationships. Mircea Djuvara is a strict relationalist: „it is a danger to believe that our lives can work without categories." There is no human consciousness without its own philosophy, the practical attitude towards life, the inherent attitude of every human being. Reason, detached from subjectivity, predominates in every human being; the very law – expression of social relations – has a predominantly rational character: attitude towards life determines in any human consciousness a certain philosophical consciousness, the attitude towards society determines a certain philosophical consciousness, the attitude towards society determines a certain legal consciousness.

Keywords: *Whitehead, Djuvara, Speranţia, philosophy, legal thinking, subjective experience, fundamentals of law, spirituality, social reality, organic being.*

1. The philosophy of law is the philosophical reflection on the law, which deals with the right in a dual sense: as an objective law (in its sense), as a set of rules, norms that organize social life and as a subjective law (in its sense), respectively as a faculty, as the possibility, the enabling, the prerogative of a subject (of law) to have, to capitalize and to protect themselves against another a certain legally protected interest.

The Romanian philosophers of law have made important contributions - together with other thinkers of the world - to the development and affirmation of the philosophy of law in the world in an attempt to explain and evaluate the principles on which one of the major dimensions of human existence is based, the normative dimension (ethical and legal).For example, in this regard the following can be taken into account, Alexandru Vălimărescu, Traian Ionașcu, Petre Pandrea, Dumitru Drăghicescu, P.P. Negulescu, Gheorghe Băileanu, Șt. Zeletin, Nicolae Titulescu. Out of them, the following have made themselves known

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through their own conceptions: Eugeniu Speranţia and Mircea Djuvara. In their works are ideas that can be appreciated as being close to Whitehead's thinking, an aspect on which we will settle on in the following passages.

2. A thinker of the greatest rank and a true encyclopedic spirit, the author of an impressive work in the field of philosophy of law was **Eugeniu Speranţia.**

Eugeniu Sperantia was born in Bucharest on May 6/18, 1888. He attended the secondary and university education in Bucharest; in 1912 he completed his Ph.D in law with the thesis called: „*Pragmatic Apriorism".*

He subsequently specialized in Berlin and upon his coming back in the country (1914) he had a position in a department in the secondary education after which he was appointed lecturer (1921) and professor (1923) in the philosophy of law and sociology within the Faculty of Law and the Orthodox Theological Academy, both from Oradea.

Among the most important scientific studies and researches we enumerate: Pragmatic Apriorism (1912), Definition and Prehistory (1912), The Philosophy of Magic (1916), The Beauty as Great Sufferance (1921), The Philosophy of Thinking (1922), The Ideal Factor (1929), Social Phenomenon as Spiritual Process of Education (1929), Course in General Sociology (1930), Problems of Contemporaneous Sociology (1933), The Historic Spiritualism (1933), Judicial Encyclopedia, with an Historic Introduction in the Philosophy of Law (1936), Immanent Lyricism (1938), Introduction in Sociology (1938).

Eugeniu Sperantia was one of the few Romanian thinkers that attended the international congresses of philosophy of the time, collaborating at the same time with foreign magazines of philosophy.

The thinker's philosophical work is characterized by a strong biological, social and metaphysical feature.

None of the fundamental philosophical problems can be solved, according to Sperantia, if social reality and life, which is the original principle of existence, are not taken into consideration. In other words, there is a unique formula with the help of which both biologic phenomena and psychological acts may be expressed, starting with the simplest ones.

What seems to stay in the way of incorporating a single science dealing both with organic and psychical acts, would be the individuality or material discontinuity of organic beings on one hand and the fluid continuity of the moods, on the other hand.

Any living creature is defined by unity and its synthesized activity, whereby it assimilates amorphous and disparate elements, appearing thus as a permanent preservative and expansive process of synthesis. But creating syntheses is one and the same with conquering and creating. The phenomenon of conscience is defined by the same features: the tendency to preserve itself as a process of synthesis, under analogue forms: expansion, conquest, construction.

This resemblance of features leads us to the idea, according to Sperantia, that both at the basis of biological and psychological phenomena lies the same impulse, that psychology could have great advantages by using biology and also that, biology would obtain precious information by using and consulting psychology. Sperantia is strongly convinced that we would reach very interesting knowledge if we decided to consider conscience (despite all vicissitudes of its short existence and in all relationships with its peers) as representing the minimal vital phenomenon and hence, as presenting in itself, in abbreviated form, all essential and distinctive features of life in general.

According to Sperantia, the logical laws are laws that the thinking subject requires alone and which it forces itself to comply with. Having a binding feature, they may be breached but when this is happening the thinking subject feels the need of a reprimand or reprobation, or at least of an apology and seeks to make things right.

If life represents the total acts of thinking and movement, then the world is only the content and virtual aspect of life. A reality can only be conceived for and by a living creature.

Along with philosophy in general, the philosophy of law was also challenged for many times, being often attacked in a fervent way and of course, groundlessly.

Sperantia – who found out that philosophy had been severely discredited in the 19th century, being challenged by the ascension of the scientific spirit, by the ephemeral time of materialism and empiricism – considered, at the time he was teaching his course in Cluj that, a "*progressive affirmation*" is close to the philosophy of law.

According to Sperantia, the philosophy of law was closely correlated in the last centuries with social and political sciences of those times. The periods of great social and political turmoil, wars or revolutions brought along with them great projects of social reform. At the same time with these projects it appears, however, an interest in the studies related to the justifying bases of the right and state.

Starting from the idea that social organization closely follows the logic of thinking, Sperantia reaches the conclusion that, even if philosophy followed the social and political oscillations to a great extent, it corresponds to a general exigency of the human mind, which it renders the feature of stability.

Sperantia is one of the most fervent supporters of the philosophy of law, being aware of the fact that it is the only one that can contribute to a proper creation of the law. That is why he militates against the exclusion of philosophical problematic from the General Theory of Law. The philosophy of law gains, in his conception, practical connotations, to the meaning that "*in all branches of scientific research it is more and more difficult to challenge the truth that between the philosophical conception of the world and the solution to problems of detail there is such an intimate correlation that any insignificant discovery or verisimilar hypothesis may cause a modification of the philosophical trend".*

In Kant's spirit, Sperantia argues that the philosophy of law must examine which are the aprioristic or transcendental bases of law in general. Besides these aprioristic bases, the philosophy of law must also take into consideration the influence of external, extrinsic factors which are important in the elaboration of judicial order. Besides these two factors, a third one has a significant role in the functioning of law. It is the finality of the right as technical means of progressive spiritualization of the humankind.

Because a philosophy of law must be framed within a broad vision about world, it must, in Sperantia's opinion, be preceded by a philosophy of the Spirit. The statement is correct and it was applied with success especially by Kant and Hegel. Since the characteristic and primordial function of the spirit is that to create norms, it results that the law has a spiritual foundation, and the spirit-related problematic must be found, specifically, in the problematic of law. The purpose of the philosophy of law conceived by Sperantia is the spiritual substantiation of the law which embedding the science, it offers it the possibility to ascend to principles or to first causes.

Eugeniu Sperantia, known for having a rich culture founded on thorough readings in the field of social sciences and nature, succeeds to carry out a philosophy of the law in connection with all other fields. Without fear of error, one may state that Sperantia is the philosopher that frames the law within an universal vision about the world in general; the law is framed within and is part of an integrated world and the philosophy of law is the one that requires and renders it the endorsement of unity with the great world of ideas that transits to an optically founded reality.

Although it is a part of a unitary whole, the law is, at its turn, a unitary reality, which is different from other realities, which confers it a different feature. To this purpose, Sperantia stated that "*the philosophy of law shall consider the right as a unitary whole, in what it has identical with itself always and everywhere – which makes it to be a unitary reality, in what it differentiates it from any other reality and in what it assigns to it an own place and feature inside the whole imaginable and thoughtful world."* From this way of raising the question, it results that the law, as a different reality, is part of a much broader world and in which it brings its characteristic way of being.

Starting from the framing of the law within the broad area of social sciences, Sperantia tries to catch, however, its the characteristic elements, its essentiality, that is what it distinguishes it in its idealism and reality itself.

The main distinction made by him is the one between the science of social life (the sociology) and the science of law and, correlatively, between the social philosophy and the philosophy of law. "*Sociology* – argues Eugeniu Sperantia – *ascertains certain phenomena, it seeks for their causal explanation and the regularity of their relationships, while the judicial point of view is not that of causal explanation but of logical justification".*

It is very interesting the way in which Sperantia approaches the concept of constraint. He remarks that the sanction or non-sanction doesn't characterize only the norms of law. It is exercised under all aspects of the social life. The society itself is a reality which constrains us and forces us to subordinate ourselves to its way of being. Moral is also, at its turn, an internal constraint. In contradiction with Trade who argued that not only constraint is the engine of the social life but also imitation, Sperantia, will show that in case of imitation, even if we are not in the presence of an outer constraint, it is however the result of an inner, involuntary impulse that in fact, constrains to a certain adaptation to environment. Sperantia states that in fact, constraint is one way of imitation: "*through it, the process of unification, hence of imitation, universalizes and smoothens itself."*

Starting from the ascertainment that social life is a manifestation of the human spirit, Sperantia requires that the general and imitable laws of thinking should apply also here with all consistency. In fact, according to him, the need for consistency is the most general need of the human spirit.

Approaching the notion of the norm characterized by constraint and identifying the constraint with fundamental logical concepts, such as those of identity and non-contradiction, Sperantia, succeeds in performing a substantiate logic of the norm.

Dealing with the laws of evolution of right, Eugeniu Sperantia, assimilating what other thinkers brought positive in this matter and completing with his own contributions, determines the following laws:

- the law of progressive intentionality: the right evolves through a transition from instinctive and automatic to intentional;
- the law of progressive rationality: the right evolves through a transition from irrational to rational;
- the law of transition from anonymous enactment to enactment by established bodies;
- the law of progressive organization of sanction – which, implying an increasing intervention of intentionality and rationality, represents a corollary of the two laws;
- the law of continuity or of psychological adaptation of the new institutions to the old mentality;
- the law of progressive solidarity of society with the individual;
- the law of evolution from particular to universal (supported by Giorgio del Vecchio);
- the law of transition from a "status" to a "contractus" (or the law of Sumner Maine) which could be also called –Sperantia says – the law of gradual affirmation of human personality (thus appearing as a corollary of law 6);
- the law of transition from psychological inferior grounds to superior grounds;
- the law of gradual simplification of the procedure;
- the law of sweetening and individualization

(extrinsic and intrinsic);

- the law of progressive organization of creation and self-preservation functions of the right;
- the law of functional and adaptive motivation.

All these laws would be reduced, according to Sperantia, to two general laws, that is:

- the right– as one of the social aspects of life – similarly evolves with any vital process;
- the right – as spiritual fact – evolves through the progressive affirmation of human spirituality

The evolution of practical behaviour and of the human spirit is carried out through a permanent and progressive union of means of "intermediation" (as a transition from immediate to mediate).

Despite having an obvious biological conception about the world, Sperantia does not exclude though aprioristic, transcendental factors in establishing the right. On the contrary, he strongly highlights their role. "*The law* – says Sperantia –*appearing always as a spiritual synthetic product aspiring to a maximum of harmony and consistency, a philosophy of law must be preceded by at least one concise introduction in the philosophy of Spirit*". The spirit creates itself certain exigencies to which it understands to obey, because they express the life of the Spirit itself and they make it possible. Which are these universal and imperative exigencies without which the spirit itself couldn't exist? They are the following:

- the spirit conceives itself as universal;
- the spirit considers itself as sufficient to itself;
- the spirit is and requires always to be subjected to a universal norm enacted by itself;
- the exigency of universality is the condition of rationality;
- any confinement of the universality of a norm represents for the spirit a defeat of its fundamental and primordial exigency;
- the sensible experience is a series of defeats of aspiration of the spirit to the universal;
- any defeat of the aspiration to the universal represents a negation of identity of the real with the spiritual and the rational;
- the horror of contradiction, the impulse to reject and avoid any contradiction is the defensive attitude of the spirit which tends to preserve its identity with itself and its aspiration to the universal norm;
- the individual spirit ("*the ego"),* as we know it in subjective conscience, postulates the objective existence of the spirit;
- thanks to the exigencies of universality, "*the ego"* conceives "*the alter*" as its own exteriorization;
- "*the ego*" assigns to each "*alter"* the same position of purpose in itself and the same requirement to be subjected to a universal norm. The consequences of identity of the subjective spirit and of the application of the same norm are:
  - the exigency of "equality of rights";
  - the exigency of "reciprocity";
  - the exigency of "compensation"

The real "*social conflict*" is reduced to the subjective, inner conflict, among the affective tendencies and rational norms. Any interdiction that starts from the normal conscience is a form of imperative of non-contradiction, a refusal of our logic, such as any exigency of the moral conscience is in fact still a logical existence.

Naturally, Sperantia is not content only with establishing the judicial imperatives which, as we have seen, they are exigencies of the spirit and they show as systematically the appearance that such imperatives have in the social contingency.

Spiritual life assumes social life, the latter being a constituent of the former: spiritual life is not possible without social life. Two strong tendencies are noticed in social life: on one hand, the tendency to possess material goods and on the other hand, the tendency to possess spiritual goods. While the latter tendency almost animates the humans and intensifies sociality, the former tendency alienates the humans, hence threatening the social cohesion. The explanation for these adverse effects of the two tendencies lies in the fact that while spiritual goods are susceptible of a simultaneous, unlimited affiliation, material goods, being exhaustible, are susceptible only of a limited affiliation. The exigencies of animality on one hand, the limitation of goods on the other hand, threatens not only the social life but also the spiritual one. That is why the spirit can not remain indifferent, but reacts, reducing or limiting the tendency of possession of material goods by certain norms. By doing so, the spirit is not the only one subjected to confinements: Organic life itself is subjected to norms, but to certain norms which are dictated to it from outside. Logical thinking creates alone norms for itself, according to which it develops, without which it wouldn't be a thinking but just a simple incoherent dream.

Social life can not dispense with norms, because it would be fully precarious without norms. This is why the law intervenes and establishes the necessary norms. Of course, besides the proper judicial norms, social life is followed by habits, customs, manners, commons laws, rules of politeness and ceremony, religious rites, etc., such as the individual conscience is normalized, besides the logical laws, by the laws of association. The right though, is not the result of fortuity or of human conscience taken in the amplitude of its formations, but "it is a rational and international creation", resembling to this respect with technical constructions.

The law must accomplish a high function: that of insuring human spirituality by protecting the social life, indispensable to the spirit.

3. Above all Romanian authors who consecrated the life and work of philosophical and legal writings is **Mircea Djuvara**, the representative figure of Romanian culture, the founder of an original thinking

system, of definite theoretical and methodological value[1].

Mircea Djuvara was born in Bucharest on May 18th (30th), 1886, son of Estera (born Paianu), and Traian Djuvara, of a family of Aromanian origin who gave the Romanian society more jurists. With his existence, Mircea Djuvara marked a new opening in the Romanian interwar philosophy. A prominent personality of the time, Djuvara is an important landmark for any current research in the field of legal philosophy.

Mircea Djuvara followed, with very good results, the general education in Bucharest, also graduating from high school, the studies having provoked him *"That ferment of ennobling and intellectual creation found in every human consciousness ... when I realize today how complete was the study cycle I have undergone in my childhood and how great was the influence it has exercised in its entire complexity upon my being, I bring through this the highest honor to the high school in which I have studied"*-(the "Gheorghe Lazăr" highchool - n.a.)[2].

During high school, which he graduated in 1903 with honors, he was awarded the "Romanian Youth" award, a prestigious pedagogical institution of that time.

He starts his University studies in Bucharest, where he attends the Faculty of Law and the Faculty of Letters and Philosophy. Here he receives the influence, decisive for his scientific orientation, of Titu Maiorescu, a jurist and philosopher himself.

In 1909 he defends his thesis, both at the Faculty of Law and at the Faculty of Letters and Philosophy, the latter educational institution awarding him the mention "*magna cum laude*". Later, at Sorbonne, Mircea Djuvara gets the title of Doctor in Law with the thesis entitled *Le fondement du phénomène juridique. Quelques reflections sur les principes logiques de la connaisance juridique,* thesis which he publishes in 1913.

Characteristic for that age in which he begins to publish his studies, are collaborations in the "Facts" section of "Literary Conversations" where he makes himself known through his high level of knowledge, giving preference to the signaling of the interdisciplinary phenomena, revealing the unity of the universe, by the skill, even then, in the nuanced presentation of moral and social problems, with the desire to become a *homo universale*[3].

In 1920, he started his university career at the Faculty of Law of the University of Bucharest, where he gradually obtained all degrees and where he would carry out most of his teaching activity. He was also a professor at The Hague International Law Academy and lectured as an associate professor at law schools in Rome, Paris, Vienna and Marburg.

His scientific work materialized - including chronographs, reviews, lectures, conferences and interventions - in over 500 titles, of which, apart from his PhD thesis, we take into account the most important: *Teoria generală a dreptului (Enciclopedia juridică) (The General Theory of Law (Legal Encyclopedia))*, 1930; *Drept raţional, izvoare şi drept pozitiv (Rationally, Sources and Positive Law)*, 1934; *Dialectique et experience juridique*, 1939, *Le fondement de l'ordre juridique positif en droit international*, 1939; *Precis de filosofie juridical (Tezele fundamentale ale unei filosofii juridice) (Précis of legal philosophy (The Fundamental Theses of a Legal Philosophy))*, 1941; *Contribuţiile la teoria cunoaşterii juridice/Spiritul filosofiei kantiene şi cunoaşterea juridică (Contributions to Theory of Legal Knowledge / Spirit of Kantian Philosophy and Legal Knowledge)*, 1942. The entirety of this scientific work was to culminate in a published Legal Philosophy Treaty, practically outlined, at least in part, in three of the aforementioned works: the 1913 thesis, the 1930 printed course and the *"Précis"* started in 1941.

Along with these basic works, Djuvara's scientific research consisted of numerous studies and works of theory and philosophy of law. As early as 1907, he began publishing articles and philosophical studies in the magazine" *Convorbiri literare*", then in other magazines and periodicals as well, such as: „ *Democraţia*" (1919-1932)," *Dreptul"* (1920-1935), " *Revista de filosofie"* (1924-1940)," *Pandectele române*" (1923-1942), " *Rivista internationale di filosofia del diritto* „(Roma, 1931-1936)," *Revue internationale de la théorie du Droit*" (1931-1939)," *Archives de philo- sophie du droit et de Sociologie juridique*"(Paris, 1937)," *Annuaire de l'Institut international de philosophie du droit et de sociologie juridique*" (1934-1938), „*Analele Facultăţii de Drept din Bucureşti"*(1938-1942), „*Revista cursurilor şi conferenţiarilor (universitare*)"," *Revue roumaine de Droit privé*", *„Forme*"," *Buletinul Academiei de Ştiinţe Morale şi Politice*", „*Cercetări juridice*", as well as in the newspaper" *Universul"* .

Regarding Mircea Djuvara's entire work, it can be appreciated that it is a broad analysis, in which are included elements of general philosophy or juridical philosophy as well as elements of the theory of law or sociology of law. The great project of Mircea Djuvara, which identifies solid foundations for the entire legal research, is based on a complex series of epistemological and axiological researches, which induce a certain pre-eminence of the philosophical analysis in relation to the whole work. Moreover - as

[1] Above all, Mircea Djuvara, who through the vastness and depth of his attempts must be recognized not only as the greatest Romanian thinker but also one of the greatest contemporary thinkers in the field of Philosophy of Law." (Giorgio del Vecchio, Lecţii de filosofie juridica(Lessons in the phylosophy of Law), Europa Nova Publishing House, f.a.)

[2] M. Djuvara**,** *Confessions of a former student* (*Confesiuni ale unui elev de altădată,)*in the "Gheorghe Lazar" High School Monograph in Bucharest, (1860-1935), on the occasion of the 75th anniversary of its foundation, Bucharest, Inst. a.g. Luceafărul, 1935, p. 299 and 301.

[3] B.B. Berceanu**,** *Universul juristului Mircea Djuvara (The Universe of Lawyer Mircea Djuvara)***,** Academiei Române Publishing House, Bucharest,1995., p. 26.

Nicolae Bagdasar claims - from the investigation of juridical phenomena, Mircea Djuvara always wants to exceed the limits imposed by the strictly determined thematic framework of legal philosophy in order to relate to the much broader horizon of general philosophy: *"What characterizes Djuvara's philosophical attitude in general ... is that by examining issues of philosophy of law, he is convinced that they cannot be untied without an overall, epistemological and philosophical conception.. For, according to Djuvara's conception, the problems of the philosophy of law are not isolated from the great philosophical problems, but they are closely related to them, the philosophy of law integrating organically with general philosophy"*[4].

Most philosophical concerns of Mircea Djuvara aimed at identifying the ontological and epistemological foundations of law. When inventing the various elements of legal reality, the Romanian philosopher transposes legal analysis in the field of juridical logic, and when the structure of legal appreciation and implicitly the system of juridical values is investigated, research is transposed into the horizon of legal epistemology.

In addition to his scientific and publishing activities, Mircea Djuvara was directly involved in the work of highly reputable scientific institutions and organizations. He was an active member of major institutions: The Association for the Study and Social Reform (later became the Romanian Social Institute on February 13, 1921), the Society for Philosophical Studies (the Romanian Society of Philosophy), the Institute of Administrative Sciences, the Romanian Academy (Correspondent member elected in the Historical Section on May 23, 1936, following the proposal of Andrei Rădulescu, until then the only representative of the law science in that institution), The Institute of Moral and Political Science (which became, on November 20, 1940, the Academy of Moral and Political Science), the International Institute of Philosophy of Law and Legal Sociology in Paris (at whose congress he participated, being also one of its seven vice-presidents and the president of the Romanian Institute of Philosophy of Law, founded by him and affiliated with the previous one),The Academy of Sciences of Boston (Honorary Member), the Society for Legislative Studies (from its establishment until July 1921) and the Romanian Legal Chamber (from its establishment until February 1942, as Vice-President, at whose private international law session he attended)[5].

As a teacher, Mircea Djuvara has been a lecturer since 1920, an aggregate professor since 1931 (August 10) and a permanent professor (June 1, 1932) at the Faculty of Law in Bucharest. As a professor, he held the chair of General Theory of Law with Application to Public Law, a chair transformed on November 1, 1938 into the Department of Encyclopedia and Philosophy of Law. He held, up until the last academic year (1943/1944), lectures on the philosophy of law, and until tenure, lectures of constitutional law as well.

Djuvara also had an important activity as a lawyer in the Ilfov Bar.

„Those who have known him - colleagues of scientific research, chair or bar, organizers or auditors of conference cycles, students - emphasize his vocation as a researcher and teacher, his culture and intelligence, oratory elegance, urbanity and courtesy in disputes, his sense of justice, character and power of work, his modesty, charm, fine humor".

Mircea Djuvara was a legal advisor to the Permanent Delegation of Romania at the Paris Peace Conference (1919), during which he edited a Newsletter and published the most comprehensive legal study on Romania's participation in World War I, preceded by a history of the country, unfortunately, only in French.

After the war, Mircea Djuvara was aware of the importance and problems of the Great Union ("*We live in our country in such great times that it would seem that we cannot in any way ascend to their meaning [...] our intellectuals - especially ours - must come to understand, those who have the mission of thinking and not action, that their role today is not in criticizing what is being attempted, but in helping what is being done*").

Mircea Djuvara brought legal arguments against the local autonomy tendencies, contrary to the decision of the Great National Assembly in Alba Iulia (December 1, 1918), and stressed the necessity of legislative unification, recalling, after J.E.M. Portalis, that "*People who depend on the same sovereignty, without being subject to the same laws, are necessarily strangers to each other*"[6] and, aware of the weight of developing massive codes, proposed urgent partial changes.

Mircea Djuvara was a delegate of Romania at the General Assembly of the League of Nations and other international conferences, being also Vice-President of the International Union for the League of Nations and Chairman of the Executive Committee of the Romanian Association for the League of Nations. He was minister from August 29, 1936 to March 31, 1937 (but with the portfolio of Justice only until February 23, unable to stand in the defense of legality to the Carlist junctions). He was the only Minister of Justice - to give a single example of respect for the lawfulness - under which the positions of the State Attorney, a post of that time, was given through n examination, in accordance to a law not

[4] N. Bagdasar, *Istoria filosofiei româneşti (The History of Romanian Philosophy)*, Tipo Moldova Publishing House ,Iaşi,1995, p. 387.

[5] B.B. Berceanu, *op. cit.*, p. 27-28, which cites the Romanian Academy, "Anale", 56, 1935-1936, p.128, "Cercetări juridice", 2, no. 2, 1942, p. 121 and "Curierul Judiciar", 28, 1921, pp. 407-408.c

[6] M. Djuvara, *Intelectualii şi necesitatea noii constituţiuni*, in the magazine "Revista vremii", 2, no. 24, 10th Dec. 1922, p. 1-2

respected by those who had promoted[7] it; He has politically militated for barring the fascist ascension[8].

The dictatorships established under the pressure of Nazi fascism were, for Mircea Djuvara as well, a difficult challenge. He followed his way, continuing to promote, under the new circumstances, the values he believed in. Thus, in 1941, the opposes to the Nazi ideology, the subject of *the Romanian Nation as a principle of our law*[9] a*nd combats that "nationalism ... which, instead of remaining the representative of one of the holiest sentiments, of justice, foreign subjects to an unfair regime without any legitimate reason or which counts other nations as devoid of any rights"*[10].

He keeps alive the idea of freedom in Nazi Germany - in Berlin, Vienna, and Marburg - and still defends the Romanian view of the nation, underlining the difference between it and the German-Italian conceptions (more precisely the idea of *Volksgemeinschaft* of the German National Socialists and the Fascist Italian Conception, Which, in relation to the nation-state report, claims that the state creates the nation and not the other way around).

Mircea Djuvara, at the same time, adds that "in international law we cannot also admit the violation of national rights, and we also acknowledge here a supreme justice that is not based on either security or interests", That we tend "to a community of nations as a beginning of a new universal age", that the struggle of every nation throughout history must be carried out "with all sacrifice" but only "for justice, defending itself and rounding itself where Their essential rights are disregarded[11]",An attitude that is a true condemnation of the invasion war of the Third Reich and its general policy[12]. It had previously fought the idea of Grozraum ("great space"), later became the Lebensraum ("vital space"): "It is beyond any doubt that any state, even a small state, possesses spheres of interest that often extend very far, in <large spaces>, because of international solidarity"; but such interests intertwine and their existence "does not imply any right of tutelage or international domination for one another". In no way, therefore, "can there legally exist Great Powers, be they global or European, destined to govern the Little Powers"[13].

He also criticized the Nazi doctrine, which reduces the right to physical and biological phenomena. And still during full Nazi eruption, he dedicates a work to Professor Frantisek Weyr of the occupied Czech Republic, the only time he dedicated a work to a person (except for participation in collective homage). At the death of Henri Bergson (1940), Djuvara published a warm obituary and, from the chair, emphasized the greatness of the one who neglected his life because he understood not to use the regime of favor in relation to the one that was imposed on his Jewish countrymen by the Nazi occupation (whose responsibility for the premature death of the French philosopher was thus underlined)[14].

Also in this last period of life, Mircea Djuvara wanted to inform and warn the Romanian reader about the content of some writings by the Nazi lawyers, emphasizing their removal from the science of law, signaling their misgivings and removing the ambiguity, underlining their lack of scientific quality and Legal, ironizing and defending the idea of law.

Concerning the domestic law, in which the constitutional regime was suspended (1940-1944), Mircea Djuvara observes that such a regime presupposes the existence of principles over which an abusive lawmaker cannot pass; For without a wise interpretation that would lead to an objective and unyielding justice against the legislator himself, "the rule of law can easily be translated, especially to us, in the reign of whim".

In his last year of life, struggling with the illness, he seeks, accompanied and watched by his wife, to continue his courses and even suggests to students, at a time when such initiatives were unthinkable, to take a political attitude *("... and what are you waiting for?")*; He organizes seminars with students at home, requests of the members of the institute that he be allowed to chair the meeting while lying on the couch. He thinks and writes until the last day of his life, dying in Bucharest - we could say symbolically - on November 7, 1944[15], at the age at which Immanuel Kant, who influenced his philosophical conception and whose life he had as a model, had just begun working on the *Critique of Practical Reason*[16].

Mircea Djuvara's main merit - even between 1918 and 1938 - is of having extended the creative effervescence of the time from the literary-artistic field to that of moral, legal and political disciplines. "*In this circumstance - writes Prof. Paul Alexandru Georgescu - Mircea Djuvara worked as a multiplier of brightness. He extended the plenary system, integrating a doctrine of the philosophy of law developed on the basis of the*

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[7] see: Arh. St. Buc., Min. Just., Dir. Judiciară, dos. 18, 1936, vol. II, F. 468.

[8] Armand Călinescu, *Memorii(Memoir)*, 25th Oct. 1936, Arh. ISSIP., fond XV, DOS. 65.403

[9] M. Djuvara, *Naţiunea română ca principiu al dreptului nostrum (The Romanian Nation as a principle of our Law)* („ The Academy of Moral and Political Science", 4th Dec. 1941), , The Academy of Moral and Political Science, Communications, 3," Buletinul", 1941/1942, p. 41-68.

[10] Idem, Precis of philosophy of law (Fundamental theses of a legal philosophy) în" The Annals of the Faculty of Law", no. 34, p. 58.

[11] Idem, Contribuţie la teoria cunoaşterii juridice/Spiritul filosofiei kantiene şi cunoaşterea juridică (Contribution to the theory of legal knowledge / Spirit of Kantian philosophy and legal knowledge), in the " Analele Facultăţii de Drept"("The Annals of the Faculty of Law"), Bucharest, 4, no.1-2, p. 67.

[12] B.B. Berceanu**,** *op. cit*. pp. 30.

[13] Carl Schmit, *Völkerrechteiche Grossraumordnung mit Interventionsverbot für raumfrem, Deutscher Rechtsvereag* Berlin-Wien, 1939, in "Analele Facultăţii de Drept Bucureşti" ("The Annals of the Bucharest Faculty of Law"), 1 no. 2-3 apr.-sep. 1939, p. 382-384

[14] B.B. Berceanu, *op. cit*., p. 31.

[15] He was incinerated at the "Cenuşa" crematorium on the 9th of November 1944, at 12^{00}.

[16] B.B. Berceanu, *op. cit*., p. 31.

Kantian concept, but with direct and fertile applications in our country"[17].

The state of philosophy of law in 1936 was simple: neo-kantianism was the dominant center, challenged only by extremes: Marxism and totalitarian nationalism. The differences between these positions being radical and the exacerbated adversities they did not pose the problem of synthesis or integration.

Djuvara's philosophy in the history of doctrines of law philosophy was the third stage of development that brought about the solving of the millenary confrontation between fact and normality, between the world of *Sein* ("what is") and *Sollen* ("what is needed"). After the metaphysical postulation of a natural right with the pretense of being eternal and immutable, occupying antiquity, the Middle Ages, the Renaissance and extending with the rational right of the century of Enlightenment, following the unrealistic reaction of the Historical School and the legal positivism which, with the help of sociology, denied values and subdued the right to the brutal facts — interest or force — the critical idealism, supported by Mircea Djuvara, alongside and often beyond prestigious neo-kantians like Stammler and Radbruch, appears as a final solution, as a superior synthesis of the previous thesis and antithesis[18].

Djuvara allies and dialectically articulates the two major components of the legal phenomenon: the rational irradiation of the idea of justice, conceived as an open consistency of logically constrained activities and wills and the concrete social realities that justice and the legal norms inspired by it assume and to whom they apply. In this vision, the State becomes a reporting and attribution center, and the legal experience a network of assessments containing increasing doses of justice, within a legal order that gains a somewhat mathematical structure; This consisted of a continuous series, consisting of acts and act-generated situations, both legally built[19].

In any encyclopedic dictionary, Mircea Djuvara appears as a neo-kantian thinker, a neo-kantian "logico-methodologist (Marburg School), also receiving echoes from the Baden School of Values, but closer to Kant than the two neo-kantian schools ", the result of direct research and self-reflection. Djuvara himself did not conceal his point of departure: "We have started our scientific, legal and philosophical studies in the University, with the premise conviction that empiricism, sensualism and utilitarianism are the truth: strict positivism was our only method. A lesson by Titu Maiorescu about Kant's <transcendental aesthetics> was a true revelation to us and changed our perspective all at once.

Since then, we have continually gone into this new direction: we have sought to deepen the spirit of Kant's philosophy, further enlightening his criticism, detaching from him what remains alive today, and completing it with new scientific and philosophical contributions[20] *"His own conception was presented as "a new return to Kant," a Kant "transformed by Fichte and Hegel and adapted to the contemporary scientific themes"2*[21].

For Mircea Djuvara, Immanuel Kant was, if not the "deepest thinker that mankind had"[22], he was anyway "the one who, after Plato, was perhaps the greatest philosopher of all time,"[23] who opened Before us an "imperial path", which gave "the only philosophy of the ideal that can be coherent", i.e. a logical idealism contrary to the psychological one, a concept in which <empirical realism> is solved in a "transcendental idealism"; Which put the "theoretical basis of contemporary science and culture"[24]; The one whose philosophy "fits, explains and legitimizes all the advances of contemporary science"[25]; The one to begin with in order to reach W. Wilson's principles of the Peace of 1919, as well as the socialist theories of the era[26].

What is certain is that Mircea Djuvara has treated Kant's work and less that of neo-kantians[27]; Alongside Kant, Djuvara distinguished between knowledge and reality, while emphasizing the connection between them ("between knowledge and its object cannot be an abyss")[28]; Along with Kant he attested to the existence of values, mainly of the ethical idea, first of all of the right-obligation, being at the antipode of positivism and, to the extent that it encompasses it, at the antipod of psychological and intuitionistic trends.

Mircea Djuvara accepted the Kantian distinction between numen and phenomenon. But Kant's assimilation of the former with an incomprehensible "thing in itself", parallel to the relativization of the value of experiential knowledge ("for Kant, experience

[17] P.A. Georgescu, in the Preface to the work of B.B. Berceanu, Universul juristului Mircea Djuvara (The Universe of the Lawyer Mircea Djuvara), op.cit., pp. 13.
[18] *Ibidem*, pp. 14.
[19] Ibidem.
[20] M. Djuvara, *Precis.....op.cit.,* p. 5-6.
[21] Idem, Contribuţie la teoria cunoşterii juridice (Contributions to the theory of legal knowledge), II. Ideea de justiţie şi cunoaştere juridică (the idea of justice and legal knowledge), op.cit., p. 63.
[22] Idem, Teoria generală a dreptului (Enciclopedia juridică) (general Theory of Law, Legal Encyclopedia), II: Noţiuni preliminare despre drept (Preliminary Notions of law), Bucharest, Librăriei Socec Publishing House, 1930, p. 44.
[23] Idem, Contribuţie la teoria cunoşterii juridice (Contribution to the Theory of Legal Knowledge),I: Ceva despre Kant: Spiritul filosofiei lui (About Kant: the Spirit of his Philosophy), p. 3.
[24] Idem, Teoria general . (General Theory…) III: Realităţile juridice (Legal Realities), p. 158.
[25] Idem, Contribuţie I:Ceva despre Kant, p. 4.
[26] Idem, Teoria general I: Introducere, p. 28, II: Noţiuni preliminare despre drept (preliminary Notions of Law), p. 77-78.
[27] For more, please see Alexandru Boboc, *Kant şi neo-kantianismul (kant and Neo-kantianism)*, Bcharest, Ştiinţifică Publishing House, 1968.
[28] M. Djuvara, *Dialectique et expérience juridique,* in "Revista de Filosofie" no. 2 (April-June) /1938.

is a combined product of the work itself and of thought"[29)], a thesis considered having the quality of rejecting an absolute idealism (and also an absolute realism) did not prevent Mircea Djuvara from condemning it (“*"It is bizarre to see the reason that he reaches a conclusion of his reflection on himself, to his own helplessness"; "a reality in itself, incognoscible, has no significance*”[30]); Or to bring <this thing in itself> into the sphere of thought, for *"nothing is given, everything is built; And even to consider that it is "a rational formula, which, in its entirety, gives objectivity to knowledge*". Still, between the obligatory and the incomprehensible <thing in itself> there is no, as it had been interpreted, the cause of the phenomenon (which can only be a phenomenon as well), but as M. Djuvara interpreted in time - <the act of knowledge>, "If we look at him in his logical nature, in his rational, inherent and necessary tendency towards truth," he is apart from time and space, he will become an object of psychological knowledge, a phenomenon.

Kant and Djuvara's eternal intangible ideal is more than a nuance[31].

"The activity of knowledge gives itself, in accordance with the internal logical necessity which constitutes its law, its own object"*[32]* For knowledge and its object are correlative, and one cannot think without the other (Aristotelian thought that thinks of oneself).

In another hypostasis, the "thing itself" is, "in a good interpretation of Kant," the freedom.

Concurrently, therefore, Mircea Djuvara defended Kant and at the same time opposed him, the danger in his system was removed, that which stated that the minds oppose themselves, as ourselves - in our aspiration for truth - to hinder ourselves[33].

The characteristics of Djuvara's thinking, which divide both Kant and Comte, consist also in the dual approach to the object of his thought, his conception of the double epistemological approach. It is not just the inductive approach, starting from the individual to the general, attributed to science and the deductive, attributed to philosophy, the expression of two methods compensating each other, but also the psychological and logical approach, the empirical and the transcendental approach, of the development of knowledge and a priori principles.

Thus, Djuvara's philosophical thinking was influenced by his legal knowledge; The idea of a relationship, specific to law, is fully present in its general philosophy.

Djuvara's pro-Kant philosophical attitude did not prevent the former from appreciating the founder of positivism A. Comte and, in general, the French positivists[34], to appreciate institutionalism[35], pragmatism[36] and other trends of thought, and to retain from these thinkers and these trends of thinking to aid in setting up his system, valuable elements[37].

If the history of Romanian law has benefited from broad-minded personalities, with a penetrating legal sense — such as Mihai Eminescu and Nicolae Iorga — if he guided people of legal formation either to the science of history — as BPHasdeu— to the thought of the science of history — As ADXenopol — or directly to the building of history — as Mihail Kogălniceanu — or to generalization and synthesis — like Simion Bărnuţiu, Titu Maiorescu and Dumitru Drăghicescu — we can say that no one up to Mircea Djuvara brought the legal phenomenon under the eyes of the philosophers and no one offered practitioners such a wide horizon, a horizon they considered necessary: *"The philosophy of law is one of the indispensable elements of a true culture"* [38], he said, addressing both philosophers and lawyers[39].

Mircea Djuvara felt the need to draw attention to the fact that "most lawyers are content to make simple compilations for legal practice or, in public law, they think they are doing science through simple acts of obedience to authority"[40]; But "only the scientific understanding of the idea of justice and rational elaboration can ensure a strong affirmation of cultural legal values, in light of which we must guide the world that is meant to create and apply our positive right", a goal analyzed by the philosophy of law [41]. He devises for this this law "a profound and original analysis" in a work that he — at one point — divided it into four parts: I - philosophy, II - the philosophy of law, III - applications of the philosophy of law, IV - politics. The philosophy of law thus makes the connection between philosophy and positive law, and politics, in the same conception, studies the means of achieving the law. The philosophy of law is a part — a necessary part — of

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[29] *Ibidem*, p. 7.

[30] M. Djuvara**,** Considerations sur la connaissance en géneral et sur la connaissance juridi-que en particulier: la Realite, la Verite et le Droit, in “Annuaire de l’Inst’’ 2, 1935/1936, Paris, Libr. Du Recueil Sirey, 1936, p.83-96”.

[31] B.B. Berceanu**,** *op.cit*., p. 38.

[32] M. Djuvara**,** Contribuţie la teoria, p. 17.

[33] B.B.Berceanu, *op. cit.*, p.39.

[34] Constitutional Law, Part II, Ph.D. and Ph.D. [The Methods of French Positivism in Public Law]1924-1925

[35] Idem, Some observations on the relationship between the philosophy of intuition and today's great tendencies of law, a fragment of the conference "Henri Bergson and the Modern Trends in Law", Universitatea liberă, 22 November 1922, in “Convorbiri literare”, 55, 1923, p. 378-389.

[36] *Idem*, *New trends in philosophy: pragmatism,* în “Convorbiri literare*”,* p. 43, 1909, p. 765-775.

[37] B.B. Berceanu, *op. cit*., p.37.

[38] M. Djuvara**,** *Precis* …., nr. 2, p. 6

[39] B.B. Berceanu, *op. cit*., p. 34 şi urm.

[40] M. DjuvaraReview of Romul Boila's work: *The State*, vol I:” Consideraţii teoretice”(Theoretical Considerations),(Tipografia Cartea Românească Publishing House, Cluj, p. 246), în “Analele Facultăţii de Drept Bucureşti”, 3, no. 1-2, Jan-Jun 1941, p. 486-489 1018

[41] M. Djuvara, Filosofia dreptului şi învăţământului nostru juridic- fragment dintr-un memoriu (The philosophy of law and our legal education - fragment from a memoir), in “Pandectele române” 21, 1942, IV, p.7.

philosophy, the goal of which is to bring the whole Truth (the right itself has a rational character) and to guide the positive right.

Mircea Djuvara's thinking can be described as dialectical idealism. It is not a subjective idealism, which is rejected by the following: *"It is impossible to firmly support idealism in the form of the unique and exclusive existence of my own self, in which the world would only be a representation in the sense of a subjective image. My conscience is, quite contrary to itself, a product of relationships that necessarily and objectively, through their creative dialectics, put forth a plurality of consciousness*." But, obviously, an idealism whose epistemological way requires the experience, a conception in which — after C. Rădulescu-Motru's formulation — matter and spirit are confused, forming two simple aspects of the experience[42], whose ontological result *"reduces everything to objective relationships "*[43].

Mircea Djuvara is a strict rationalist[44]. It is a danger to believe — he says — "*that our lives can work without categories"*[45]; His confidence in the possibilities of knowing reason is total: *Cogito ergo realia sunt*, he will say at some point. According to Mircea Djuvara, there is no human consciousness without its own philosophy, the practical attitude towards life, an inherent attitude for each one, which *"determines, of course, in any consciousness with reason, a certain philosophical consciousness*".[46] It reduces to rational data all other human values. Djuvara believes that reason, detached from subjectivity, predominates in every human being. The very Law — the expression of social relations — has a predominantly rational character, for, according to Djuvara, as attitude towards life determines in a certain human conscience a certain philosophical consciousness, as the attitude towards society determines a certain legal consciousness[47]. Mircea Djuvara's logical idealism did not stop at the possibilities of logic: *".... The whole knowledge, and hence the whole human action, is the product of a sui generis creative activity, the so-called dialectic, this activity proceeds in successive and unceasing differentiations, and the systematic ordering of its products leads to the idea of truth [48]"*.

References

- Nicolae Bagdasar, Istoria filosofiei româneşti (The History of Romanian Philosophy), Profile Publishing, Bucharest, 2003
- Mihai Bădescu**,** Filosofia dreptului în România interbelică (Law Philosophy in Interwar Romania), Sitech Publishing House, Craiova, 2015
- Barbu B. Berceanu**,** Universul juristului Mircea Djuvara (The Universe of the Lawyer Mircea Djuvara), Academiei Române Publishing House, Bucharest, 1995
- Alexandru Boboc**,** Kant şi neokantianismului (Kant and Neo-kantianism), Stiinţifică Publishign House, Bucharest, 1968
- Mircea Djuvara**,** Precis de filosofie juridică (Tezele fundamentale ale unei filosofii juridice) (Precis of legal philosophy (the fundamental theses of a legal philosophy)), in „The Annals of the Faculty of Law", no. 34
- Mircea Djuvara**,** Dialectique et experience juridique, in the „Philosophy magazine" no.2/1938
- Mircea Djuvara**,** Problema fundamentală a dreptului (The Fundamental Problem of Law), in "Convorbiri Literare" („Literary Conversations"), 50, 1916
- Ion Dogaru, Dan Claudiu Dănişor, Gheorghe Dănişor**,** Teoria generală a dreptului (General Theory of Law), C.H. Beck Publishing House, Bucharest, 2006
- Eugeniu Speranţia**,** Locul vieţii psihice în construcţiunea unei biologii generale(The Place of the Mental Life in the Construction of a general Biology), in the „Philosophy magazine", 1934
- Eugeniu Speranţia**,** Legile şi formele gândirii ca proecţiuni ale proprietăţilor vieţii (The laws and the Forms of thought as Projections of the Properties of Life), in the „Philosophy magazine", 1934
- Eugeniu Speranţia, Principii fundamentale de filosofie juridică (Fundamental Principles of Philosophy of Law), Institutul de Arte Grafice Publishing House, Ardealul, Cluj, 1936
- Eugeniu Speranţia, Lecţiuni de enciclopedie juridică, Cartea Românească Publishing House, Cluj, 1936.

[42] M. Djuvara, *Dialectique et expérience juridique,* in" Revista de filosofie*"* no. 23, 1938, p. 21.

[43] N. Bagdasar**,** *Mircea Djuvara* in "Istoria filosofiei moderne", vol. V, Bucureşti, Societatea Română de Filosofie, 1941, p. 310.

[44] B.B. Berceanu, *op. cit*., p. 35.

[45] M. Djuvara, review of the work of Mircea Gorunescu: Reinhard Höhn şi disputa în jurul personalităţii juridice a Statului (Reinhard Höhn and the dispute over the legal personality of the State,), in "Cercetări Juridice", year I, no. 2, April 1941, p. 491.

[46] Idem, Câteva reflexiuni asupra laturei filosofice a sufletului reginei Elisabeta (Some reflections on the philosophical side of Queen Elisabeth's soul), in "Convorbiri literare", 50, 1916, p. 361.

[47] M. Djuvara**,** Dialectica creatoare a cunoaşterii juridice (The Creative Dialectics of Legal Knowledge), lecture, 1935/1936

[48] *Idem, Problema fundamentală a dreptului,* în "Convorbiri literare", 70, 1937, p. 2.

CONSIDERATIONS REGARDING THE CHOICE, BY THE EUROPEAN INSTITUTIONS, OF THE LEGAL BASIS OF ACTS, DURING THE LEGISLATIVE PROCEDURES OVERVIEW OF THE CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

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Abstract

An important moment in the conduct of legislative procedures within the European Union is located right at their onset. Thus, the initiator of an act finds himself in a position to have recourse to its legal basis, since that ground depends on fundamental issues such as the competence of the European Union or its institutions to act, the applicable procedure, etc. However, in practice, this may be rather complicated. For example, depending on the categories of competence of the Union in which each field falls and depending on the desired end, the question arrises about choosing the type of act that is best suited. After that, there is the question of choosing the legal basis of the act, which can be very complicated, since, in the case of some acts, the proper legal basis may not be obvious, in which case the Court of Justice and its case law may provide further clarification. For example, in certain situations, the Union's acts may be susceptible to more than one legal basis. To further complicate the analysis, we can say that these grounds may be compatible or not. If they are not compatible, it is necessary to identify the main legal basis, and there comes the matter of how to determine it. With all these, and not only, we will deal in the present research.

Keywords: *European Union, Commission, Parliament, Council, procedure, legislative proposal, legal basis.*

1. Introductory considerations.

As the reader knows very well, the action of the European Union in its areas of competence involves, mainly, the adoption of acts, some of which being endowed with binding force and the others not being of this nature. Among the acts endowed with binding force, some are adopted through a legislative procedure, thus becoming legislative acts[1].

In the following, we will focus on choosing the legal basis for their adoption, using, in support of our research, the information provided by the European Union's legislation (mainly primary), the jurisprudence of the Court of Justice of the European Union (henceforth referred to as CJEU) and the doctrine of specialty.

2. Legislative procedures in the European Union. General presentation.

Since, in our presentation, we intend to limit ourselves to the legislative acts of the European Union, we will present, for the begining, some general aspects on their adoption.

Thus, the article 289 of the Treaty on the Functioning of the European Union (hereinafter, TFEU) divides the legislative procedures in two categories – the ordinary legislative procedure and the special legislative procedures.

Regarding the ordinary legislative procedure, this, the same article states, "*consists in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission*[2]."

The successor of the former co-decision procedure, instituted by the Maastricht Treaty, the ordinary legislative procedure is, we could say, one of the most important elements of deepening the European integration and a reference in comparing the Union with a becoming federation.

We say this because, through the specificity of this procedure, the Union fundamentally differs from the classical international organizations in which the most important acts are adopted by a plenary body composed of the representatives of the member states and where each of them generally enjoys a veto right, while, within the mentioned procedure, the acts are adopted by a representative institution of the Member States (the Council), with a qualified majority, and by the institution representing the citizens of the Union, aspects closer to the notion of federation than to that of classical international organizations.

These seem to us, even more valid as the ordinary legislative procedure is used, according to the doctrine of specialty, in most of the situations of adoption of the Union's acts[3], this quantitative dimension

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[1] Art. 289 (3) of the Treaty on the Functioning of the European Union stipulates the following: *"The legal acts adopted by legislative procedure shall constitute legislative acts."*

[2] Art. 289 (1) TFEU.

[3] Sean Van Raepenbusch, *Institutional law of the European Union*, Rosetti publishing house, Bucharest, 2014, p. 233, apud Augustin Fuerea, *The Legislative of the European Union - between unicameralism and bicameralism*, in the journal Dreptul, no. 7/2017, p.187-200.

complementing the qualitative dimension referred to above.

Apart from the ordinary legislative procedure, as mentioned earlier, the art. 289 TFEU also stipulates the existence of the special legislative procedures.

Therefore, according to the TFEU, "*the adoption of a regulation, directive or decision, by the European Parliament with the participation of the Council or by the Council with the participation of the European Parliament constitutes a special legislative procedure*[4]."

Of course, the special procedures are not listed or described in that article, for each one's identification, it being necessary to go through those articles that refer to their use and which also provide the description of each procedure used.

Regarding the content of the special legislative procedure, art. 289 TFEU makes reference to the art. 294, which details the concrete aspects on its development (Appendix 1).

However, the dilemma that may arise in this context is related to the choice of the appropriate legal basis for each act, which is the subject of the next section.

To the elucidation of it, the case-law of the Court of Justice of the European Union helps us. This, summaring its prerogatives provided by the Treaties, which the reader knows too well, "*unitarily interprets EU treaties and legal acts*" and "*controls the legality of the EU's legal acts*[5]".

In addition, the appeal to the Court of Justice's case-law appears to be natural in the present case. In an opinion expressed in the literature of specialty, "*the Community system, as defined by TCEE in 1957, had important gaps. (...) Moreover, many of the fundamental provisions of the Treaty were drafted in unavoidable general and abstract terms (eg., the measures with an effect equivalent to the quantitative restrictions), which had to be specified*[6]*".*

However, before analyzing the jurisprudence, we will take a look at the Union's categories of competences and the types of acts that the institutions can adopt in various situations. This is because, in the first phase, the institutions can find themselves in a situation to choose of a certain type of act, out of the available ones, and only then they have to choose the exact legal basis.

Thus, in accordance with art. Article 1 (1) of the Treaty on European Union, „*by this Treaty, the High Contracting Parties establish among themselves a European Union (...), on which the Member States confer competences to attain objectives they have in common.*"[7]

Article 4 of the same treaty completes the division of competences by stating that „*competences not conferred upon the Union in the Treaties remain with the Member States*[8]"

The same article also enshrines the existence of the principle of sincere cooperation, through the regulation according to which *„the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties*[9]*."*

The competences of the European Union are exercised, however, in accordance with a set of principles. According to Article 5 of the Treaty on European Union, these are the principle of conferral, the principle of subsidiarity and the principle of proportionality[10]. As regards the categories of competences of the Union, they are listed in Articles 3 to 6 of the Treaty on the Functioning of the European Union.

Article 3 of the said Treaty specifies the areas in which the Union's competence is exclusive as follows: „*customs union; the establishing of the competition rules necessary for the functioning of the internal market; monetary policy for the Member States whose currency is the euro; the conservation of marine*

[4] Art. 289 (1) TFEU.

[5] Augustina Dumitrașcu, Roxana-Mariana Popescu, *European Union Law - Syntheses and applications*, 2nd edition, Universul Juridic, Bucharest, 2015, p. 83.

[6] Augustina Dumitrașcu, The role of the jurisprudence of the Court of Justice of the European Communities in the configuration of the community legal order, in the journal "Analele Universității din București – seria Drept", no. III-IV/08, p. 82-95.

[7] The Treaty on European Union, published in the Official Journal of the European Union, C 326/13, 26.10.2012.

[8] Idem, art. 4.

[9] Idem.

[10] Article 5 (ex Article 5 TEC):

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

biological resources under the common fisheries policy;common commercial policy[11].”

The competence of the Union is shared in a number of areas listed exemplified in Article 4 of the Treaty on the Functioning of the European Union as follows: *„internal market; social policy, for the aspects defined in this Treaty; economic, social and territorial cohesion; agriculture and fisheries, excluding the conservation of marine biological resources; environment; consumer protection; transport; trans-European networks; energy; area of freedom, security and justice; common safety concerns in public health matters, for the aspects defined in this Treaty*[12]*.”*

To these are added those areas not listed in Articles 3 and 6, but in which the Treaties confer on the Union the competence to act.

A number of areas where the exercise of Union competences is subject to a particular regime enshrined in paragraphs 3 and 4 of Article 4 TFEU. Accordingly, *„in the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs”*[13], while *„in the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs*[14]*.”*

Article 5 TFEU refers to a series of competences that we can call "coordination competences[15]."

The last category of competences, support, coordination or complement is described in Article 6 TFEU, covering the following areas: *„protection and improvement of human health; industry; culture; tourism; education, vocational training, youth and sport; civil protection; administrative cooperation*[16]*.”*

As regards the proper way of exercising a competent authority, it is governed by Article 2 TFEU. He mentions that, „*when the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.*”[17] As for the shared competences, „*when the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence*[18].”

The Union also has the competence to coordinate the economic and employment policies, as well as to support, coordinate and complement the actions of the Member States, with the mention that in the case of the latter, the competence of States in the areas listed in Article 6 is not replaced by that of the Union and the harmonization of the laws and regulations of the Member States is expressly excluded by the same provisions of the TFEU.

Moreover, „*the scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area*[19].”

However. all of these provisions could not materialize in the absence of certain acts to transpose them into practice. Their legal basis is mainly found in the provisions of Article 288 TFEU.

This article states that the Union can adopt, in the exercise of it’s competences, *„regulations, directives, decisions, recommendations and opinions*[20]*.”* Detailing the mentioned provisions, article 288 states that *„the regulation shall have general application* [and] *shall be binding in its entirety and directly applicable in all Member States”*, while *„a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.”* Moreover, the *„decision shall be binding in its entirety* [and] *a decision which specifies those to whom it is addressed shall be binding only on them”.* Meanwhile, the *„recommendations and opinions shall have no binding force*[21]*.”*

Corroborating the provisions presented in this section, we come to the conclusion, also underlined in the specialized doctrine, that the degree of harmonization through EU legislation, allowed by the Treaties, is maximal in the case of exclusive competences and then decreases, progressively, in the case of shared competences, then of the co-ordination, ultimately reaching a minimum level in the case of

[11] Treaty on the Functioning of the European Union, available at www.eur-lex.europa.eu, accesed 14.01.2018.
[12] Idem, art. 4.
[13] idem, alin. (3).
[14] Idem, alin. (4).
[15] Article 5 TFEU states as follows: 1. The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies. Specific provisions shall apply to those Member States whose currency is the euro. 2. The Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies. 3. The Union may take initiatives to ensure coordination of Member States' social policies.
[16] Idem, art. 6.
[17] TFEU, art.2.
[18] Idem.
[19] Idem.
[20] Idem, art. 288.
[21] Idem.

complementary competences (supporting, coordinating and completing the action of the Member States) [22].

Therefore, in the situations where the type of act that can be adopted in a given area is not expressly specified by the Treaties, the institutions will have to assess the specificity of each category of competence and each field in order to choose among the acts listed in Article 288.

For example, in the case of exclusive competencies, only the Union can adopt acts., Not leavind any place for state action, we think that the instrument used must be the regulation. In the case of shared competences, applying the principles of subsidiarity and proportionality, the institutions will have to choose between the regulation and the directive, specifying that, as far as possible, given the particularities of the purpose to be achieved, the latter will be preferred . The narrower applicability of the decision will give it a more limited sphere of application. Regarding the competencies covered by Article 6, the prohibition of harmonization will make recommendations and / or opinions preferable, but this conclusion must be corroborated with the principles of the open method of coordination.

3. Choosing the legal basis of proposals of legal acts. An overview of the Jurisprudence.

In terms of choosing the proper legal basis for the proposals of legislative acts, in our opinion, it can be raised a number of questions drawn from the difficulties encountered in practice, which can be summarized as follows: what features must present the choice of the legal basis of an act of the European Union, how will its own choice be made, what happens if a legislative act corresponds (at least apparently) to different grounds, how can we distinguish the primary legal basis from the secondary ones or what happens if the probable legal bases in a given case involve incompatible procedural issues. We will try to answer to these questions in the next paragraphs.

Thus, as regards the choice of the legal basis for the Union's acts, the case-law of the CJEU states, in one of the most representative cases in the matter, known as the "Titanium dioxide"[23], the fact that at this stage "*it must be firstly taken into account, that the organization of powers at Community level supposes that the choice of the legal basis of a measure can not depend solely on an institution's conviction relating to the objective pursued, but must be based on objective factors which are susceptible to judicial control. These factors"*, the Court also states, "*include, mainly, the purpose and the content of the measure"* which is envisaged.[24] Otherwise, the Court reiterates, in this judgment, the wording used in Case 45/86, but in most subsequent judgments, it would prefer to cite the judgment from the "Titanium dioxide" case.

This wording will remain a reference to how the Court of Justice examines the issue in question, it being resumed and confirmed in the subsequent case-law.

For example, in case 155/91, the Court reiterates that "*in accordance with what is already a consistent jurisprudence, in the context of the organization of the Community's powers, the choice of the legal basis of a measure must be based on objective factors, susceptible to judicial review. These factors include, in particular, the purpose and content of the measure*[25]".

Furthermore, in another judgment, the Court provides further clarification, stating that "an earlier Council practice of adopting legislative measures in a given area, based on a dual legal basis, can not derogate from the rules laid down in the Treaties and can not, therefore, create a mandatory precedent for the Community institutions as regards the correct determination of the legal basis[26]."

In addition, in the Court's view, the legal basis of an act can not be determined by similarity to other acts with a similar subject-matter, but must be based on its own characteristics. In the Court's wording, "*the determination of the legal basis of an act must be carried out by considering its own purpose and content, and not the legal basis for the adoption of other Union acts having similar characteristics*[27]*."*

This conclusion is complementary and must, in our view, be seen in close connection with the wording of an earlier case, according to which, "*if the Treaties contain a more precise provision which may constitute the legal basis of the measure in question, it must be based on this provision*[28]*."*

In other words, we figure out, the legal basis for the acts is provided by the provisions of the Treaties that are closest to the purpose and content of the project. Moreover, the same wording is reiterated in case 533/03, which demonstrates the Court's consistent orientation in the matter.

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[22] Augustina Dumitrașcu, Roxana Popescu, op.cit., p. 159.

[23] Action initiated by the Commission for the annulment of the Council Directive 89/428/EEC of 21 June 1989 on establishing procedures for the harmonization of the programs for the reduction and the eventual elimination of pollution caused by waste from the titanium dioxide industry, published in OJEC L 201, p. 56 .

[24] *Judgment of the Court of Justice of the European Communities of 11 June 1991* in Case C-300/89, extracted from www.eur-lex.europa.eu, website accessed on 14.01.2017, personal translation.

[25] *Judgment of the Court of Justice of the European Communities of 17 March 1993* in Case C-155/91, extracted from www.eur-lex.europa.eu, website accessed on 14.01.2017, personal translation.

[26] Judgment of the Court of Justice of the European Communities of 23 February 1988 in Case 131/86, extracted from www.curia.europa.eu, personal translation.

[27] *Judgment of the Court of Justice of the European Communities of 20 May 2008* in Case C-91/05, extracted from www.curia.europa.eu, website accessed on 14.01.2017, personal translation.

[28] *Judgment of the Court of Justice of the European Communities of 29 April 2004* in Case C-338/01, extracted from www.eur-lex.europa.eu, website accessed on 14.01.2017, personal translation..

We also consider it useful to point out that the above aspects are confirmed in a series of additional judgments of the Court, including the judgments in cases C-338/01, C-155/07, C-43/12 or the connexed cases C-317/13 and C-679/13.

Hence, so far, analyzing the case-law of the Court of Justice, we noticed that the choice of the legal basis of an Union's act is not left to the hazard or to the issuing institutions, but must meet some objective criteria on which the Court may rule. In addition, the basis of an act must be the one or those provisions of the Treaties closest to its purpose and content, and it can not be determined by using similarity to other acts having a close content or purpose.

Until now, however, we have considered the relatively simple hypothesis in which the basis of an act can be identified with a certain precision and in the provisions on a single area of action of the Union, but we will continue to try to determine the possible solution of the situation in which an act has a multiple legal basis.

Thus, a first such situation concerns the case where a measure can be based on two legal bases, one of which departs as the principal.

In this case, the case-law of the Court states that if the examination of a Community measure reveals that it pursues a dual purpose or has a dual component, and one of which is identifiable as the main purpose (or component) the other is only incidental, the act will be based on a unique theme, namely the one given by the main purpose or component[29].

The same wording can be identified in the judgments on the cases C-211/01, C-338/01, C-94/03, C-178/03, C-155 / 07, C-43/12 and not only, the conclusions from these being in the sense of confirming what has been said before.

A more complicated situation occurs when it can not be established which basis is the main one and which is secondary or accessory. However, for this case, the Court of Justice gives some clarifications.

More specifically, in one of the cases brought to its judgment, the Court held that "*exceptionally, if it is established that the act simultaneously pursues a number of inextricably linked objectives, without one of them being secondary or indirect in relation with another, such an act may be based on the various legal bases related to*" its objectives[30].

The same idea is reiterated in the subsequent case-law, which states that "*by way of exception, if it can be established that the measure simultaneously pursues several objectives which are inseparably linked, without one of them being secondary or indirect by reference to another, the measure must be based on the appropriate legal bases*[31]."

In the same idea, exceptionally, if, on the other hand, "*it is determined that an act simultaneously pursues a number of objectives or has a series of components that are inextricably linked, without one of them being secondary or indirect in relation with another, such an act will have to be based on the various appropriate grounds*[32]."

This jurisprudential orientation is also confirmed in a number of more recent judgments, such as those in the cases C-178/03, C-155/07, C-43/12 etc.

However, difficulties may also arise in this case. More specifically, we can think of the situation where, given the characteristics of the case, the applicable legal bases are not compatible. And in this situation, the Court of Justice provides the main coordinates needed to find a solution.

Specifically, since the "Titanium dioxide" judgment, it has stated that "the use of a dual legal basis is excluded where the procedures provided for the two legal bases are incompatible[33]."

The conclusions from the "Titanium dioxide" judgement can be found in the subsequent jurisprudence. For example, in a judgment post-2000, the Court reiterates that *"a dual legal basis is not possible where the procedures established for each ground are incompatible with each other*[34]*."*

Further details can be found in a more recent judgment. According to it, "as the Court has already established (...), the recourse to a dual legal basis is not possible where the procedures established for each ground are incompatible with each other or where the use of the two legal bases may undermine the rights of the Parliament", as mentioned in the judgments from the cases C-164/97 and C-164/97, C-338/01 etc.[35].

In this case, the position mentioned is reiterated by the Court in subsequent judgments, of which, we specify, as an example, those in the cases C-155/07, C-43/12 or the connexed cases C-317/13 and 679 / 13.

It also seems useful to mention that the same Court has set some rules for the situation where, of two incompatible grounds, one has to be chosen. Thus,

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[29] *Judgment of the Court of Justice of the European Communities of 30 January 2001* in Case C-36/98 (which refers to the Judgments in Case C-42/97), extracted from www.eur-lex.europa.eu, website accessed on 14.01.2017, personal translation.

[30] *Judgment of the Court of Justice of the European Communities of 19 September 2002* in Case C-336/00, extracted from www.eur-lex.europa.eu, website accessed on 14.01.2018, personal translation.

[31] *Judgment of the Court of Justice of the European Communities of 11 September 2003* in Case C-211/01, extracted from www.eur-lex.europa.eu, website accessed on 14.01.2017, personal translation.

[32] *Judgment of the Court of Justice of the European Communities of 10 January 2006* in Case C-94/03, extracted from www.eur-lex.europa.eu, website accessed on 14.01.2017, personal translation..

[33] *Judgment of the Court of Justice of the European Communities of 6 November 2008* in Case C-155/07, extracted from www.eur-lex.europa.eu, website accessed on 14.01.2017.

[34] *Judgment of the Court of Justice of the European Communities of 29 April 2004* in Case C-338/01, extracted from www.eur-lex.europa.eu, website accessed on 14.01.2017, personal translation.

[35] *Judgment of the Court of Justice of the European Communities of 10 January 2006* in Case C-94/03, extracted from www.eur-lex.europa.eu, website accessed on 14.01.2017, personal translation.

summarizing the conclusions of the case-law, we could state that if, of two incompatible grounds, one involves a more consistent involvement of the European Parliament, and one reserves a less important place for this institution, it will be necessary to choose the basis that gives Parliament a more important role in the decision procedure.

Thus, in a relatively recent judgment, the Court stated the following: "In the present case, it should be stressed that, unlike the situation which led to the judgment for Titanium dioxide (...), the Council decides with a qualified majority both in the procedure laid in the article 179 EC and in the article 181a EC.

It is true that, under the article 179 EC, the European Parliament carries out its legislative function through the codecision procedure together with the Council, while the article 181A EC - the only legal basis used for the adoption of the contested decision - stipulates only the consultation of the European Parliament by the Council. However, the importance of the role of the European Parliament in the Community legislative process must be reminded. As the Court has already stressed, the participation of the European Parliament in this process is the reflection, at a Community level, of a fundamental democratic principle, according to which the peoples participate in the exercise of power through a representative assembly (...)[36].

We appreciate that this Court's approach supports the transition from the elitist institutions (the Council, the Commission) to the institutions that have the most democratic legitimacy (the European Parliament, the European Council), given by the existing rapprochement between the European citizen's vote and the persons who, obviously, make up these institutions (the European parliamentarians, plus the heads of state and / or of government) [37].

However, from the further analysis of that judgment, we conclude that privileging the legal bases which give a more prominent role to the European Parliament can not be done in a way that would prejudice the achievement of the purpose of the act in question.

As the Court further states, "a solution which, given the differences between the procedures known as <<co-decision>> and <<consultation>> provided in the article 179 EC and article 181A EC, would consist in privileging only the legal basis of the article 179 EC as a ground for a greater involvement of the European Parliament, would mean the non-inclusion in a specific way, in the the chosen legal basis of the economic, financial and technical cooperation with non-developing third countries. In such a case, the Council's legislative role would, in any event, be affected in the same way as it would have been affected by the use of a dual legal basis, represented by the articles 179 EC and 181A EC. On the other hand, as shown in the content of the paragraph 47 from this judgment, since the article 181A EC does not have the vocation to constitute the legal basis for some measures which pursue the objectives of the article 177 EC on the cooperation for development for the purpose of the Title XX of the Treaty, the article 179 EC can not, in principle, be the basis of the cooperation measures which do not pursue such objectives[38]*."*

4. Conclusions.

In conclusion, it can be noticed that the choice of the legal basis of the European Union's acts, a matter not detailed by the Treaties and apparently simple, is susceptible to numerous specific requirements and difficulties. In order to elucidate them, the Court of Justice, with numerous cases brought before it, has, over time, made a constant effort and produced a consistent set of rules, which today form an effective guideline of the subject mentioned.

These judgments mainly arise due to the concern of each applicant institution to safeguard its own prerogatives and, more broadly, its place in the Union's institutional architecture. In this respect, we positively note the energy with which the institutions defend their own role, a reality that confirms Jean Monnet's vision on their role in shaping a European identity.

Summarizing the conclusions of the analyzed jurisprudence, we can say that the choice of the legal basis of the Union's acts shall be based on objective factors and can not depend on mere whim of the issuing institutions, in order to achieve an effective judicial control of it.

Also, the institutions can not derogate from these rules by their own will and must take into account the purpose and content of those acts and not those of some acts with a similar content. The legal basis of an act must consist in that provision that matches the most its content.

In addition, in the case of the existence of several legal bases, if one of them stands as principal, it will regulate the adoption of the act, while, if one can not establish a main and a secondary theme, the act will be based on both grounds, unless they are incompatible. Moreover, the Court of Justice tends to give priority to the role of the European Parliament, given its democratic legitimacy, in the case of some alternative and incompatible legal bases, some of which granting a more important role to the Parliament and others diminishing its participation.

[36] *Judgment of the Court of Justice of the European Communities of 6 November 2008* in Case C-155/07, extracted from www.eur-lex.europa.eu, website accessed on 14.01.2017.

[37] Augustin Fuerea, The Legislative of the European Union - between unicameralism and bicameralism, in the journal Dreptul, no. 7/2017, p.187-200.

[38] Ibidem.

References

- Dumitraşcu, Augustina, The role of the jurisprudence of the Court of Justice of the European Communities in the configuration of the community legal order, in the journal "Analele Universităţii din Bucureşti – seria Drept", no. III-IV/08
- Dumitraşcu, Augustina; Popescu, Roxana-Mariana, *European Union Law - Syntheses and applications*, 2nd edition, Universul Juridic, Bucharest, 2015, p. 83
- Fuerea, Augustin, The Legislative of the European Union - between unicameralism and bicameralism, in the journal Dreptul, no. 7/2017, p.187-200
- The Treaty on the Functioning of the European Union, extracted from www.eur-lex.europa.eu, website accessed on 14.01.2017
- Judgment of the Court of Justice of the European Communities of 23 February 1988 in Case 131/86, extracted from www.curia.europa.eu
- Judgment of the Court of Justice of the European Communities of 11 June 1991 in Case C-300/89, extracted from www.eur-lex.europa.eu, website accessed on 14.01.2017
- Judgment of the Court of Justice of the European Communities of 17 March 1993 in Case C-155/91, extracted from www.eur-lex.europa.eu, website accessed on 14.01.2017
- Judgment of the Court of Justice of the European Communities of 30 January 2001 in Case C-36/98, extracted from www.eur-lex.europa.eu, website accessed on 14.01.2017
- Judgment of the Court of Justice of the European Communities of 19 September 2002 in Case C-336/00, extracted from www.eur-lex.europa.eu, website accessed on 14.01.2018
- Judgment of the Court of Justice of the European Communities of 11 September 2003 in Case C-211/01, extracted from www.eur-lex.europa.eu, website accessed on 14.01.2017
- Judgment of the Court of Justice of the European Communities of 29 April 2004 in Case C-338/01, extracted from www.eur-lex.europa.eu, website accessed on 14.01.2017
- Judgment of the Court of Justice of the European Communities of 10 January 2006 in Case C-94/03, extracted from www.eur-lex.europa.eu, website accessed on 14.01.2017
- Judgment of the Court of Justice of the European Communities of 20 May 2008 in Case C-91/05, extracted from www.curia.europa.eu, website accessed on 14.01.2017
- Judgment of the Court of Justice of the European Communities of 6 November 2008 in Case C-155/07, extracted from www.eur-lex.europa.eu, website accessed on 14.01.2017

THE ROLE OF NATIONAL PARLIAMENTS IN VERIFYING THE COMPLIANCE WITH THE PRINCIPLES OF PROPORTIONALITY AND SUBSIDIARITY

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Abstract

The decision-making process of the European Union is a particularly complex one and its democratic legitimacy has almost always been a preoccupation for the citizens involved in European affairs, researchers, practitioners of Union law and, ultimately, political decision-makers. Today, after an evolutionary process that began, we could say, along with the Single European Act and, as the entire union construction, is still underway, this legitimacy is ensured in a multi-level organized system. One of these, alongside the European Parliament, is represented by national parliaments. This role is regulated in detail by the provisions of the Protocols No. 1 and 2. Practically, according to Protocol No. 1, the National Parliaments have the right to receive information about the content and the effects of the institutions issuing the draft normative acts. The obligation to transmit the documents that are necessary for the exercise of their control is a prerequisite for it, since no effective control can be exercised without knowing its exact subject. In Protocol No. 2, on the other hand, the concrete mechanismes of the National Parliaments' control over the compliance with the aforementioned principles are regulated, consisting in the issuing of reasoned opinions and, in extreme cases, in the action before the Court of Justice of the European Union.We will further discuss these matters in the present study.

Keywords: *European Union, legislative procedure, Commission, Council, European Parliament, draft, act, legislative, national parliaments, subsidiary, opinion.*

1. Introductory considerations.

As we have stated in the previous lines, the democratic legitimacy of the European Union's decision-making process comes from, in our opinion, the existence and the cumulated action of several levels of representation. One of these is, of course, the European Parliament.

In this regard, Article 10 of the Treaty on European Union states that "*citizens are directly represented at Union level in the European Parliament*"[1], while Article 14 of the same Treaty stipulates that "*the European Parliament shall be composed of the representatives of the Union's citizens*"[2]

Therefore, as nationally, the Parliaments of the Member States are the representative bodies of the citizens of those states, at the Union level, this role is fulfilled by the European Parliament, without this state of affairs showing any incompatibility with the national level. In practice, we can speak, as in the case of European citizenship, of a complementary representation at another level and not of an exclusion of national representation.

Moreover, this also results from the role played by the sources of primary law of the European Union, and here we refer in particular to Treaties of the national parliaments of the Member States.

Thus, the same Article 10, which we have just referred to, also refers to national Parliaments, recalling that the representatives of the Member States' governments, meeting within the Council, "*are democratically accountable either before national parliaments or to their citizens*[3]." In fact, this seems natural, given the tradition of parliamentary control over the executive, as embodied by the Romanian Constitution[4].

Moreover, National Parliaments, says art. Article 12 of the TEU, actively contribute to the smooth functioning of the Union, in a variety of ways, among which "by being informed by the Union institutions and by receiving notifications of Union's legislative act drafts in accordance with the Protocol on the role of national parliaments in the European Union, by compliance with the principle of subsidiarity, in accordance with the procedures laid down in the Protocol on the application of the principles of subsidiarity and proportionality, through the participation within the area of freedom, security and justice in the mechanisms for assessing the implementation of Union policies within this area, and by engaging in Europol's political control and in evaluating Eurojust's activities, by participating in the procedures for revising the Treaties, by being informed of applications for membership in the Union, and by participating in inter-parliamentary cooperation between national parliaments and the European

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[1] The Treaty on European Union, consolidated version, available at www.eur-lex.europa.eu, accessed 25.01.2018, art. 10.

[2] Idem, art. 14.

[3] Idem, art. 10.

[4] See, in this respect, the provisions of Chapter IV of the Romanian Constitution, entitled *Raporturile Parlamentului cu Guvernul* and not only.

Parliament, in accordance with the Protocol on the role of national parliaments in the European Union[5]."

Of course, the picture that appears to us today, before our eyes, has not been present since the beginning of the European construction, but is the result of successive reforms, as we have previously said. In this regard, Professor Augustin Fuerea states that "in relation to legislative activity, the European Parliament has evolved over time, from a consultative perspective, but also from the point of view of cooperation with the Council, the co-decision respectively, by the Council. Its evolution is due to the manifested trend, in the sense of the transition from the elitist institutions (the Council, the Commission) to the institutions that have the most democratic legitimacy consistency (European Parliament, European Council), given by the existing rapprochement between the European citizen's vote and those who of course, make up these institutions (European parliamentarians), plus heads of state and / or government)[6]."

Therefore, the above picture depicts the multi-level democratic legitimacy of the European Union's decision-making process. Next, however, we will briefly refer to the principles of proportionality and subsidiarity, with their main characteristics. We will also briefly address the role of national parliaments in controlling the application of these principles without, for the time being, addressing concrete control mechanisms, their analysis being reserved for a subsequent section.

2. Principles of subsidiarity and proportionality. Overview on the role of national parliaments.

Fundamental references to how to exercise the competences of the European Union, the principles of proportionality and subsidiarity introduced in the Treaties on the occasion of the Single European Act and the Maastricht Treaty, have in the meantime benefited from a gradual deepening of their content, in order to better implement and control their observance.

In this regard, Professors Craig and Burca report how in 1992 the Heads of States and Governments, meeting in the European Council at Edingurgh, drafted a series of guidelines on the application of the principles of subsidiarity and proportionality, which in their turn, underpinned the development of an inter-institutional agreement with the same field, so that, on the occasion of the Treaty of Amsterdam, their provisions could be incorporated into primary law by virtue of a Protocol attached to that Treaty. This protocol, without insisting on the definitions of the mentioned principles, details how to apply and diminish the inconsistency between the two principles[7], which can be seen in a close relationship, as will be explained hereinafter.

On the occasion of signing the Treaty of Lisbon, the Protocol I have referred to is being replaced, the same authors report, with a new, shorter Protocol, which focuses rather on the mechanism for controlling their observance, but the Commission further assumes, observance of those contained in the old Protocol, recommending the same to the other institutional actors[8].

Summarizing the content of these principles, we can say, in accordance with the specialty doctrine, that they only recommend legislation when necessary and, when considered as such, instruments with a higher degree of generality will be preferred, to the detriment of concrete ones (directives instead of regulations, framework directives instead of concrete ones).

In conclusion, according to the same Craig and Burca, the principles of subsidiarity and proportionality suggest a departure from hierarchical governance at the level of the European Union, and they also fulfill the broader aim of ensuring that the Union "does not unnecessarily regulate[9]."

In particular, according to Article 5 of the Treaty on European Union, "pursuant to the principle of subsidiarity, in the areas not of its exclusive competence, the Union shall intervene only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States. neither at central level nor at regional and local level, but due to the dimensions and effects of the envisaged action, can be better achieved at Union level[10]." With regard to the principle of proportionality, according to the same Art. 5 TEU, "Union action, in its content and form, does not go beyond what is necessary to achieve the objectives of the Treaties[11]." In fact, the Treaty which we specifically referred to expressly states that "the institutions of the Union shall apply the principle of subsidiarity in accordance with the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments shall ensure compliance with the principle of subsidiarity in accordance with the procedure laid down in that Protocol[12]."

The same idea is also reiterated in the Treaty on the Functioning of the European Union, Article 69 of which insists on the fact that "*National Parliaments ensure, with regard to the legislative proposals and*

[5] The Treaty on European Union, consolidated version, available at www.eur-lex.europa.eu, accessed 25.01.2018, art. 12.
[6] Augustin Fuerea, *Legislativul Uniunii Europene – între unicameralism și bicameralism*, in the Dreptul magazine, no. 7/2017, pp.187-200.
[7] Paul Craig, Grainne de Burca,. *Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină,* Sixth Edition, Hamangiu Publishing House, Bucharest, 2017, p. 192.
[8] Idem, p. 193.
[9] Craig, de Burca, op.cit, pp.192-193.
[10] The Treaty on European Union, consolidated version, available at www.eur-lex.europa.eu, accessed 25.01.2018, art. 5
[11] Idem, art. 5.
[12] Idem, art. 5.

initiatives presented in chapters 4 and 5 (chapters entitled "Judicial cooperation in criminal matter" and "Police cooperation" in Title V - "Area of freedom, security and justice" – s.n.) *observance of the principle of subsidiarity, in accordance with the Protocol on the application of the principles of subsidiarity and proportionality*[13]*."*

Therefore, we note, and we find it very important, that even under this title of the Treaty on the Functioning of the European Union, which may require special decision-making procedures (e.g. Article 83 (1), third sentence, Article 83 (2), Article 86, Article 87 (3), Article 89), observance of the principles of subsidiarity and proportionality is considered by the authors of the Treaties as important as in other matters, and the role of National Parliaments is the established one.

Moreover, even in the case of the procedure provided under art. 352 TFEU[14], the Treaty explicitly lays down the obligation on the Commission to "*draw national Parliaments' attention to the proposals based on this Article"*[15], precisely so that they can exercise their legal prerogatives to control compliance with the principle of subsidiarity.

After these references to the content of the principles of subsidiarity and proportionality, we continue our approach by exposing the proper mechanisms to control compliance, as set out in Protocols no. 1 and 2, attached to the Treaties.

3. Control of compliance with the principles of subsidiarity and proportionality. Contributions of national parliaments.

Moving to the actual analysis of the provisions of Protocols 1 and 2, it seems important to underline the fact that Protocol No. 1 begins by enshrining the obligation for the Commission to transmit to the National Parliaments a series of documents, such as the Commission's consultation documents (green books, white books and communications), the "*annual legislative schedule*", but also "*any other legislative programming or political strategy instrument*." As regards the timing of their transmission, for consultation documents, it coincides with their publication, while the documents subsequently listed are transmitted to national Parliaments "*simultaneously with their transmission to the European Parliament and the Council"*[16].

Furthermore, Protocol No. 1 enshrines, in its Article 2, the obligation to submit to the national parliaments the drafts of "*legislative acts addressed to the European Parliament and the Council*"[17], also defining the notion of legislative act draft by "*proposals of the Commission , initiatives of a group of Member States, initiatives of the European Parliament, requests from the Court of Justice, recommendations of the European Central Bank and requests from the European Investment Bank to adopt a legislative act*[18]*."*

As to the addressee of the obligation to transmit drafts of legislative acts to the national Parliaments, Article 2 distributes this obligation as follows: the Commission is responsible for transmitting the drafts issued by it (at the same time as transmitting it to the European Parliament), the European Parliament is responsible for the transmission to the national Parliaments of the projects emanating from this institution, while the Council is responsible for transmitting to the national Parliaments the projects issued by a "*group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank*[19]*."*

Practically, so far, we can see that Protocol no. 1 ensures that important documents that can impact on the process of law-making at the Union level are transmitted to national Parliaments, whatever their nature, and without being limited to drafts of legislative acts.

Further on, the same Protocol anticipates some aspects that will be further detailed in Protocol No. 2. More specifically, Article 3 provides for the possibility for national Parliaments to submit to the President of the European Parliament, the Presidency of the Council and the President of the Commission reasoned opinions "*on the conformity of a draft of legislative act with the principle of subsidiarity*[20]*."* In this article we find some important procedural issues. For example, it is stipulated that if the legislator is a group of Member States, the President of the Council shall transmit the

[13] The Treaty on the Functioning of the European Union, consolidated version, available at www.eur-lex.europa.eu, accessed 25.01.2018, art. 69

[14] Article 352 TFEU reads as follows: 1. Where action by the Union proves necessary in the policies defined in the Treaties in order to achieve one of the objectives set out in the Treaties without their being required to do so, The Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt appropriate measures. Where those provisions are adopted by the Council in accordance with a special legislative procedure, it shall act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament. 2. The Commission, in the framework of the procedure for reviewing the subsidiarity principle referred to in Article 5 (3) of the Treaty on European Union, draws the attention of national parliaments to proposals based on this Article. 3. Measures based on this Article may not entail harmonization of the laws, regulations and administrative provisions of the Member States where the Treaties exclude such harmonization. 4. This Article may not be used to achieve the objectives of the common foreign and security policy and any act adopted pursuant to this Article shall comply with the limits laid down in the second paragraph of Article 40 of the Treaty on European Union.

[15] The Treaty on the Functioning of the European Union, consolidated version, available at www.eur-lex.europa.eu, accessed 25.01.2018, art. 352.

[16] *Protocol No. 1 on the role of national parliaments in the European Union*, published in the Official Journal of the European Union C 326/203, available at www.eur-lex.europa.eu, accessed 26.01.2018, art. 1.

[17] Idem, art. 2.

[18] Idem.

[19] Idem.

[20] Idem, art. 3.

reasoned opinion or advice to the governments of the Member States concerned", whereas, if the issuer is the Court of Justice, the European Central Bank, The European Investment Bank, again the President of the Council shall "*forward the reasoned opinion or advice to the institution or body concerned*[21]*."*

Therefore, the first way in which national Parliaments can act to verify compliance with the principles of subsidiarity and proportionality is this reasoned opinion.

From a procedural point of view, they have at their disposal, for action, an eight-week period set by Article 4 of Protocol No. 1. The term shall begin to run from the date on which "*the draft is made available to the national parliaments in the official languages of the European Union*" [22] and, after its passing, the draft is "*entered on the Council's provisional agenda for adoption or in order to adopt a position in a legislative procedure*[23]*."*

After the agenda of the Council meetings has been established, and after deliberation within them, the agenda, and the minutes of the meetings, are also sent to the national Parliaments and to the governments of the Member States. Practically, we find that National Parliaments are informed throughout the decision-making process, from the issuance of the project to the adoption of a decision regarding it. They are also informed if the European Council discusses the adoption of decisions to implement qualified majority voting in an area where unanimity is required or the transfer of areas subject to special legislative procedure within the scope of the ordinary legislative procedure. In turn, the Court of Auditors has the obligation to submit its annual report to national Parliaments, once they have been forwarded to the European Parliament and the Council.

Another aspect worthy of mention is that contained in Title II of Protocol no. 1. It establishes inter-parliamentary cooperation, organized by the European Parliament and national Parliaments. The Protocol also encourages national Parliaments to make, when necessary, their Union's specialized bodies' conferences, which may submit its conclusions to the European Parliament, the Council and the Commission, and may also provide a framework for the exchange of good practices. The same Title II of Protocol no. 1 explicitly encourages the Conference of the above-mentioned parliamentary bodies to also discuss matters of Foreign and Common Security Policy, including its Common Security and Defense component. Although they are consultative in nature, such debates may prove useful, especially in the context of the development of the new Consolidated Cooperation in Defense sector.

If, until now, we have seen that, at the general level of the Union decision-making process, national Parliaments are informed of the most important programmatic documents and drafts of legislative acts issued by the Union institutions and that they can issue consultative opinions on observance (or not) of the principles of subsidiarity and proportionality and also that the Member State Parliaments are informed throughout the main course of the projects concerned and are also encouraged to cooperate as effectively as possible in Protocol No . 2, we find out the concrete ways of applying the control of observance of the mentioned principles.

Thus, after, in Article 1, the said Protocol establishes that each institution (of the European Union) is the recipient of the obligation to observe the principles contained in Article 5 TEU, it goes to the concrete procedural provisions.

In particular, according to Article 2 of the said Protocol, the drafts of legislative acts begin with a series of consultations, under the coordination of the Commission, which take into account, in particular, the "*regional and local dimension of the actions envisaged."*[24] Mentioning these levels appears to us to be natural, as it is precisely the possibility of achieving, under better conditions, the purpose of the action envisaged within them, would make Union intervention no longer necessary. The consultation stage is, in our opinion, mandatory, the mentioned article excluding it only in case of an exceptional urgency and under the condition of motivation.

Further on, Protocol No. 2 maintains the definition given by Protocol no. 1 of the drafts of legislative acts, but also the recipients and the content of the obligation to transmit the projects to the National Parliaments, adding, this time, the obligation of the institutions to also submit to the National Parliaments the drafts of the amended legislative acts. We therefore conclude that a change in the content of a draft of a legislative act entails the obligation to refer it back to the National Parliaments.

Also, Article 4 of Protocol No. 2 also adds the obligation to refer to the national Parliaments the legislative resolutions of the European Parliament and the positions of the Council since their adoption[25].

From Article 5 of Protocol no. 2, the essential provisions regarding the obligation to motivate the compliance of the drafts of the legislative acts with the principles of subsidiarity and proportionality are underlined. This obligation falls under the responsibility of the issuer of the act from the interpretation of this article and is executed, inter alia, by the preparation of a letter, named by the specialists as the Subsidiarity File.

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[21] Idem.
[22] Idem, art. 4.
[23] Idem.
[24] *Protocol No. 2 on the role of national parliaments in the European Union*, published in the Official Journal of the European Union C 326/203, available at www.eur-lex.europa.eu, accessed 26.01.2018, art. 2.
[25] Idem, art. 4.

It should, according to the mentioned article, "*contain elements to allow the assessment of the financial impact of the project in question and, in the case of a directive, the assessment of its implications for the regulations to be implemented by the Member States, including regional legislation, as the case may be."*[26] *In order to facilitate their control, "the reasons which lead to the conclusion that a Union's objective can be better achieved at Union level are based on qualitative indicators and, whenever possible, on quantitative indicators."*[27] *Nevertheless, "drafts of legislative acts also take account of the need to ensure that any financial or administrative obligation falling upon the Union, national governments, regional or local authorities, economic operators and citizens is as small as possible and proportionate to the envisaged objective*[28]." Therefore, the authors of the treaties seem to have pursued the fact that the subsidiarity file will motivate the observance of this principle as much as possible, and not only in general terms, because the general formulations do not allow effective control, or that is the purpose of this protocol.

Furthermore, Article 6 of Protocol No. 2 repeats the eight-week deadline for national parliaments to send their reasoned opinions on non-compliance with the principle of subsidiarity to the Commission, the Parliament or the Council. Unlike Protocol No. 1, in the case of Protocol No. 2, to the previous provisions are added those regarding the situation in which the national Parliaments have a bicameral structure (each Chamber may issue its own opinion) and the one in which a Member State has a structure in which there are regional Parliaments (these will be consulted by the National Parliaments / Chambers, if applicable).

Further on, Article 7 of Protocol No. 2 provides that the institutions which the draft of legislative act originates from "*shall take into account the reasoned opinions of the national parliaments or a chamber of one of these national parliaments"*[29], but this must not necessarily entail compliance with the opinion received.

Also, from the same article we find out that each national parliament has, in the procedure that we will describe below, two votes, which are distributed either entirely in the case of the Unicameral Parliaments, or by one vote of each Chamber, in the case of bicameral ones.

From now on, there are more possibilities opening up.

The first of them takes into account the case where "reasoned opinions on non-compliance by a legislative project with the subsidiarity principle represent **at least one third** of the total votes allocated to national parliaments"[30], in which case the draft of the legislative act should be re-examined. If the project is based on art. 76 of TFEU [31], the threshold shall be **one quarter** of the total votes available. This stage is called, in the specialized doctrine and in the public references on this subject, as "yellow card". At this time, three possibilities are also open, in which case the issuing institution may decide "either to maintain the project, either to modify it or to withdraw it"[32], motivating the adopted decision.

The second possibility concerns the situation in which the draft of the normative act **occurs** in one of the **areas** that are subject to the **ordinary legislative procedure**. In such a case, "*where reasoned opinions on a draft of a legislative act's failure to comply with the principle of subsidiarity represent **at least a simple majority** of the votes allocated to national parliaments (...), the project must be re-examined".*[33] At this point, three possibilities are also opened: the Commission (because it has the legislative initiative under the ordinary legislative procedure) can maintain, amend or withdraw its proposal, provided that the principle of subsidiarity is upheld in the case of maintaining the proposal. This motivation takes the form of a motivated opinion, which will be further important. This stage is also known as the "orange card".

Once the procedure has reached this point, the reasoned opinion, together with the opinions issued by the national Parliaments, are referred to the "Union legislative body" (in Article 7), which the authors of the treaties recognize as being formed by the **European Parliament and the Council**. This (the legislative body) has, in turn, two possibilities. Thus, only in the first reading, on the basis of the opinions of the Parliaments and of the Commission's opinion, the Parliament and the Council will be able to examine "*the compatibility of the legislative proposal with the principle of subsidiarity".*[34] The second possibility may take place "*where, with a 55% majority of the members of the Council or a majority of the votes cast in the European Parliament, the legislative authority considers that the legislative proposal is incompatible with the principle of subsidiarity"*[35], in which case it will no longer be examined.

[26] Idem, art. 5.
[27] Idem.
[28] Idem.
[29] Idem, art. 7.
[30] Idem.
[31] „The acts referred to in Chapters 4 and 5 and the measures referred to in Article 74 which provide for administrative cooperation in the areas referred to in these Chapters shall be adopted: (a) on a proposal from the Commission; or (b) at the initiative of a quarter of the Member States."
[32] *Protocol No. 2 on the role of national parliaments in the European Union*, published in the Official Journal of the European Union C 326/203, available at www.eur-lex.europa.eu, accessed 26.01.2018, art. 7.
[33] Idem.
[34] Idem.
[35] Idem.

Therefore, according to the provisions analyzed so far, the role of the National Parliaments provided for in Protocol No. 2 may be to issue reasoned opinions on non-compliance with the principle of subsidiarity, and if their total reaches the level required by the Protocol for each situation, they are forwarded to the issuing institutions and, ultimately, to the legislative body, acting according to the mechanisms provided by the same Protocol.

Further on, according to art. 8 of Protocol no. 2, National Parliaments may, if they consider it necessary, bring actions (for annulment) before the Court of Justice under the provisions of Article 263 TFEU through the Governments of the Member States.

Finally, Article 9 of Protocol No. 2 enshrines the right of national Parliaments, along with that of the European Council, the Council and the European Parliament, to receive an annual report from the Commission on compliance with Article 5 of the TEU, and so on observance of the principle of subsidiarity.

Further on, it is not without meaning to consider the activity of the Chamber of Deputies and the Senate of Romania regarding the issuance of reasoned opinions on the drafts of legislative acts of the European Union in accordance with the provisions of Protocol No. 2, as previously exposed.

4. Motivated opinions issued by tje Chamber of Deputies and the Senate of Romania in accordance with the procedures estabilished by Protocol No.2

According to the Annual Reports issued by the Commission regarding the observance of the principle of subsidiarity, in 2010, the Chamber of Deputies and the Senate of Romania did not issue reasoned opinions in accordance with the procedure provided by Protocol no. 2.

The report for 2011, however, states that, this time, the Chamber of Deputies and the Senate have each issued a number of two reasoned opinions.

One of them concerned the Proposal for a Council Directive on a Common Consolidated Corporate Tax Base, registered under number COM (2011) 121. Unlike the Chamber of Deputies, however, the Senate considered that this project did not violate the principle of subsidiarity. As a result, the Commission received the reasoned opinion of the Chamber of Deputies, this one representing one vote, in accordance with the provisions of Protocol no. 2.

The other reasoned opinion issued by the Chamber of Deputies in 2011 concerned the initiative on Further Activity and Surveillance of Credit Institutions, Insurance Undertakings and Investment Companies in a Financial Conglomerate, COM (2011) 453.

In the same year, the Senate issued reasoned opinions on initiatives on the Temporary reintroduction of border control at internal borders in exceptional circumstances, COM (2011) 560 and Jurisdiction, applicable law, recognition and enforcement of judgments in registered partnerships, COM 2011) 127[36].

The following year, in 2012, the Chamber of Deputies and the Senate did not issue reasoned opinions [37], but in 2013 the Chamber of Deputies issued such an opinion on the Proposal for a Regulation establishing the European Public Prosecutor's Office (COM (2013) 534), *the Proposal for a Directive on the approximation of the laws, regulations and administrative provisions of the Member States relating to the manufacture, presentation and sale of tobacco and related products (COM (2012) 788), and the Senate on the Proposal for a Regulation on the European Union Railway Agency and repealing Regulation (EC) No 881/2004 (COM (2013) 27), Proposal for a Directive on railway safety (COM (2013) 31) and the Proposal for a Regulation on the promotion of free movement of persons and businesses by simplifying the acceptance of certain official documents in the European Union and amending Regulation (EU) No. 1024/2012 (COM (2013) 228*[38]).

In 2014, the Chamber of Deputies and the Senate did not issue reasoned opinions on non-compliance with the principle of subsidiarity, which is in fact the general downward trend in the number of such opinions, 2014 bringing only 22 such documents[39].

A year later, however, the Chamber of Deputies issued a reasoned opinion on the Proposal for a Regulation of the European Parliament and of the Council establishing a transfer mechanism in the event of a crisis and amending Regulation (EU) no 604/2013 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 (COM (2015) 450), of the total of 8 such opinions issued at Union level[40].

As regards the year 2016, the proposal for a Directive amending Directive 96/71 / EC of the European Parliament and of the Council of 16th of December 1996 concerning the posting of workers in

[36] Data extracted from the Commission's Report on Subsidiarity and Proportionality, COM (2012) 373, Brussels, 10.07.2012,

[37] According to the data presented in the Annual Report on Subsidiarity and Proportionality of 2012, COM(2013) 566 final, Brussels, 30.7.2013, available at www.eur-lex.europa.eu, accessed 27.01.2018.

[38] According to the data presented in the Annual Report on Subsidiarity and Proportionality of 2013, COM(2014) 506 final, Brussels, 05.08.2014, available at www.eur-lex.europa.eu, accessed 27.01.2018.

[39] According to the data presented in the Annual Report on Subsidiarity and Proportionality of 2014, COM(2015) 315 final, Brussels, 02.07.2015, available at www.eur-lex.europa.eu, accessed 27.01.2018.

[40] According to the data presented in the Annual Report on Subsidiarity and Proportionality of 2015, COM(2016) 469 final, Brussels, 15.07.2016, available at www.eur-lex.europa.eu, accessed 27.01.2018.

the framework of the provision of services (COM (2016) 128) has received one opinion on the Proposal for a Regulation laying down 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 Member State and a Senate, Member States by a third-country national or a stateless person (recast) (COM (2016) 270). They also coincided with a substantial increase in the number of reasoned opinions issued, reaching 74[41].

We can consider, in the light of those shown above, that the Romanian legislature understood and assumed the role enshrined in Protocol No. 2, using the mechanisms provided by it whenever it deemed necessary.

5. Conclusions

Although the effectiveness of the mechanisms provided by Protocol No. 2 may be, and has been, in some cases, challenged, certain concrete results have been achieved in the course of the not very long time that has elapsed since the entry into force of its provisions.

Thus, at the end of 2017, a number of three reasoned opinions reached the required number of votes for the review to be necessary. Specifically, the first "yellow card" concerned the proposal for a European Commission regulation on the exercise of the right to take collective action in the context of freedom of establishment and freedom to provide services, in which case the national parliaments' votes in the sense of non-compliance with the principle of subsidiarity reached the number of 19 of the total of 54 available. As a result, the Commission withdrew its proposal but did not accept that the principle of subsidiarity had been breached. The second "yellow card" targeted the proposal to set up a European Prosecutor's Office, this time totaling 18 votes. However, the Commission has decided to maintain the proposal, not accepting that the principle of proportionality has been breached. As for the third "yellow card", it targeted the proposal to revise the Posting of Workers Directive, and this time the Commission also not accepting to review its proposal. As regards judicial review, the Court has highlighted the need to comply with the obligation to state reasons for observing the principle of subsidiarity, but acknowledged the broad margin of appreciation enjoyed by the issuing institutions (for example in Cases C-84/94 and C-233/94)[42]. Also, in Case C-547/14, Philipp Morris, the Court insisted on verifying that "if the Union legislator could, on the basis of sound data, assume that the objective of the proposed action could be better achieved at Union level[43]".

Therefore, although it does not grant a right of veto to national parliaments, which, we believe, would be detrimental to the Union's legislative capacity, and although it does not provide for spectacular mechanisms at the fingertips of national parliaments, the treaties and protocols analyzed still co-opt them into the Union's decision-making process, which is likely to strengthen its democratic legitimacy. Moreover, as Professor Augustina Dumitrascu says, "*national parliaments must be careful not to engage in a systematic opposition*", as "*this approach would be contrary to the spirit of the early alert mechanism, which is, on the contrary, to fostering information and their positive association with the construction of a Europe closer to its citizens*[44]". However, the effective results of the control on observance of subsidiarity principle as regulated by the provisions under consideration depend very much on the capacity and willingness of Member States' Parliaments to use them, or this remains to be measured in the future.

References

- Craig, Paul; de Burca, Grainne, *Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină*, Sixth Edition, Hamangiu Publishing House, Bucharest, 2017
- Dumitrascu, Augustina, *Dreptul Uniunii Europene și specificitatea acestuia* , Universul Juridic, Bucharest, 2012
- Fuerea, Augustin, Legislativul Uniunii Europene – între unicameralism și bicameralism, in Dreptul magazine, no. 7/2017
- *Protocol No. 1 on the role of national parliaments in the European Union*, published in the Official Journal of the European Union C 326/203, available at www.eur-lex.europa.eu
- *Protocol No. 2 on the role of national parliaments in the European Union*, published in the Official Journal of the European Union C 326/203, available at www.eur-lex.europa.eu
- Raffaelli, Rosa, *Principiul subsidiarității*, www.europarl.europa.eu, 10/2017
- Commission report on subsidiarity and proportionality, COM (2012) 373, Brussels, 10.07.2012
- *Annual Report on Subsidiarity and Proportionality*, 2012, COM(2013) 566 final, Brussels, 30.7.2013, available at www.eur-lex.europa.eu

[41] According to the data presented in the Annual Report on Subsidiarity and Proportionality of 2016, COM (2017) 600 final, Brussels, 30.06.2016, available at www.eur-lex.europa.eu, accessed 27.01.2018.

[42] Rosa Raffaelli, *Subsidiarity principle*, www.europarl.europa.eu, 10/2017, accessed 27.01.2018.

[43] Ibidem.

[44] Francois-Xavier Priollaud, David Siritzky, *Le traite de Lisbonne.Commentaire, article par article, des nouveaux traites europeens(TUE et TFUE)*, La Documentation Francaise, Paris, 2008, p.430, apud Augustina Dumitrascu, The Law of the European Union and its Specificity, The Universe Juridic, Bucharest, 2012, p.71.

- *Annual Report on Subsidiarity and Proportionality*, 2013, COM(2014) 506 final, Brussels, 05.08.2014, available at www.eur-lex.europa.eu
- *Annual Report on Subsidiarity and Proportionality*, 2014, COM(2015) 315 final, Brussels, 02.07.2015, available at www.eur-lex.europa.eu
- *Annual Report on Subsidiarity and Proportionality*, 2015, COM(2016) 469 final, Brussels, 15.07.2016, available at www.eur-lex.europa.eu
- *Annual Report on Subsidiarity and Proportionality*, 2016, COM(2017) 600 final, Brussels, 30.06.2017, available at www.eur-lex.europa.eu
- *The Treaty on European Union*, consolidated version, published in the Official Journal of the European Union C 326/203, available at www.eur-lex.europa.eu
- *The Treaty on the Functioning of the European Union*, consolidated version, published in the Official Journal of the European Union C 326/203, available at www.eur-lex.europa.eu

THE REFERENDUM, REFLECTED IN THE ROMANIAN CONSTITUTIONAL COURT'S CASE LAW

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Abstract

The referendum is the main instrument of direct democracy, a means of consultation by which the People has the possibility to directly exercise national sovereignty. In Romania, the referendum has to be organized every time the Constitution is subject to a revision, regardless of who has initiated it, and also when the dismissal of Romanian President is at stake. The result of the valid referendum cannot be disregarded in these two cases. So, this kind of referendum is compulsory both in what concerns its organization and its outcome. There is also a so-called consultative referendum, which is organized at the national level at the request of the President of Romania, who may ask the Romanian citizens to express their will as to questions of national interest. This one is optional from both fore-mentioned points of view: its necessity and its result. The Constitutional Court of Romania supervises the observance of the procedure for the organization and carrying out of a referendum, and it confirms its results. The referendum was a pretty controversial issue in Romania in the context of political changes that lead in 2012 to the suspension of the President of Romania and it continues to stir the feelings of the political stage in connexion with further intended amendment of the Basic Law. The present paper aims to depict the importance of the case law of the Constitutional Court concerning the referendum, as a guardian of constitutional democracy that renders compulsory decisions on the compatibility with constitutional principles and the rule of law of actions taken by the Government and the Parliament of Romania in respect of other State institutions. In this regard, it strongly recommended to the State's institutions to engage in a loyal co-operation between themselves.

Keywords: *Referendum, Sovereignty, Direct democracy, Constitutional Court, Constitutional review.*

Introduction

Meant to be an effective mechanism of the direct democracy, an expression of national sovereignty whose exclusive owner is the people, the referendum is the legal instrument through which citizens have the opportunity to participate actively in shaping the political decision at state level by explicitly expressing their opinion on actual issues regarding the organization and functioning of the State and the structuring and arrangement of political life, in general.

As to its utility and the very reason for its existence, opinions have been divided over time. Thus, some scholars praised their virtues, others warned about its shortcomings and disadvantages[1]. Thus, since the seventeenth century, the theory of democracy, understood as the ruling of the majority, has been divided into two currents of thought. One is represented by the participatory school, according to which the truly democratic means of making public policy decisions is the direct and full participation of all citizens without any interposition.

The mentors of this school of thought are classical scholars like Rousseau, or modern theorists like Benjamin Barber, Lee Ann Osbourne or Carole Pateman. On the opposite side are the partisans of the representative school or of the "responsible elite" whose pioneers were John Stuart Mill and Henry Jones Ford, and, later, the modern theorists Joseph Schumpeter, E.E. Schattschneider and Giovanni Sartori[2]. According to this theory, citizens elect democratically a representative body that, on their behalf, will make political decisions as governors.

Nowadays, the referendum is generally accepted as necessary at certain moments of particular importance to a State, in certain historical or political circumstances, inasmuch as it does not question the effectiveness of Parliament as the representative assembly of the People and does not destabilize its authority, but only reflects the will of the People, giving voice to its choice on punctual issues of particular importance to the State.

The importance of the issue addressed by this study becomes obvious if we consider the impact of referendums that may sometimes be particularly strong, especially in the international geopolitical context. This was, for example, the case with the wave of referendums organized in 2003 in eight Central and Eastern European countries concerning their accession to the European Union (Czech Republic, Hungary, Estonia, Latvia, Lithuania, Poland, Slovakia and Slovenia)[3].

The broad resonance that referendums may have is also illustrated by the blocking of the ratification of the Treaty establishing a Constitution for Europe through the negative vote of the French and Dutch People expressed in the referendums held in their

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[1] Olivier Duhamel, "Le référendum – Introduction", *Pouvoir* no.77/1996: 5.

[2] Austin Ranney, "Référendum et Démocratie", *Pouvoir* no.77/1996: 10.

[3] See Jean-Michel De Waele, *Referendumurile de aderare la Uniunea Europeană* (Iași: Editura Institutul European, 2007).

countries on 29th of May 2005 and 1st of June 2005, respectively. Also, a true political storm was triggered throughout Europe by the surprizing and disturbing outcome of the referendum on the United Kingdom European Union membership, on the 23rd of June 2016. Similarly, the symbolic referendum organized on the 1st of October 2017 for Catalonia's independence from Spain had major echoes at the European level. Last but not least, one can recall the referendum by which Turkey has recently[4] amended the Constitution granting exaggerate presidential powers, with critical consequences for the democratic features of that State.

The particular implications of the political will expressed by the citizens through the referendum were noted in the literature, being analyzed in round tables or conferences on this topic[5]. It is also noted that in France, the prestigious *Pouvoirs* magazine, dedicated a whole number to this subject, inviting reputable specialists to examine the issue of the referendum.

The present study aims to highlight the situation of Romania, where the referendum contributed to defining the political will of the citizens, with six referendums organized so far. To this end, this study will mainly present the applicable normative framework, namely the provisions of Law no. 3/2000 on the organization and conduct of the referendum, as interpreted by the Constitutional Court in its rich case-law on this matter by the decisions made both in the framework of the *ex ante* review of constitutionality, by means of constitutional objections formulated with regard to the law which would become Law No. 3/2000 or the subsequent amending and supplementing laws before their entry into force, as well as in *ex-post* review, by way of exceptions of unconstitutionality raised during a pending trial on the law applicable to the case.

1. Sovereignty and Referendum

The concept of sovereignty has, in the theory of constitutional law, very complex meanings, being analyzed from a triple perspective. Thus, one can speak of state sovereignty, national sovereignty, and the sovereignty of the people. Essentially, state sovereignty expresses the idea of the *suprema potestas* that is indissolubly attached to the State[6]. National sovereignty, specific to the Nation, as a collective subject, whose will is distinct from that of its members, necessarily implies the delegation of the exercise of this power. That is why national sovereignty usually equals the sovereignty of the Parliament[7]. Finally, popular sovereignty, based primarily on the concept of citizenship as it was set up by Jean Jacques Rousseau in the social contract theory, reflects the ability of all citizens of a State to be equal in the state-level decision-making process[8]. Democracy in its pure form, as a way of leading the State by citizens through their direct participation in political decision-making, is no longer feasible in the manner used by the ancient Greek and Roman civilizations[9]. That is why it was necessary to be adapted to contemporary societies, by its transformation into representative democracy, where the prerogatives of power belong to the People, exercising them sovereignly, but through an limited number of representatives, democraticaly elected[10]. In order to reconcile these two systems, they were combined, so that currently, the referendum - organized in well-defined cases -, together with the parliament as a result of a free electoral process organized periodically and correctly, shape a new form of democracy, known as semi-direct democracy or participatory democracy. This system also provides to the People other means of expression, such as the right of legislative initiative or the public debate of draft laws[11].

In the spirit of this idea outlined in the current context, the Romanian constitutional legislator stated, in 1991, when drafted the democratical Basic Law, detached by teh communist regime, defeated in December 1989, that „*National sovereignty belongs to the Romanian people, who shall exercise it through their representative bodies established as a result of free, periodic and fair elections, as well as by means of a referendum. No group or individual may exercise sovereignty in their own name" (Article 2).*

Romanian Basic Law regulates three types of national referendum: the consultative referendum, initiated by the President of Romania on matters of national interest, mentioned in Article 90, the referendum on the dismissal of the President of Romania from office, referred to in Article 95(3) and the one approving the revision of the Constitution, regulated by Article 151(3).

The organic law dedicated to this issue details and specifies the legal and technical conditions connected with the organization and conduct of the referendum, namely the Law no.3 of 2000 on the organisation and

[4] On the 16th of April 2017.

[5] Like the one recently organized by Le Centre Régional Francophone de Recherches Avancées en Sciences Sociales in colaboration with the Romanian Association of Constitutional Law, on 15-16th of September 2017, with the topic "Prendre la démocratie au sérieux – référendum et société civile dans le contexte contemporain".

[6] Giorgio del Vecchio, *Lecții de filosofie juridică* (București: Editura Europa Nova, 1997), 278.

[7] Ioan Muraru, Elena Simina Tănăsescu, *Constituția României. Comentarii pe articole* (București: Editura C. H. Beck, 2008), 23.

[8] Ibidem, 22.

[9] For details on the evolution of the concept of democracy and its application, see, for example, Anthony Arblaster, *Democrația* (București: Editura DU Style, 1998), Robert A. Dahl, *Democrația și criticii ei*, (Iași: Institutul European, 2002), Leonardo Morlino, *Democrație și democratizări* (Iași: Institutul European, 2015).

[10] Ion Deleanu, *Instituții și proceduri constituționale – în dreptul roman și comparat*, (București: Editura C.H.Beck, 2006), 103-104.

[11] See, in this regard, Valentina Bărbățeanu, "Curtea Constituțională și democrația participativă sau implicarea cetățenilor în procesul legislativ", *Buletinul Curții Constituționale* nr.1/2016.

holding of the referendum[12], as subsequently amended and supplemented. It specifically mentions the fact that the national referendum is the form and means of direct consultation and expression of the sovereign will of the Romanian People (Article 2 of the law). The regulation of the referendum by a separate law is fully in line with those established by the Venice Commission experts who appreciated that, in order to be truly democratic, referendums – just like the elections - must satisfy certain requirements. One is respect for procedures provided for in law. Others are common to both elections and referendums, and cover respect for the principles inherent in Europe's electoral heritage, which apply *mutatis mutandis* to referendums[13].

2. Temporal Aspects Regarding the Organization and Holding of the Referendum, from the Constitutional Jurisdiction Perspective

Regarding the moment in time when the referendum can be organized, the Constitutional Court considered that the amendment of Law no. 3 of 2000 by introducing the provision according to which the organization of the referendum cannot take place simultaneously with the holding of the presidential, parliamentary, local elections or of the elections for the European Parliament, or with less then 6 months prior to the date of the said elections is not consistent with Article 90 of the Basic Law, according to which the President of Romania, after consulting the Parliament, may ask the people to express their will on issues of national interest, and with those of Article 95 (3) stipulating that, in the event of approval of the proposal to suspend the President of Romania, within a maximum of 30 days, a referendum shall be held for the dismissal of the President. The Court noticed[14] that, it is clear from the analysis of the two constitutional texts that the referendum can be held at any time during the year if the Parliament has been consulted or if it approved the proposal to suspend the President of Romania. Therefore, according to the Constitution, there is no other condition prohibiting the organization and holding of the referendum simultaneously with the presidential, parliamentary, local or European Parliamentary elections, or at a certain time before or after the said elections. As such, where the law does not distinguish, the interpreter cannot distinguish it, either (*Ubi lex non distinguit, nec nos distinguere debemus*). Consequently, the Court stated that the conditions set by the legislator for conducting the referendum were suplementing the provisions of the Constitution, which is unacceptable and determines their unconstitutionality. The Court also found that these provisions may result in constitutional blockages, the date of the elections becoming appendant on the date of the referendum[15].

Another interesting issue was raised from the perspective of a supposed contrariety between the provisions of Article 34 of Law no. 3 of 2000, according to which "The ballot will open at 8.00 and end at 20.00", on the one hand and on the other hand, the constitutional and conventional norms guaranteeing freedom of thought, conscience and religion, as well as and the right to vote. The grievance of unconstitutionality concerned the idea of discrimination on the basis of religious affiliation, having regard to the factual and legal situation put forward by the author of the exception, namely the fact that the citizens of religious denominations who have a weekly prayer on Saturday were detered to attend the referendum organized for the dismissal of the President of Romania on Saturday, the 19th of May 2007, between 8.00 and 20.00. The Constitutional Court found that the claims of the author of the exception were unfounded[16]. In this regard, the Court held that guaranteeing the above freedoms requires the State to observe specific obligations, whether negative or positive, the latter being materialized in appropriate measures so as to avoid disturbing the exercise of individual freedom of thought, conscience and of religion. In the discused case, the Court held that the source of the alleged constitutional conflict lies in the impossibility of simultaneous exercise of an electoral right - the right to vote – and of the freedom of religion, manifested by the practice of rituals specific to the cult that declared the day of prayer the seventh day of the week, Saturday. Both the establishment of Saturday as the date of the referendum on the dismissal of the President of Romania on the 19th of May 2007[17] and the hourly interval provided by the legally criticized text prevented the followers of this cult from voting in the organized referendum, having religious obligations to be fulfilled during the entire Saturday from dawn to sunset.

Faced with these claims by the author of the exception, the Court stated that there is no incompatibility between the status of citizen – which implies the right to vote -, and that of practitioner of a religious cult recognized by the Romanian state. The fact that, through the way of organizing and holding the referendum on the dismissal of the President of Romania on the 19th of May 2007, regulated by a law with general applicability for all the citizens of the country, the adherents of a religious minority in

[12] Published in the Official Gazette of Romania, Part I, no. 84 of 24 February 2000.
[13] CDL-AD (2005)034, Referendums in Europe – an Analysis of the Legal Rules in European States, Report adopted by the Council for Democratic Elections at its 14th meeting (Venice, 20 October 2005) and the Venice Commission at its 64th plenary session (Venice, 21-22 October 2005).
[14] Decision no. 147 of the 21st of February 2007.
[15] Ibidem.
[16] Decision no. 845 of the 8th of June 2009.
[17] By Article 1 paragraph 3 of the Decision no. 21 of 2007 of the Romanian Parliament.

Romania were unable to exercise their right at the same time, choosing to fulfill the religious obligations and practices specific to the cult in the same timeframe for the elections, cannot be converted into a reason for unconstitutionality of the provisions of art. 34 of Law no. 3/2000, nor into a restriction of either the exercise of the right to vote or the freedom of religion.

The right to vote expresses the essence of the relationship between the State and its citizens, independent of the citizen/church relationship, and, according to Article 2 paragraph 1 of the Constitution, the referendum, together with the elections organized for the constitution of representative bodies of the Romanian people, is the constitutional way of exercising national sovereignty. The Court has held that the importance of a referendum or the election that is taking place at a given moment in a state is clearly superior due to the level of a general interest involved in comparison with the narrow interest, limited to a group or at individuals, that a particular religious minority proclaims. So, the followers of such a cult can not reasonably claim that the organization of the specific operations of a national election should takes place according to the practices of that cult. In electoral matters, espeically, but not exclusively, the legislator considers the general interest of the society and can not legislate according to the religious option of every citizen, without thus being questioned the freedom of conscience safeguards.

At the same time, this legislative policy can not have the meaning of discrimination on the grounds of religious affiliation, as the author of the exception claims. It gives expression to the natural mechanism of a democratic, social state in which the rights and freedoms of citizens are protected so as to achieve a reasonable balance between the general interest of society, on the one hand, and individual rights and freedoms, on the other.

Also related to the date of the referendum, the Constitutional Court recently examined[18] allegations regarding the law amending Law no. 3/2000 that attributed to the Government the power to establish the date of the organization of the referendum for the revision of the Constitution, despite the fact that this is an exclusive right of the Parliament.

Considering the specific powers attributed at constitutional level in what concerns each type of national referendum, Article 15 paragraph 1 of the Law no. 3 of 2000, as it currently stands, specifies the type of normative act that determines the organization of the referendum and its date, as well as the authority which will issue it, depending on its constitutional legitimacy regarding the initiation of the referendum. Thus, the subject and the date of the national referendum are established by law, in the case of a referendum on the revision of the Constitution, by Parliament's decision, in the case of the referendum on the dismissal of the President of Romania and by a decree of the President of Romania, in case of a referendum on issues of national interest.

The differentiation that the text mentioned in Law no. 3 of 2000 makes between the three types of referendum in terms of the normative act which, in the procedure of its organization and deployment, determines the object and the day when it will take place, is justified by the constitutional provisions conferring the competence to initiate a referendum, respectively The President of Romania, by decree, on the referendum on issues of national interest, and by Parliament, by decision, in the situation of the dismissal of the President of Romania, respectively by law, in the case of the revision of the Basic Law. For the consistency of the procedure, it is reasonable that the same authority that initiates the referendum to also be the one setting the date of the referendum. For the hypothesis in question in the examined case, regarding the amendment of the Basic Law, the Court noted that it is the Parliament that adopts the draft or proposal for revision of the Constitution. In order to become final, the review must be approved by referendum, thus gaining full legitimacy through the general will of the people. Therefore, with a view to ensuring a complete procedural mechanism for the amending of the Constitution, including the regulation of its final stage, the Parliament is entitled to establish, by a separate law, the date of the referendum, thus setting the moment when the law it has adopted would be subject to popular approval. Unlike this hypothesis, in the case of the suspension of office of the President, the Parliament sets the date of the referendum by a decision, which is issued in exercising its control function, part of its constitutional attributions. Instead, the revision of the Constitution, as a fundamental law of the state, is made by means of a law amending and / or supplementing it and that is why, consequently, as a matter of course, for the normative act on the organization of the referendum to be also a law, not an administrative act issued by the Governement.

The legislator's concern for the establishment of the date of the referendum continued. Thus, through the Law for amending and completing the Law no. 3 of 2000 it has been stated that "Romanian citizens are called to express their will by voting in the national referendum on the revision of the Constitution, in the last Sunday of the 30-day period provided for in Article 151 (3) of the Constitution of Romania, republished, calculated from the date of the adoption by the Parliament of the draft constitutional law, the Government having the obligation to make public, by means of mass media, its text and the date of the national referendum". The fore-mentioned provision has been subjected to *a priori* constitutionality review and analyzed by the Constitutional Court by Decision no. 47 of 1 February 2018,

The authors of the objection of unconstitutionality criticized the fact that the date of the

[18] Decision no.612 of the 3rd of October 2017.

referendum is to be established by the very Law no. 3/2000 and not by a separate law, as specified by the Constitutional Court by Decision no. 612 of the 3rd of October 2017. The Court emphasized that what is important, in terms of the conformity of the procedure for organizing and conducting the referendum with the spirit of the Constitution, is the legitimacy and legal force of the act by which it is triggered and where the defining aspects are established, as the date when it is to take place.

What is essential is that this act comes from the authority that has the constitutional mandate to initiate each type of referendum, according to its powers, namely the decree of the President of Romania, regarding the referendum on issues of national interest, Parliament's decision, in the situation the dismissal of the President of Romania, and the law, in the case of the revision of the Basic Law. Therefore, the fact that the Parliament established by Law no. 3 of 2000 the date of this last type of referendum is in accordance with the constitutional requirements concerning the Parliament's exclusive competence to decide on this matte. It is, therefore, irrelevant whether it is a separate law adopted on the occasion of the organization of each referendum or the provision is included in the framework law on the organization and conduct of the referendum. And in the new legislative view, the date of organizing this referendum is determined by Law no. 3 of 2000, as the last Sunday of the 30-day period referred to in Article 151 paragraph 3 of the Basic Law.

The Court also held that the Parliament maintained itself within the scope of the constitutional text invoked, establishing by Law no. 3 of 2000 the fixed and unequivocal time stamp in relation to which is calculated the date on which the referndum will take place, but strictly circumscribed to the period of maximum 30 days in which the referendum for the revision of the Constitution must be organized. The Court noticed that the provisions of the Basic Law invoked do not require the full use of that time-limit, but provide for the most remote time to which the citizens may be summoned to the national referendum, so the establishment of its date within that period cannot be considered a disregard of the formentioned constitutional text.

In addition, the Court has held that nothing prevents the Parliament from adopting a law, depending on the circumstances, in order to set a different date for the holding of the referendum - within the said 30-day period - if this is necessary to ensure the proper conditions for citizens to express their will on the revision of the Constitution as a way of exercising national sovereignty.

Also as regards the schedule of the referendum, the Court noted that, although the rule is that the referendum should be held in one day, in exceptional cases, in order to ensure greater participation in the vote, the legislature may also regulate the referendum to take place over several days. In this regard, the Court held[19] that the establishment of a national referendum on the amending of the Constitution in two days instead of one day does not affect the general interest in conducting the referendum in good condition.

The same was the Court's ruling on the extension of the voting time in the referendum, from 12 to 16 hours[20]. Since the time frame of the referendum is one of the elements of the procedure for organizing and holding it, its establishment is subject to the rule established by Article 73 paragraph 3 letter d) of the Constitution, that imposes its regulation by organic law. As a result, its regulation by government decision contravenes the constitutional refered provision. In fact, such a regulation would be likely to cause a state of uncertainty regarding an element of this procedure, contrary to the principle of legal certainty imposed by Article 1 paragraph 5 of the Constitution[21].

3. Participation Quorum, Turnout Quorum and the Returns of the Referendum in the View of the Contitutional Case-Law

Currently, the law stipulates that the referendum is valid if at least 30 percent of the number of people enrolled on the permanent electoral lists participate in it. The condition to be met for the validity of the referendum is the same for all types of referendum, Article 5 Pararagraph 2 of the Law no. 3 of 2000 requiring the meeting of a certain participation threshold in relation to the number of persons on the permanent electoral lists.

The law was deducted from the *a priori* constitutionality review, and the Court found[22] that it introduced a novelty in terms of the validity of the referendum, stating that "The result of the referendum is validated if the validly expressed options represent at least 25 percent of those enrolled in the lists permanent election ". Thus, besides the conditions established by the law in force, the new regulation makes the validation of the result of the referendum conditional upon the surmounting of a threshold in relation to the number of persons on the permanent electoral lists, according to which the majority of the valid votes is established.

The Court stated that for the validation of the referendum it is necessary to meet these two minimum conditions, which is a way of securing the representativeness of the scrutiny. Besides, the Court noted that a quorum for the participation of most voters is also needed in other states, as well: Poland, Bulgaria, Croatia, Italy, Malta, Lithuania, Slovakia or Russia. In Latvia, the quorum is half the voters who participated

[19] By Ruling no. 1 of the 15th of October 2003.
[20] Decision no. 735 of the 24th of July 2012.
[21] Ibidem.
[22] Decision no. 334 of the 26th of June 2013.

in the last legislative elections. In Portugal, if the participation rate is not more than 50 percent, the referendum has no binding, but only consultative effect.

A quorum of approval of a quarter of the electorate is established in Hungary. In Albania and Armenia, the quorum is one third of the electorate. In Denmark, a constitutional amendment must be approved by 40 percent of the electorate; in other cases, the voted legal provision is rejected not only if the simple majority of voters voted against, but only 30 percent of voters enrolled in the electoral lists - the Netherlands or Denmark.

The Court held that the law does not require citizens to participate in the referendum, but only their right and it is in the will of every citizen to decide freely whether to exercise this right or not. In the Constitutional Court Decision no. 3 of August 2, 2012, published in the Official Gazette of Romania, Part I, no. 546 of August 3, 2012), the Court held that the expression of a political option can take place not only by participating in the referendum but also by not participating in it, especially in cases where the relevant legislation imposes a quorum of participation. A majority of the blockage can be created in relation to the number of citizens of a state. This way, those who choose not to exercise their right to vote believe that through passive conduct they can impose their political will. Exercising a constitutional right, citizens see their own beliefs indirectly, by not accepting the contrary. Therefore, the non-participation in the referendum, namely the non-exercise of the right to vote, is also a form of expression of the political will of the citizens and of participation in political life.

Over the time, the legislative instability concerning the referendum, caused by the frecquent amendment of this legislation, especially during periods when Parliament was preparing for a dismissal of the President or when initiating the revision of the Constitution, turned out to be not just a factor of legal uncertainty, but also a source of civic discontempt towards this legislation, oftenly criticized on the occasion of its application. In this context, the Court held that the legislator can change the quorum for participation in the referendum, but the Constitutional Court must ensure that the instrument is not used for contrary purposes than the one that the constituent legislator intended in what concerns the referendum, as an essential legal institution in a state governed by the rule of law and as a form of direct participation of citizens in decision-making process.

The Court has to ensure compliance with the principles of legal stability of the referendum laws and of the loyal consultation of citizens, principles which presuppose the creation of all conditions for the voters to be aware of the issues under scrutiny, the legal consequences of lowering the threshold of participation to vote, as well as the effects of the result of the referendum on the general interests of the community.

However, given that the threshold for participation is a prerequisite condition for the referendum to be able to effectively express the will of the citizens, constituting the premise of an authentic democratic manifestation of sovereignty, the Court stressed trhe fact that its task is to strike a fair balance between the need to protect the right to decide to participate in the referendum of the citizens as a fundamental right and the desire of a parliamentary majority to impose its political will in the State at a given moment.

The preservation of the rule of law and democracy requires the Constitutional Court, as the supreme guardian of the Constitution, to prevent the consequences of the unexpected change of the legal provisions in the field of referendum and to comply with the principles of legal stability (which require clarity, predictability and accessibility) the right to vote, the freedom of choice, and the interpretation of the letter and spirit of the Constitution in good faith, principles which constitute structural elements / valences of the general principle of legal certainty, unanimously accepted within constitutional democracy.

Therefore, the new regulations should not create a state of uncertainty about a defining element of the examined procedure, since the choices of the ordinary legislator regarding the quorum for participation in the referendum can fluctuate according to the will of the political majority in Parliament and the conjunctural interests of its nature and can create a general state of uncertainty regarding an essential element of the referendum, namely the validity of the referendum.

Accordingly, the Court noted that, in order to ensure compliance with the general principle of legal stability in the matter of the referendum, in line with the recommendations of the Code of Good Practices on the Referendum adopted by the Venice Commission, with the First additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms and with the International Covenant on Civil and Political Rights, the provisions of the Law for the amendment and completion of the Law no. 3 of 2000 on the organization and conduct of the referendum are constitutional, but they cannot be applied to referendums organized within one year of the enactment of the amending law.

4. The Referendum Regarding the Amending of the Basic Law

Due to the long-term impact of a constitutional change, the Romanian lawmaker has established a procedure for revising the Basic Law that gives it both stability and legitimacy. That is the reason it provided that the organization and conduct of the referendum on

the amending of the Constitution, as well as its outcome, are mandatory[23].

According to Article 150 Paragraph 1 of the Basic Law, a revision of the Constitution may be initiated by the President of Romania at the proposal of the Government, by at least one quarter of all Deputies or Senators, as well as by at least 500,000 citizens having the right to vote. Article 151 Paragraph 1 and 3 states that the bill or proposal for revision must have been adopted by the Chamber of Deputies and by the Senate, by a majority of at least two-thirds of the members of each Chamber and revision shall be final after approval by a referendum held within 30 days from enactment of the bill or proposal concerning such revision.

Regarding this kind of issue, the Venice Commission stated that „a national tradition of holding referendums may contribute to the democratic legitimacy of a constitution. In the view of the Commission, in certain circumstances, it may also reduce the risk that political actors could try unilaterally to change the rules of the game. Referendums can also contribute to strengthening the democratic legitimacy of the constitutional protection of human rights" .

Until now, there were seven initiatives of amending the Basic Law of Romania, but only one has achieved its final goal, in 2003. Each time, the Constitutional Court has rendered decisions regarding the complience with the limits of revision enshrined as the "hard-core" of the Constitution, concerning the national, independent, unitary and indivisible character of the Romanian State, the Republican form of government, or territorial integrity, independence of judiciary, political pluralism, the official language and the citizens' fundamental rights and freedoms, or their safeguards [24]. It also confimed the turnout of the national referendum on the 18th-19th of Octomber 2003 and noted that the Law on the Review of the Romanian Constitution, published in the Official Gazette of Romania, Part I, no. 669 of the 22nd of September 2003, was approved by referendum. At the time of publication of this decision in the Official Gazette of Romania, Part I, the Law for the Revision of the Romanian Constitution entered into force.

5. Referendum on the Dismissal of the President of Romania From the Office

The referendum on the dismissal of the President of Romania is compulsory and is determined by a decision of the Parliament, under the conditions stipulated in Article 95 of the Constitution. The dismissal of the President is in fact a popular revocation, Parliament can not dismiss he/she discretionary, as the President was elected by the people and not by the Parliament, that is why he/she does not answer to the Parliament, but to the electoral body who chose him/her by universal suffrage[25]. According to the forementioned constitutional provisions, in case the President of Romania has committed a serious offence in violation of the Constitution, he may be suspended from office by the Chamber of Deputies and the Senate, in a joint session, by a majority vote of Deputies and Senators, and after seeking opinion from the Constitutional Court. If the proposal of suspension from office has been approved, a referendum shall be held within 30 days for removing the President from office.

The dismissal of the President of Romania is approved if, following the referendum, the proposal has received the majority of the votes validly cast. This rule is valid only in conjunction with those established by the Constitutional Court by Decision no. 731 of 10th of July 2012, in the sense that the text is constitutional insofar as it ensures the participation in the referendum of at least half plus one of the number of persons on the permanent electoral lists.

Another procedural rule regarding the majority required to dismiss the President was outlined by another decision of the Constitutional Court[26], which was called upon to rule on the provisions of the same art.10 of Law no.3 of 2000, as it was to be amended. It intended to establish that the dismissal of the President of Romania is approved if it has obtained the majority of the votes of the citizens enrolled in the electoral lists, if the President of Romania was elected from the first ballot, and if the President of Romania was elected in the second ballot, his/her dismissal is approved if he/she has obtained the majority of votes validly expressed throughout the country by the citizens that voted.

Analyzing the objection of unconstitutionality, the Court found that, by amending the content of Article 10 of the Law no. 3 of 2000, the legislator wanted to apply, in terms of the votes cast, the principle of legal symmetry when electing the President of Romania in the second ballot and dismissing it as a result of the popular consultation. The Court noticed that, basing its solutions on the principle of symmetry, the legislator did not take into account the fact that the application of this principle in public law is not possible, even more so in constitutional law, especially when the organization and functioning of public authorities is at stake. The principle of symmetry is a principle of private law, and the possibility of its application in public law is excluded. That is why constitutional norms are asymmetrical *par excellence*. Thus, the Parliament is elected by the people, but ceases its mandate by passing the time or by the dissolution of the President of Romania; the Government is appointed by the President of Romania on the basis of Parliament's vote of confidence, but it is dismissed

[23] Article 6 of the Law no.3 of 2000.
[24] Article 151 (1) and (2) of the Basic Law.
[25] Decision no. 70 of the 5th of May 1999.
[26] Decision no. 147 of the 21st of February 2007.

following a vote of distrust, due to the resignation of the Prime Minister or when he/she loses his/her electoral rights or is in a state of incompatibility, etc .; eligible public functions are held by people who have obtained them in elections and cease by revocation, occurrence of incompatibility, leakage of time, etc.

Similarly, in the case of the President of Romania, the holding of this position is entrusted to the person who won the presidential election and the cessation of the presidential election takes place as a result of a conviction for high treason, the approval of the dismissal by referendum, the incompatibility, etc. Therefore, the requirements set by the Constitution for the election of the President of Romania and those referring to his dismissal following a referendum are not symmetrical, because they are different legal institutions with different roles and purposes, each with distinct legal treatment.

Thus, the election of the President of Romania is governed by a homogeneous group of legal norms, which establish the rules regarding the organization and holding of the presidential election. At the end of this electoral process, according to Article 81 Paragraph 2 of the Constitution, the candidate who has assembled in the first ballot the majority of the voters who have been included in the electoral lists shall be declared elected. It is possible, however, that in the first ballot, none of the candidates obtain the absolute majority of the votes required by Article 81 Paragraph 2 of the Constitution. Under these circumstances, the electoral process must continue in order to get a winner. As such, the second ballot is organized, only with the first two candidates taking part ranged on the number of votes obtained in the first round. The candidate with the highest number of votes will be appointed as President of Romania.

On the other hand, the dismissal by referendum of the President of Romania does not have the significance of such an electoral competition. On the contrary, it is a sanction for committing serious acts by which the President of Romania violates the provisions of the Constitution. The distinctions regarding the dismissal of the President of Romania by referendum, as it results from the provisions of point 2 of the unique article of the criticized law, regard the President of Romania who obtained the mandate in the first round, the President of Romania elected in the second round of elections and also the interim president. Following the legislator's logic, in the first case, the president would be dismissed with the absolute majority of the votes of the electoral body; in the second case, with the relative majority of the votes of the citizens present at the polls, while for the situation provided by art. 99 of the Constitution, on the "Interim President's Liability" that was not elected by vote, there would be no constitutional provision on dismissal. Such an interpretation is contrary to Article 1 Paragraph 3 of the Constitution, according to which Romania is a state governed by the rule of law, such a state opposing the application of the same sanction to the President of Romania, in different way that depend on how he/she obtained this function: in the first round of voting, second ballot or as interim in the exercise of his / her office.

The rational solution of this problem lies in the fact that, in the event of serious acts infringing the provisions of the Constitution, the President of Romania - whoever he/she is and anyway he/she would has become head of state - may be suspended from office by the Chamber of Deputies and the Senate, in a joint session, with the vote of the majority of deputies and senators. As such, when the legislator established by law that the results of the referendum on the dismissal of the President of Romania are set differently, depending on the number of the ballot in which he was elected are contrary to the constitutional provisions of Article 81 Paragraph 2. In this respect are also the provisions of Article 96 of the Constitution, which establish a second way for the ceasing of the position of President of Romania, namely the prosecution for high treason. In this case, too, the opening of the road to the end of the presidential term is decided by the Chamber of Deputies and the Senate in a joint session, which may decide the prosecution of the President of Romania - no matter who he/she is, with how many votes he/she won the election or by what way he/she occupies this position. Hence the conclusion that, when the constituent legislator wished to establish a certain majority of votes, he did so by a reference text, whose application to subsidiary situations is understood, except where such a the majority is left to the law.

The constitutional provisions regarding the majority required for the election of the president in the first round are sufficient to allow the determination of the dismissal of the head of state in all cases by analogy and not by the legal symmetry. However, the Court stated that it does not rule out the possibility for the legislator to opt for a majority of relative votes for the dismissal of the President of Romania in all three situations. As a consequence, the Court found that the Law amending and supplementing Law no. 3 of 2000 on the organization and conduct of the referendum which envisages such a legislative solution is unconstitutional[27].

Following the re-examination of the law, the reason for unconstitutionality shown above was removed[28] by a new wording of Article 10, which stipulates, for all situations, a single majority of votes by which the President of Romania can be dismissed, if "the majority of the validly expressed votes at the national level bby the citizens who participated in the referendum" was met. In this way, the text has been put in concordance with the clarifications made by the Constituional Court in the Decision no. 147 of 2007.

[27] Decision no. 147 of the 21st of February 2007.
[28] This fact was noticed by the Constitutional Court by a subsequent decision, namely Decision no. 420 of the 3rd of May 2007.

The question of the percentage of valid votes required for the dismissal of the President came again into the attention of the Court[29] in 2012, after the Article 10 was once again amended, meaning that the dismissal of the President of Romania is approved if, following the referendum, the proposal has met the majority of the votes validly expressed.

Noteing the numerous legislative changes of the criticized provision, the Court recalled that in the Code of Good Practices on the Referendum adopted in 2007, the European Commission for Democracy through Law (the Venice Commission) recommended to States to ensure stability with regard to legislation in electoral and referendum matters.

The Court also found that the outcome of the referendum depends on the cumulative fulfillment of two conditions: one referring to the minimum number of citizens who have to participate in the referendum so it be considered valid and one on the number of validly cast votes that determine the result of the referendum. These conditions are detailed in Article 5 Paragraph 2 and Article 10 of the Law no. 3 of 2000. According to Article 5 Paragraph 2, as it was written at that time, "The referendum is valid if at least half plus one of the number of persons on the permanent electoral lists attended the polls".

The Court observed that the Law for the amendment of Article 10 of the Law no. 3 of 2000 provides a unitary regulation for all types of referendum established by the Constitution, giving expression to the representativeness demand in terms of the turnout of the vote. Thus, the same legislative solution can be found in the referendum on the amending of the Constitution, the referendum on issues of national interest and the local referendum, where the result is determined by the majority of votes validly expressed throughout the country.

Similarly, the Court found that the condition to be met for the validity of the referendum is the same for all types of referendum, Article 5 Paragraph 2 of the Law no. 3 of 2000 requiring the meeting of the absolute majority consisting of half plus one of the number of persons on the permanent electoral lists. The Court held that this is an essential condition for the referendum to be able to effectively express the will of the citizens, constituting the premise of an authentic democratic manifestation of sovereignty through the people, in accordance with the principle stated in Article 2 Paragraph 1 of the Basic Law. The participation of the majority of the citizens in the referendum is an act of civic responsibility, in which the electoral body is to decide whether or not to sanction the President of Romania, having the possibility of dismissal or keeping him in office. As such, it found that the Law for the amendment of Article 10 of the Law no. 3 of 2000 is constitutional insofar as it ensures the participation in the referendum of at least half plus one of the number of persons on the permanent electoral lists.

6. The Referendum on National Interest Issues

According to Article 11 of Law no. 3 of 2000, the President of Romania, after consulting the Parliament, may ask the people to express their will through a referendum on issues of national interest. The issues that are subject to the referendum and the date of the referendum are established by the President of Romania, by decree.

Initially, this law stipulated that the referendum on issues of national interest was organized before the adoption of measures, including legislation. By Decision no. 70 of the 5th of May 1999, the Court found that this legal provision was unconstitutional because it limited the possibility for the President to initiate the referendum only to the situation in which it is held prior to the taking of measures. This wording created the premises of restricting the exercise of a constitutional right of the President and added a non-existent condition in the text of Article 90 of the Constitution, which provides: "The President of Romania, after consulting the Parliament, may ask the people to express their will on issues of national interest by referendum". In the light of these provisions, consultation of Parliament is, in all cases, mandatory. The Constitution does not, however, condition, by reference to a certain period, the initiation by the President of this form of popular consultation on issues of national interest. Thus, the legal provision submited to the constitutional review was seen by the Court as a restriction of the President's right, by obliging him to propose to the Parliament what "other problems" are to constitute the object of the referendum it intends to initiate. In fact, the President is the only one entitled to establish "issues of national interest" on which he/she can ask the people to express their will by referendum.

The Court subsequently developed this theory, through Decision no. 567 of the 11th of July 2006 on the objection of unconstitutionality of the provisions of Article 12 Paragraph (1) of the Law no. 3 of 2000, which lists the problems considered of national interest. The Court found that the referendum procedure initiated by the President on "issues of national interest", involves two phases: the consultation of the Parliament, which is to adopt a decision in the joint session of the two Chambers, with the vote of the majority of the deputies and senators on the referendum initiated by the President of Romania. If the Parliament has not been consulted, the President will not be able to initiate the referendum. The second stage is the consultation of the people, expressing their will on matters of national interest submitted to them by the President.

Article 90 of the Constitution establishes the exclusive competence of the President in determining national issues of interest to the referendum, even if Parliament's consultation is compulsory. Only the President of Romania has the right to decide which are

[29] Decision no. 731 of the 10th of July 2012.

the issues of national interest and, within them, to establish by decree the concrete issue that is subject to the referendum and the date of its implementation. In this regard, the Court found that the limiting list in Article 12 paragraph 1 of the Law no. 3 of 2000 of certain situations considered to be "problems of national interest" is likely to restrict the President's right to consult the people, knowing that, over time, the national interest may differ, whenever new situations may arise, claiming the organization of a referendum. Any listing of situations considered to be of "national interest" at the time when the legislator adopts the regulation may later turn into a constraint, to a limitation that affects the constitutional right of the President to decide on its own problems to consult the people. That is why establishing by law the problems of national interest represents a mixture of Parliament in the exercise of the exclusive powers conferred on it by the Constitution to the President and, as such, a disregard for the principle of separation and balance of power within constitutional democracy.

7. The Role of the Constitutional Court in the Procedure of the Referendum

Beside reviewing the constitutionality of legislation, the Constitutional Court is responsible for exercising various powers which undeline its important role in enforcing the supremacy of the Basic Law and the values and principles of democracy. In 1991, when drafted the first genuine democratic Basic Law after the Second World War, the Romanian constituent power stated that the national sovereignty belongs to the Romanian people, who shall exercise it through their representative bodies, namely the Parliament and the President of Romania, established as a result of free, periodic and fair elections. But it also also provided a way of direct involvement of the people in the political decision making process, by means of a referendum. Thus, the referendum becomes the instrument of direct democracy enshrined in the Romanian Constitution.

The Constituional Court keeps in mind those stated by the Venice Commisssion in the Code of Good Practice on Referendums, according to which the principle of the rule of law, which is one of the three pillars of the Council of Europe along with democracy and human rights, applies to referendums just as it does to every other area. The principle of the sovereignty of the people allows the latter to take decisions only in accordance with the law. The use of referendums must be permitted only where it is provided for by the Constitution or a statute in conformity with the latter, and the procedural rules applicable to referendums must be followed[30].

By Decision no. 51 of the 25th of January 2012, the Court pointed out, in relation to the legal force of the provisions of the Code of Good Practice in Electoral Matters, drafted by the European Commission for Democracy through Law, invoked by the authors of the petition, that "its recommendations are the coordinates of a democratic election in which the states - which are characterized as belonging to this type of regime - can manifest their free choice in electoral matters, respecting the fundamental human rights in general and the right to be elected and to choose, in particular ".

In Romania, the referendum has to be organized each time the Constitution is subject to a revision and also when the dismissal of Romanian President is at stake. In both cases, the result of the valid referendum cannot be disregarded. These two variaties of referendum are compulsory both in what concerns their organization and their outcome. On the contrary, the so-called consultative referendum is optional from both fore-mentioned points of view: its necessity and result. It is organized at the national level on the request of the President of Romania, who may ask the People of Romania to express its will as to questions of national interest.

The Constitutional Court supervises the observance of the procedure for the organization and carrying out of a referendum, and it confirms its results. In order to implement the provisions above, the Constitutional Court is entitled to request information from any public authority[31]. Within this power, the Court renders a ruling, which has to be taken by a vote of two-thirds of the judges of the Court. The Constitutional Court publishes the ruling on the outcome of the referendum in the Official Gazette of Romania, Part I, and in the press. Before publication in the Official Gazette of Romania, the ruling of the Constitutional Court shall be presented to the Chamber of Deputies and the Senate, in their common session[32].

As effects of the ruling, the Law for revision of the Constitution or, as the case may be, dismissal from office of the President of Romania comes into force on the day of publication in the Official Gazette of Romania of the Constitutional Court’s ruling confirming the referendum’s results.

There were 5 referendums that have been organised in Romania until now: one referendum on the revision of the Constitution (held between the 18th-19th October 2003). The Romanian Constitution was initially approved by the national referendum of the 8th of December 1991; two referendums on the dismissal of the President of Romania from office (held on the 19th May of 2007 and the 29th of July 2012); two referendums at the initiative of the President of Romania on matters of national interest (held on the 25th of November 2007 and the 22nd of November 2009), regarding the introduction of the first-past-the-post vote for the election of the members of the

[30] CDL-AD(2007)008rev, Code of Good Practice on Referendums.
[31] Article 46 of the Law no. 47 of 1992.
[32] Article 47 of the Law no. 47 of 1992.

Romanian Parliament[33] and respectively, the moving to a unicameral parliament and the decrease in the number of members of the Romanian Parliament to a maximum of 300 parliamentarians[34].

The Constitutional Court establishes whether the procedure for the organisation and holding of the referendum and the confirmation of its returns was observed or not16 [Article 146 i) of the Constitution and Article 46 (1) of Law no. 47/1992]; prior to its publication in the Official Gazette of Romania, Part I, the Constitutional Court's ruling is submitted to the Chamber of Deputies and the Senate, in joint session [Article 146 i) of the Constitution and Article 47 (3) of Law no. 47/1992].

Regarding the manner in which this function was exercised, the Court delivered a decision [35] in the *a priori* review of constitutionality, analyzing the provisions of Article 45 Paragraph 1 of Law No. 3 of 2000, which should have been amended in the sense that "the Constitutional Court shall, at the reasoned request and accompanied by the evidence on which the parties or their alliances are based, cancel the national referendum if the voting and the results have been established through fraud". The authors of the objection argued that it contravenes the constitutional provisions that give the Constitutional Court the right to observe the procedure for organizing and conducting the referendum and to confirm its results. Since none of these constitutional provisions makes the exercise of the Court's powers subject to any referral, it is imperative that the Court would act *ex oficio* and annul the referendum, if it finds that the procedure for its organization and conduct has been violated.

The Court has held that the claim was well founded. Thus, the Court noted that the Constitution, by means of a general wording, recognizes the Court's right to resolve actions specific to the constitutional litigation and, from that position, to resolve the petitions or complaints relating to possible deviations from the referendum rules and procedures. It is no less true, however, that within the scope of the right conferred by the Constitution on "observing" the observance of the procedures for the organization and holding of the referendum also comes the possibility of the Court to react by itself when it finds out directly or when it has information from citizens, the press, non-governmental organizations, etc. in connection with non-compliance with these rules and procedures. This possibility is indissolubly linked to the exercise of the Court's attributions to "confirm" the results of the referendum. In the case of finding frauds that question the fairness of the turnout of the referendum, the Court does not confirm this result. The significance of nonconfirmation, which is a legal act with serious consequences, is that of finding the national referendum null and void. For this reason, the Court cannot be limited in its action by the necessity of the existence of a request from the parties or their alliances.

Conclusions

The jurisprudence synthesized above, although representing just a part of the issues which the Constitutional Court was called to resolve in conexion with the referendum, reflects the contribution that this authority has had in the clarifying of the normative framework governing the organization and holding of the referendum. The finality pursued by the Romanian jurisdiction of constitutional review has always been to maintain the democratic character of this instrument, through which citizens express their opinion and are able to participate in taking a decision. At the same time, the Court has always took into account the fact that the main feature of the referendum resides in its function of legitimizing power, the popular will validating the acts to be voted. The referendum diminishes the gap between the governors and the governors, and democratically completes the relations resulting from the elections. In other words, the referendum is a means of manifesting the role of the citizen in politics, within the scope of the public debate. On the other hand, the referendum gives the people the opportunity to control the power and the way this is exercised, as well as the possibility to deal with extremely important political issues (such as those related to the dismissal procedure of the President of Romania). The Court also warned that the referendum does not constitute an alternative to the parliamentary democracy and its abusive use can undermine the legitimacy and role of Parliament as a representative body of the people. The same view was expressed in doctrine, where it has been noted that although the referendum can be a powerful instrument to increase the responsiveness of political system, nevetheless, one should not forget that too much responsiveness may not always be a good thing, and that on certain issues it may be worthwhile to protect elite consensus, namely the Parliament, against too much popular pressure[36].

The legislation examined by the Constitutional Court proved to be insufficiently clear and its frequent amendements, sometimes dictated by short-term interests, raised questions about its effectiveness and its ability to provide an effective framework for the

[33] The Decree of the President of Romania no. 909 of the 23rd of October 2007 for the organisation of a national referendum on, published in the Official Gazette of Romania, Part I, no. 719 of the 24th of October 2007, considered to be unconstitutional, as the object of the referendum was different from that on which the Parliament was consulted, as well as the fact that "it does not set a date, but a delay" for holding the referendum (Ruling no. 7 of 2007)

[34] The Decree of the President of Romania no. 1.507 of 22 October 2009 for the organisation of a national referendum (Ruling no. 33 of 2009)

[35] Decision no. 70 of the 5th of May 1999.

[36] Thomas Poguntke, ”Introduction” in *Referendums and Representative Democracy. Responsiveness, accountability and deliberation*, ed. Maija Setälä and Theo Schiller (New York: Routledge, 2009), xvi.

referendum to express the political will of the people. In order to maintain the rule of law, it is necessary to address this issue seriously and responsibly so as to respect both the principle of legal certainty and the democraticaly recognized ability of citizens to make their voices heard in matters of national importance.

References

- Jean-Michel De Waele, Referendumurile de aderare la Uniunea Europeană (Iași: Editura Institutul European, 2007)
- Giorgio del Vecchio, Lecții de filosofie juridică (București: Editura Europa Nova, 1997)
- Ion Deleanu, Instituții și proceduri constituționale – în dreptul roman și comparat, (București: Editura C.H.Beck, 2006)
- Olivier Duhamel, "Le référendum – Introduction", Pouvoir no.77/1996
- Ioan Muraru, Elena Simina Tănăsescu, Constituția României. Comentarii pe articole (București: Editura C. H. Beck, 2008)
- Thomas Poguntke, "Introduction" in Referendums and Representative Democracy. Responsiveness, accountability and deliberation, ed. Maija Setälä and Theo Schiller (New York: Routledge, 2009)
- Austin Ranney, "Référendum et Démocratie", Pouvoir no.77/1996
- CDL-AD (2005)034, Referendums in Europe – an Analysis of the Legal Rules in European States, Report adopted by the Council for Democratic Elections at its 14th meeting (Venice, 20 October 2005) and the Venice Commission at its 64th plenary session (Venice, 21-22 October 2005)
- CDL-AD(2007)008rev, Code of Good Practice on Referendums
- Decision of the Constitutional Court of Romania no. 70 of the 5th of May 1999
- Ruling of the Constitutional Court of Romania no. 1 of the 15th of October 2003
- Decision of the Constitutional Court of Romania no. 147 of the 21st of February 2007
- Decision of the Constitutional Court of Romania no. 420 of the 3rd of May 2007
- Decision of the Constitutional Court of Romania no. 845 of the 8th of June 2009
- Decision of the Constitutional Court of Romania no. 731 of the 10th of July 2012
- Decision of the Constitutional Court of Romania no. 735 of the 24th of July 2012
- Decision of the Constitutional Court of Romania no. 334 of the 26th of June 2013
- Decision of the Constitutional Court of Romania no.612 of the 3rd of October 2017

THE EUROPEAN PUBLIC SYSTEM OF HUMAN RESOURCES. PERFORMANCE IN ORGANIZATIONS AND GOOD PRACTICES FOR ROMANIA

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Abstract

Considering the fact that recruitment and selection activities are vital in ensuring the human resources flow in every private or public organization sector, the present paper seeks to elaborate a proposal aimed to modernize the recruiting and selection process within the Romanian public service based on best practices models implemented in other European states.

From the perspective of providing adequate training skills and abilities needed by the qualified personnel, initial training is very poor. Practical training is not on the same level of quality with theoretical one and the current system of examinations in education units, based predominantly on theoretical assessment, do not motivate learners well enough in order to gain practical skills. Continuous training programs organized by the units do not always take into account the needs of the personnel or are not adapted to the job description, the category and level of specialization of the beneficiaries' functions and the degree of novelty and utility of most of the presented theoretical information is usually low.

The costs of selecting one person for the public service are usually very high, including not only the cost of the initial recruiting, but also the long term cost, represented by the continuous training of the employee. Consequently, recruiting human resources is a basic part of both public and private systems.

Keywords: *public administration, occupation of vacant public positions, recruitment methods, transparency, equal opportunities.*

1. General Aspects of the Recruitment and Selection Process

The staffing process at the organizational level has been defined as a sum of activities indispensable in order to meet individual and organizational goals. Personnel recruitment and selection activities can be considered as the main ways to achieve the staffing process. The more important this process is when we talk about state authorities and institutions.

Personnel recruitment is defined as the process of seeking, locating, identifying and attracting prospective applicants from whom qualified candidates will be elected, who ultimately have the necessary professional characteristics or best fit vacant current and future posts[1]. Recruitment is also the time when a job is searched for by someone seeking a person by an organization to fill in a post. It is concluded by achieving a full concordance between the requirements of the post and the personal and professional characteristics of the person, materializing through the employment offer[2].

At the same time, the selection of personnel is that human resource management activity which consists in selecting, according to certain criteria, the most competitive or the most suitable candidate to fill in a particular post[3]. The main objective of staff selection is to identify those employees who are closest to the desired performance standards and who have the best chances to achieve individual and organizational goals.

In all European Union states, it is said that the administration is at the service of all citizens. The very term of administration comes from the Latin "administer" that translates as "agent", "helper", "servant", and in another sense - "instrument". It is therefore necessary for the recruitment and selection procedures to be finalized by selecting the most qualified persons for the fulfillment of the prerogatives of public power.

A new concept has emerged in recent years, namely the European Administrative Space, which involves a set of legally binding principles, rules and regulations that are respected in a given territorial area[4]. Each state has its own administrative culture and, implicitly, its own rules of public administration. So it can not be a single public administration for all the sovereign states of the European Union, but one can speak of the approximation in certain areas of the legislation, under the guidance of the Community legislation, the legislative activity of the European institutions and the cases of the European Court of Justice. Moreover, states borrow some from other successful experiences and practices in fields that have been the sole object of national sovereignty in the past and have proved to be somewhat permeable to change.

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[1] Aurel Manolescu, *Managementul resurselor umane*, Economica Publishing House, Bucharest, 2001, p. 26

[2] Cristina Manole, *Managementul resurselor umane în administraţia publică*, ASE Publishing House, Bucharest, 2006, p. 83

[3] Viorel Lefter, Alexandrina Deaconu, Cristian Marinaş, Eivira Nica, Irinel Marin, Ramona Puia, *Managementul resurselor umane. Teorie şi practică*, 2nd Edition, Economica Publishing House, Bucharest, 2008, p. 45

[4] Iorgovan Antonie, *Introducere. Organizare adminitrativă. Funcţia publică*, All Beck Publishing House, Bucharest, 2005, p. 72

Administrative law in general and the public function in particular in Romania was one of these rigid domains. With the need to integrate into the structures of the European Union, the way for the modernization of the public office has been opened. This process had as its starting point the experiences of other European states which have a long democratic tradition[5].

In this paper, I chose to present the practices of France and the United Kingdom of Great Britain and Northern Ireland as two representative states for the two systems of the civil service: the "career" system and the "post" system. We also considered that the recruitment and selection systems of these two countries contain fundamental elements in this area, which could represent good practices for Romania. This is the reason why the present paper is based on a comparison of the "career" system and the "post" system, followed by a detailed analysis of the public system of human resources in Romania.

The reform of the public office involved the reform of public recruitment, a process considered opaque and not accessible to the great majority of the population, according to the studies carried out by the European Institute of Romania, but also by the National Agency of Civil Servants.

The modernization of public service recruitment is a constantly evolving process. A first step was the establishment of principles of transparency, equal opportunities and merit, as well as the establishment of the open competition as the main recruitment method[6].

Regarding the similarity between the Romanian public recruitment system and the other European models, it can be said that the Romanian state has traditionally been close to the French one (starting with the first Civil Code adopted under Alexandru Ioan Cuza, following the model of the Napoleonic Code and continuing to the present day), taking from it numerous regulations on public administration. This is also true of the civil service, which also follows a civil servant's career model. Also, the classification of the public service in Romania (state, territorial and local) presents some common points with that in France (state, territorial and hospital). Despite these similarities, there are points that differentiate them and I might recall here the preference of the French Republic towards a competition for access to the state public function organized at national level, rather than one organized by each public authority or institution.

The approximation of French administrative law should not prevent the taking of other examples of good practice from the states that have opted for a post-civil service system. Here, the Nordic states, the Netherlands and, of course, the United Kingdom can be mentioned. It should also be mentioned here that I do not support the adoption of such a system in the case of the Romanian civil service. However, some practices of these states can be adopted and adapted, as we can see in the next analysis.

2. Recruitment to the public position in France

In the French public service, whether state, hospital or territorial, professional life is guided by the career principle. Thus, an official is recruited within a body of officials, who, depending on the position to be assigned, will be able to try out more trades. The continuity of his career is not interrupted neither by the change of employer nor by the change of activity.

A fundamental principle of access to the French civil service is the principle of equal access to public functions. This principle, governed by the statute of the civil service of 13 July 1983, is a general principle of public law and originates in Article 6 of the Declaration of Human Rights of 1789. It is the translation of the principles of democracy into the public function plan[7].

2.1. Organizing the contest for the public function of the state

Established by Article 16 of the Civil Service Statute of 1983, it is considered to be the method which ensures the greatest possible recruitment of well-trained officials from a professional point of view. There are two forms of competition: the open one, for all citizens, and the internal one, organized for existing civil servants. Most contests are annual. Article 19 of Law No. 84-16 of February 11th, 1984 on the public function of the state provides for the possibility of acceding to a public position of the state either by external competition, either by internal competition or by the third competition.

The competition can be organized nationally or deconcentrated. The ministry's competence in organizing the contest may be delegated, by joint order of the ministry with componence in that specific area and the ministry of civil service, following consultations of the technical committees, representatives of the state in the region, the department, the territory or the overseas collectivity.

The contest has several stages:

- The organization of the contest falls under the responsibility of the competent public authority. The Minister is competent to set up examination and competition centers. The publication of the job offer must be sufficient. The presence of a person who is not a jury may result in the cancellation of the contest. The number of available seats differs at each contest. All members of the jury must be established before each contest, their number being editable before the tests start.
- Establishing the list of candidates to participate in the competition. This list approved by the Minister

[5] Cezar Corneliu Manda, *Teoria administraţiei publice*, C.H. Beck Publishing House, Bucharest, 2013, p. 88
[6] Abrudan Denisa, Novac Emilia, *Resursele umane şi performanţa în organizaţii*, Eurostampa Publishing House, Timişoara, 2013, pp. 29-33
[7] Peiser Gustave, *Droit de la fonction publique*, 13 ed, Dalloz, Paris, 2003, p. 38

prior to any competition, allows the elimination of candidates who do not meet all the conditions. The examination is carried out by a jury, a collegial body that must be fair and impartial, and have knowledge in the field. The jury has the possibility to draw up the list of candidates admitted, in order of merits, a list that will be forwarded to the competent authority. If deemed necessary, the jury may be in groups of examiners and, at the end of the examination, to ensure equal grading, they will deliberate on the final marks. Within the jury, with the consent of the authority invested with the power to appoint the members of the jury, special examiners may participate on certain issues. They participate in the deliberations of the jury and have a consultative vote.

Each contest is finalized with a list that ranks by merit candidates nominated by the jury. This jury also establishes a supplementary list to allow candidates to be replaced on the main list if, for any reason, they can not be appointed.

2.2. Recruitment in the territorial public function

The competition is the main rule for recruitment in the territorial public function. It is organized either by the National Center for Territorial Public Functions or by the Departmental or Interdepartmental Centers for the Management of Territorial Public Functions or, in some cases, directly by the collectivities.

The general conditions for access to the public office are common to all three public functions[8]:

- Age at least 16 years of age;
- French nationality or another EU Member State;
- Compliance with national service obligations in France or the state of origin;
- The fullness of the exercise of civic rights;
- Fulfillment of physical fitness conditions;
- Lack of criminal convictions.

And with regard to the condition of studies, the general provisions apply, so that for extarnal competitions applicants must submit:

- For category A: Bachelor's degree or equivalent;
- For category B: baccalaureate diploma or equivalent;
- For category C: no diploma;

There is also the possibility for candidates who do not have a diploma that allows them access to the competition, to apply for the equivalent of another diploma or, in the absence of a full diploma, to apply for the equivalence of their experience in the workplace, either in the public sector or in the private one.

European citizens have access to the territorial public function, except for the municipal police.

As in the case of the state or hospital civil service, there is the possibility of direct access to the job without a contest. Access to the first degree in certain bodies, for category C, can be done through direct recruitment by collectives. Also, people with disabilities can be recruited directly, even without meeting the conditions[9].

3. Recruitment to the public position in the United Kingdom

The documents governing the public office in the United Kingdom are the Civil Service Management Code and the Civil Service Code issued by the Civil Service Tribunal. They are issued under the Constitutional Reform Act of 2010 and come to provide specific instructions on how and when the public office functions.

According to Article 10 of the Constitutional Reform Guidance Act of April 8th, 2010, the selection of a person to hold a public office must be based on merit, based on an open and transparent competition. This rule excludes the following categories of people:

- Selection for appointment to a diplomatic post or head of a diplomatic mission;
- Selection of a special counselor;
- Selections excepted from the recruitment principles.

Special advisers are persons who hold a position in one of the following administrations and whose appointment is governed by Section 15 of the Constitutional Reform Government Act:

- Her Majesty's Government of the United Kingdom, with the following requirements:
  - The person is called to assist a Coronet Minister after being selected for appointment by that minister personally;
  - Appointment is approved by the Prime Minister;
  - The terms of appointment are approved by the Ministry of Civil Service.
- The Scottish Executive:
  - The person is called to assist the Scottish Ministers;
  - Appointment is approved by the Minister of Civil Service.
- The Welsh Government:
  - That person is called upon to assist the Welsh ministers and his appointment is approved by the Ministry of Civil Service.

3.1. Commission of the public function and its role in recruitment

Section 2 of the Governance Act for Constitutional Reform establishes the creation of a Civil Service Commission. Commissioners of the Civil Service, as well as representatives of the Civil Service Commission, lead the selection committees to fill a public position[10]. As a member of a selection committee, the Commissioner's role is to ensure the

[8] https://www.fonction-publique.gouv.fr, accessed on January 15th, 2018, 18:40.
[9] Ibidem
[10] https://www.gov.uk/government/organisations/civil-service, accessed on January 27th, 2018, 13:15.

correctness of the recruitment process. The Commission is made up of commissioners and administrative staff. There are currently 13 civil servants. They are appointed by Her Majesty the Queen of the United Kingdom upon the recommendation of the Minister of Civil Service. They are recruited under the merit system following an open competition. They are guiding their work on the basis of a Code of Conduct approved in November 2010, replacing the old Code of Conduct approved by the 1995 Council Order. Paragraph 4 of this Code sets the following Commissioners:

- They will observe the highest standards of integrity, honesty, objectivity and impartiality;
- Will operate in a transparent and open manner, informing citizens about their activities, publishing an annual report, accountability to Parliament when they are interrogated;
- Not to abuse information acquired during the service in order to obtain personal gains;
- Not to be part of any political party;
- Not to publicly support or criticize any political party.

Commissioners of the civil service share a collective responsibility in relation to their activities within the Commission. These functions refer to:

1. Supervising the principles of recruitment of civil servants based on merit, open and fair competition;
2. Creating and publishing recruitment principles;
3. Chairmanship of Selection Committees for senior public functions;
4. Control of public authorities;
5. Solving complaints under the Civil Service Code.

3.2. The recruitment process involving the Civil Service Tribunal

Commissioners for the civil service participate in recruitment procedures only to the extent required by the regulations in force. Thus, a commissioner participates as chairman of the recruitment commission in the following cases:

- For the external recruiting of permanent secretaries and competitions for salary bands 2 and 3 as well as for internal competitions for secretary and salary band 3;
- In internal or external source competitions preceded by an official request from the department concerned and with the Commission's agreement that the direct involvement of the Commissioner is timely.

Steps of the selection procedure:

a) Planning: refers to a good identification of selection criteria and their hierarchy, but also to the level of remuneration and how to publish the ad.
b) Publication of the notice. There must be open and fair advertising of the vacancy notice using appropriate means. The commissioner who chairs the competition must agree on the manner of publication.
c) Longlisting: The committee must make decisions based on the merits of the applicants at each stage of the competition. The decision is collective, and if unanimity can not be obtained, the decision is taken by majority vote.
d) Shortlisting: this stage should be completed by selecting those candidates who will be interviewed (usually 3-5 applicants are selected).
e) Pre-interview used to assist the committee in choosing the right candidate.
f) Interview with the committee and final evaluation: it is the culmination of the competition finalized with the selection of the most suitable candidate for the post. The decision shall be taken unanimously, and if this is not possible, with the agreement of the members of the committee, the decision shall be taken by a majority. If the members of the committee do not agree on the majority vote, the competition may be abandoned. Interviews last between 45 and 50 minutes for each candidate. In the case of external source competitions for a salary band 3, time may be exceeded, and the committee may opt for another way of interviewing by dividing the commission. In the final interviews it is not customary to address the salary theme. It is true that the department has posted a salary in the ad, but may vary depending on the qualifications of the candidates. Thus, the recruiting authority is free to offer a salary different from the one published (but obviously the variation may be within reasonable limits).
g) Post-interview stage: The Commissioner will write a note to the department or the agency reporting the outcome of the competition. The role of this letter is to endorse the Commission's permission to the department or agency to make the appointment. So it is up to the department or the agency to appoint to the public office, in keeping with the Commissioner's recommendations for the public office. Moreover, its department is not obliged to make an appointment unless it comes to an agreement with the candidate nominated by the selection committee. In this case, the post will be given to the candidate with the next score.

4. Modernizing the recruitment of civil servants in Romania

4.1. Recruitment of civil servants in Romania

The statute of civil servants in Romania is regulated by Law No. 188/1999, which defines the civil servant as “the person appointed, according to the law, to a public office” (Article 2, Paragraph 2).

Chapter VI, entitled Career of Civil Servants, deals extensively with the topic of recruitment in public office. Pursuant to Article 54, a person who fulfills the following conditions may hold a public position:

a) is a Romanian citizen;
b) has domicile in Romania;
c) knows Romanian, written and spoken;
d) is at least 18 years old;

e) has full exercise capacity;
f) has a state of health appropriate to the public office for which he/she is a candidate, certified on the basis of specialized medical examination;
g) fulfills the conditions of study provided by the law for the civil service;
h) fulfills the specific conditions for the employment of the public office;
i) has not been convicted of committing an offense against humanity, against the state or against authority or service, which impedes the execution of justice, forgery or acts of corruption or intentional crime, which would render it incompatible with the exercise of public office, except in the case of rehabilitation;
j) has not been dismissed from a public position in the last 7 years;
k) did not conduct political police activity, as defined by law.

Occupation of vacant public positions can be done through promotion, transfer, redistribution and competition (Article 56). The conditions for participation and the procedure for the organization of the contest will be determined under the present law and the contest will be organized and managed accordingly:

a) by a competition commission for senior civil servants;
b) by the National Agency of Civil Servants, for the occupation of vacant pumnmmblic civil service, except for the public office of the head of office and head of department;
c) by the public authorities and institutions in the central and local public administration, for the occupation of the public office of the head of the office and the head of the service, as well as for the filling of the public execution positions and respectively the specific public vacancies with the opinion of the National Agency of Civil Servants.

The competition is based on the principle of open competition, transparency, professional merits and competence, as well as equal access to public functions for every citizen who fulfills the legal conditions. The conditions of the contest will be published in the Official Gazette of Romania, Part III, at least 30 days before the date of the contest. The persons participating in the contest must meet the seniority requirements in the civil service specialty provided by the present law. The conditions for the participation and the conduct of the contest, the bibliography and other data necessary for the competition to be displayed, shall be displayed at the headquarters of the public authority organizing the contest and on its website.

The procedure for organizing and conducting competitions is established by a Government decision, at the proposal of the National Agency of Civil Servants, according to the principles and conditions established by the statute[11].

G.D. No. 611/2008[12] on the organization and development of civil servants' career, stipulates that recruitment of civil servants is carried out through a competition organized within the limits of the vacant public positions, provided annually for this purpose through the civil service plan. We observe from this legal regulation that competition is established as a rule, a recruitment method that dominates all national systems and the European civil service system, thus becoming the common law in the recruitment of civil servants[13].

Once the conditions stipulated by the law have been met in order to enter a public office, the candidate wishing to apply has to take part in the competition for the respective civil service. The contest consists of three stages[14]:

I. Selection of registration dossiers;
II. Written test;
III. Interview.

So a first step is to submit a registration dossier. This file is to be reviewed by the contest committee to verify that the conditions for participation are met.

The written test consists of elaborating a synthesis work or solving some grid tests in the presence of the competition committee. The purpose of the test is to verify the degree of speciality knowledge of the candidate, the necessary knowledge in the exercise of public office.

The written test and the interview are scored with points from 1 to 100 each. It is believed that the candidate who has achieved a minimum of 50 points for public execution positions and 70 points for leadership has been promoted. In order to promote the contest, the final score must be at least 100 cumulative points on both samples. Candidates who have passed the two tests are admitted. The interview can only be sustained after the written test has been promoted.

The competition commissions, as well as those for solving the appeals, are constituted by an administrative act of the head of the authority or the public institution organizing the contest. The membership in the contest committee is incompatible with that of the member of the appeal panel. The appointment of the president of the contest committee, respectively the resolution of the contestations, is done by the administrative act for setting up commissions among their members[15].

[11] Ibidem
[12] Government Decision No. 611/2008 (H.G. nr. 611/2008)
[13] Iorgovan Antonie, *op. cit.*, p. 74
[14] Ioan Alexandru*, Dreptul Administrativ în Uniunea Europeană*, Lumina Lex Publishing House, Bucharest, 2007, p. 93
[15] Marius Profiroiu (coordinator), Tudorel Andrei, Dragoş Dincă, Radu Carp, *Study no. 3: Reform of public administration in the context of European integration*, European Institute of Romania – Impact studies, pp. 19-23

Members of the competition commission or the appeal panel may not be members of the dignitary, husband, wife, relative, or cobbler (4th degree of kinship) including any of the candidates.

At the request of the interested candidates, the authority or public organizing authority of the contest shall make available to them the documents drawn up by the contest committee, respectively the resolution of appeals, which are information of public interest. Also, the public authority or institution that organized the contest is obliged to ensure that each candidate has access to the individual work written in the written test of the contest upon his request.

4.2. Particularities of recruitment and selection in the three analyzed countries

Table 1: Comparison on recruitment and selection in France, UK and Romania

Criterion	Similarities	Differences
Legislative framework	In all three countries subject to the analysis there are legislative regulations on the recruitment and selection process.	While in France and Romania these processes are governed by clear rules (Law No. 83-634 of 13 July 13th, 1983 on the Rights and Obligations of Officials, Law No. 84-16 of January 11th, 1984 on State Public Function, Law No. 84-53 of January 26th, 1984 for the territorial public function, namely Law No. 188/1999 on the status of civil servants, Government Decision No. 611/2008 on the organization and development of the career of civil servants) in the UK we meet the Civil Service Code and the Civil Service Code.
Access conditions	In France and Romania the conditions of clear access stipulated in the legislative norms regulating this area and mainly concern the following aspects: French or Romanian nationality or a member of the European Economic Area, the exercise of their civil rights, the lack of a criminal record make them incompatible with the exercise of a state function, the fulfillment of psychological skills requirements for the exercise of the position.	In the UK, the public office is governed by the principle of merit. Thus, even the document titled Recruitment Principles states that merit implies the appointment of the most appropriate person for that function. Therefore, certain conditions of general access are not expressly regulated, since the agencies and departments are the only ones able to determine the requirements for each post. However, there are some conditions of professional and senior experience for the senior public and Top 200.
Principles of the civil service	All three states recognize general principles as free access to public office, the transparency of the recruitment process.	It should be noted that while in France and Romania these principles are found in the statutes regulating the activity of public servants, it was considered necessary in the United Kingdom to adopt a distinct document (Principles of Recruitment) in order to make these principles.
Recruitment methods	In all three countries the contest is preponderantly seen as a recruitment method. Apart from the competition, there is also the possibility of being recruited without a competition in the public function of the state for functions in category C. In France, autonomy in the recruitment of agencies and departments is the same.	Although concussion prevails in all three countries, there are some peculiarities. In France, the competition is conducted separately for the public function of the state and for the territorial public function, while there is a distinction between competitions for the categories of functions

		(A, B or C)[1]. In Romania, the contest has a relatively homogeneous character, being regulated in detail by the legislative framework. In the UK, agencies and departments have great autonomy in determining how to conduct the contest.
Running the contest	As a rule, the contest involves passing a written (theoretical) stage as well as an oral phase.	In the United Kingdom, more emphasis is placed on the interview stage.
The organizing institution of the contest		In France: for the public function of the state, ministries and other central or deconcentrated authorities, and for the territorial public function, the National Center for Territorial Public Functions. In Romania: public authorities and institutions in central and local public administration[2]. In the UK: each agency and department, and for some functions, with the participation of the Civil Service Commission.
The institution for the control and coordination of the recruitment process		In France: the Ministry of Public Service at central level and the National Center for Territorial Public Function at local level. In Romania: National Agency for Civil Service. In the UK: The Civil Service Commission through its specialized commissions.
Facilities for young people and disadvantaged categories of people		In France, the PACTE program; in the UK, the fast-track program.

4.3. SWOT analysis of the recruitment process in the public service in Romania

4.3.1. Strenghts

- A well-regulated normative framework by the existence of Law No. 188/1999 on the status of civil servant and G.D. No. 611 of June 4th, 2008 for the approval of the norms regarding the organization and development of the civil servants' career. Moreover, there is an interest in updating the legislation in this area in the sense of modernizing the public function. Thus, Law No. 188/1999 was amended by Law No. 251/2006, but also by various emergency ordinances.
- The National Agency of Civil Servants has the legal and institutional capacity to monitor and evaluate the performance of recruitment and selection activities of public institution staff.
- The predominant application of the contest method for public recruitment. As mentioned above, it is considered to be the most appropriate recruitment method. Also, by organizing the multi-stage contest (submission of files, written exam, interview), a better selection of candidates is ensured.
- Advertising of competitions (on the site of the institution, at its headquarters, on the ANFP (Romanian National Agency of Civil Servants) website, in the Official Journal for certain functions) ensures the access of a good part of the population. Moreover, citizens' access to information on the activity of public institutions is doubled by Law No. 544 of October 12th, 2001 on free access to information of public interest
- Publication of the Agency's recruitment and promotion reports. On a semi-annual basis, the ANFP publishes on its website a report on the situation of recruitment competitions in the public, central, territorial and local level.
- Developing by ANFP guides and manuals aimed at facilitating legal provisions in the field of civil service and civil servants. Regarding recruitment, a Guide on Recruitment and Promotion of Civil Servants

[1] https://www.legifrance.gouv.fr, accessed on February 5th, 2018, 11:45.
[2] http://www.anfp.gov.ro/continut/Informatii_de_interes_public, accessed on February 7th, 2018, 15:30.

has been developed, a guideline available in electronic format, free of charge, on the Agency's website.

- Giving autonomy in recruitment to the local public office.

4.3.2. Weaknesses

- In the perception of citizens, but also in the specialized studies carried out, it is considered that the recruitment and selection processes are not fully ensured, that the involved staff is not specialized and that performance indicators are not used in a proper manner.
- There is a strong political influence on the recruitment process. Among the conditions of access to a public office the prohibition to be a member of any party is not mentioned specifically. Moreover, in Ordinance No. 611/2008 it is stated that during the selection interview, it is forbidden for the evaluators to ask questions regarding political affiliation.
- Personnel responsible for human resource management do not always have sufficient knowledge to identify those truly prepared candidates, limiting themselves to using the recruitment and selection tools required by law.
- There are few sources of information available to potential candidates. There is no public recruitment portal. Announcements on recruitment competitions posted on the ANFP website are insufficient and incomplete in the sense that they do not cover all central and local posts and all the information necessary for participation in the competition, being limited to the announcement of the contest and the sending on the organizing institution's website.
- Excessive autonomy of public authorities and institutions in organizing the contest: setting up an evaluation and resolution committee, setting bibliography and contest evidence, as well as specific participation conditions.
- Establishment of seniority conditions for participation in the recruitment competition organized to fill public positions, minimizing professional competence and disfavoring the promotion of young people:

– 1 year in the specialty of the studies necessary for the participation in the recruitment competition organized for the occupation of civil servants in the first grade, 8 months for filling the civil servants of second grade or sixth grade professional for employment of the third grade professional civil servants;

– 5 years in the specialty of the studies necessary for the exercise of the public function for the occupation of the public functions of execution of the main professional degree;

– 9 years in the specialty of the studies necessary for the exercise of the public function for the occupation of the higher professional public execution positions;

– 2 years in the specialty of the studies necessary for the exercise of the public office for occupying the leading positions of the head of office, head of department and secretary of the commune;

– 5 years in the specialty of studies necessary for the exercise of public office for the other public management positions.

- As regards the bibliography required in order to support a contest, great emphasis was placed on memorizing normative acts and less on testing candidates' skills or on case studies and practical exercises.
- Lack of regulations to facilitate the employment of people with disabilities.
- Lack of regulations to promote the employment of young graduates.

4.3.3. Opportunities

- An intense concern of ANFP in the sense of collaboration with international bodies for the exchange of experience for the modernization of the public office:

a) Collaboration of ANFP-OECD-SIGMA (Support for Improvement in Governance and Management) based on ideas that were funded by the European Commission;

– ANFP together with OECD-SIGMA organized as the main partner the Central Unit for Public Administration Reform, the Public Sector Quality Management Seminar – Romania, regional level.

– Making a technical visit to the OECD headquarters in Paris of a team of ANFP representatives to discuss the modernization of the public office.

– Carrying out a case study entitled Development of the Civil Service Career in Romania – Comparative ex-ante and ex-post comparative study.

b) ANFP-Council of Europe: ANFP managed a project with financial assistance from the Council of Europe – Ethical Policies: Mechanisms and Instruments – a project that proposed the pilot use of two innovative tools used by quality management in several Romanian public institutions and authorities (these are scoring cards and peer reviews). The result was the publication of the Manual of Ethical Procedures.

c) The ANFP-EIPA (European Institute for Public Administration) collaboration through EPSA (European Public Sector Award)

d) The ANFP Collaboration and the EUPAN Network, which proves to be a forum for exchange of experience and good practice information, allowing a comparative perspective of the Member States' reforms and modernization measures

- The possibility of absorption of structural funds for the development of human resources both through the Sectoral Operational Program of Development for Human Resources, but also through the Administrative Capacity Development Operational Program.
- Developing partnerships with similar institutions from other countries, such as France, Belgium, UK, for the exchange of know-how.

4.3.4. Threats

- The negative image of the status of civil servants in the opinion of the citizens, which determines a low

degree of attractiveness for the young graduates;

- Low payroll level;
- The current economic, social and political crisis;
- The high degree of migration of civil servants to the private sector;
- Excessive bureaucracy;
- Resistance to change;
- Legislative instability;
- Changing parties from the governance process.

4.3.5. Recommendations

1. Establishment and development of well-defined performance indicators for the career development of civil servants.
2. Diminishing the number of public positions that can be filled on political criteria, through political appointments.
3. Diminishing the political interference in the competition for recruitment and selection of civil servants.
4. More specialization of staff responsible for the recruitment and selection of civil servants.
5. Use of sources of information on the availability of a vacancy and the manner of conducting the competition, more accessible to potential candidates.
6. Reduce seniority for public service promotion.
7. The transition from an evaluation (for the purpose of employing public functions) based on memorization to the testing of skills and competences.
8. Introduce specific regulations to help disadvantaged categories of staff (disabled persons).
9. Introduce measures in order to implement equal opportunities policy by encouraging women's promotion.
10. Encourage the attraction of young graduates to public sector activities.

4.4. The results of the analysis undertaken and the elaboration of a model for improving the process of recruitment and selection of civil servants in Romania

Starting from the particularities of the recruitment and selection process in the three countries as well as from the ones identified with the SWOT analysis, several proposals can be made to improve the recruitment and selection in public function in Romania, as follows:

1. In terms of recruitment sources:

a) Establishment of a National Administration Institute (similar to the Ecole Nationale d'Administration), as an autonomous institution, for the initial training of civil servants holding public functions at central and territorial level. The Institute would have its headquarters in Bucharest for the initial training of civil servants from central structures and territorial offices in each region (the eight development regions established by Law No. 151/1998 could be taken as territorial units). Graduation of such an institute allows the automatic occupation of a leading public office or a high public office. By this measure, I believe that the professionalisation of high-level public functions will be ensured.

b) The access to the schooling within this institute is done through a contest, organized under conditions of transparency, equality of opportunity and merit.

c) Local public officials, whether leaders or executives, can join anyone who fulfills the general and specific conditions for a public office.

2. As regards the competition for recruitment:

a) For Central Public Execution Functions, they propose to organize a national competition by ANFP, similar to the competition for a state public office in France. Thus, all eligible citizens can participate in the contest and those declared admitted will be placed on a list with an established validity period (at least two years), a list which will determine their distribution, in order of the score obtained in the competition, in public positions. In this way, the arbitrariness of competitions organized by each public authority or institution can be eliminated.

b) For the public functions in the territory, a competition will be held at the level of each county following that the declared candidates admitted to be assigned to public positions within the county where they held the contest.

c) For the public functions in the territory a competition will be organized at the level of each county, following that the declared candidates admitted to be assigned to public positions within the county where they held the contest.

d) For local public functions, based on the principle of administrative decentralization, a competition is organized by the recruiting authority.

e) The contest has the following stages:

– Verification of fulfillment of the participation conditions by the evaluation committee;

– Written evaluation by a test that includes sections to verify: Candidate's knowledge of the Romanian language (grammar and spelling), logical reasoning of the candidate;

– Oral evaluation to check on one hand the candidate's specialized knowledge and on the other hand the ability to cope with concrete situations from the practice of public servants.

f) The bibliography for the contest should be limited to the normative acts that are essential for the activity within the public authority or institution that recruits.

3. Implementing regulations to encourage youth recruitment:

a) Decreasing the duration of seniority;

b) Developing opportunities for rapid promotion.

4. Regarding the ways in which posts are advertised:

a) Creating a public function portal where all vacant public functions can be traced;

b) The possibility for declared candidates admitted to

the national or county competition to apply online to public posts.

5. With regard to monitoring the conduct of competitions, I am proposing the establishment of a Public Service Committee similar to that of the United Kingdom and the Civil Service Commission. It would be made up of personalities recognized as specialists in public administration, and it would be the primary responsibility to oversee the process of recruitment, to ensure that it is carried out in accordance with the principles of transparency, equal opportunities and merit, and to resolve complaints about irregularities reported by candidates, members of the evaluation or appeal commissions or other persons proving a legitimate interest.

5. Conclusions

The paper proposed a comparative view of the process of public recruitment and selection in France and the UK and the identification of those practices that could be taken, implemented and adapted to the factual situation in Romania.

While maintaining the current structure of the public (state, regional and local) civil service, as well as the current civil service career system and starting from the weaknesses identified in public recruitment, I selected some proposals in order to improve the procedures for filling the vacant public positions:

- Re-establishment of a National Institute of Administration to ensure the initial training of a class of prestigious public servants;
- Organizing a national competition for central government positions at the expense of the competition organized by each authority and institution;
- Implementing regulations to encourage the promotion of young people;
- Create a public function portal with up-to-date information on where to keep track of all vacant public functions;
- Establishment of a Civil Service Commission to supervise the conduct of competitions according to the principles of transparency, equal opportunities and merit.

All these measures would have the primary objective of improving the overall image of civil servants and as secondary objectives:

- Limitation of political interference;
- Transforming the body of civil servants into an elite social class;
- Increase the professionalism of civil servants;
- Increase the transparency of the public recruitment and selection process.

Romania has taken important steps towards opening up its public function and its orientation towards the democratic principles of the rule of law, but this process needs to be further developed and improved.

References

- Abrudan Denisa, Novac Emilia, *Resursele umane şi performanţa în organizaţii*, Eurostampa Publishing House, Timişoara, 2013
- Alexandru Ioan, *Dreptul Administrativ în Uniunea Europeană*, Lumina Lex Publishing House, Bucharest, 2007
- Iorgovan Antonie, *Introducere. Organizare administrativă. Funcţia publică*, All Beck Publishing House, Bucharest, 2005
- Lefter Viorel, Deaconu Alexandrina, Marinaş Cristian, Nica Elvira, Marin Irinel, Puia Ramona, *Managementul resurselor umane. Teorie şi practică,* 2nd Edition, Economica Publishing House, Bucharest, 2008
- Cezar Corneliu Manda, *Teoria administraţiei publice*, C.H. Beck Publishing House, Bucharest, 2013
- Manole Cristina, *Managementul resurselor umane în administraţia publică*, ASE Publishing House, Bucharest, 2006
- Manolescu Aurel, *Managementul resurselor umane*, Economica Publishing House, Bucharest, 2001
- Peiser Gustave, *Droit de la fonction publique*, 13 ed, Dalloz, Paris, 2003
- Profiroiu Marius (coordinator), Andrei Tudorel, Dincă Dragoş, Carp Radu, *Study no. 3: Reform of public administration in the context of European integration*, European Institute of Romania – Impact Studies
- https://www.gov.uk/government/organisations/civil-service, the official website of UK civil servants
- https://www.fonction-publique.gouv.fr, the official website of French officials
- https://www.legifrance.gouv.fr, the legislative site of the French Republic
- http://www.anfp.gov.ro/continut/Informatii_de_interes_public, the official website of the Romanian National Agency of Civil Servants

THE FREE MOVEMENT OF JUDGMENTS AND JUDICIAL DECISIONS

Gheorghe BOCSAN[*]

Abstract

EU substantive law is based on a system of circulation freedoms which encompasses the idea that the Union, its internal market or other areas of legal rule, such as the area of freedom, security and justice are, above all, spaces of liberty, which rejects the limits represented before by internal borders. So, the essential EU integrative concepts could be formulated as free circulation principles or instruments aiming to such freedoms. The free movement of judgments and judicial decisions represents concomitantly the consequence and the expression formulated through freedom of circulation, which is specific to EU law, of the principle of mutual recognition of judgments and judicial decisions between member states in both civil and criminal matters. This principle is based upon the mutual trust that member states owes to each other. Finally, the study analyses the principle of mutual recognition in EU law as a transplant from the internal market in the judicial cooperation in criminal matters, which produces numerous application instruments, among them the first and most productive is the European Arrest Warrant.

This paper studies also the common standard and paradigm that all instruments based upon the free movement of judgments and judicial decision have, amongst others: the warrant/order typology, direct communication between the competent authorities of Member States, elimination of the recognition procedure, the express mentioning of the mandatory and optional grounds of refusal, the partial removal of double criminality requirement etc.

Keywords: *EU substantive law, free circulation of judgments and judicial decisions, area of freedom, security and justice, the principle of mutual recognition, judicial cooperation in criminal matter.*

Introduction

The process of integration necessary for the construction and development of the European Union presupposes the coexistence of a horizontal dimension, usually called harmonization, which aims to "*remove any frictions that arise between different systems, thereby achieving legal harmony*"[1], and of a vertical dimension, represented by the approximation of laws, which is often achieved by setting minimum rules. Separately from these concepts, within the field of judicial cooperation, the free movement of judgments and judicial decisions, the consequence of the application of the principle of mutual recognition, also functions in an integrative way. The latter principle has numerous applications in Union law, its origins being found in the internal market field.

The European Union's substantive law is based on a system of freedoms of movement, which captures the idea that the Union's space, whether regarding the internal market, or other areas of legal regulation, such as the area of freedom, security and justice, is above all an area of freedom that removes the barriers previously represented by the borders between Member States. Thus, the essential integrative concepts of the Union can usually be expressed in a language specific to substantive law, or they can be formulated as freedoms of movement or as instruments having the purpose of such freedoms. From the free movement of goods, persons, services, capital and payments, specific to the definition and development of an internal market, the free movement of official documents issued by Member States (such as driving licenses, study diplomas, attestations and qualifications etc.), and then to the free movement of judgments and judicial decisions, first regarding the civil matters, and after the Amsterdam and Nice Treaties, also regarding criminal matters.

This study shows that the free movement of judgments and judicial decision within the space of liberty, security and justice of the European Union derives from the principle of mutual recognition, which was implemented in that space from the internal market. Part of the doctrine sustains that idea and part of it disagrees, as we will explain bellow.

1. The concept of free movement of judgments and judicial decisions

As previously stated, the free movement of judgments and judicial decisions represents the expression formulated by means of the concept of freedom of movement, specific to the substantive law of the European Union and, at the same time, the consequence of the principle of mutual recognition of judgments and judicial decisions between Member States (both in civil and criminal matters). This principle also relies, in its turn, on the trust that must exist between the legal systems of the Member States.

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[1] F. Calderoni, Organized Crime Legislation in the European Union – Harmonization and Approximation of Criminal Law, National Legislation and the EU Framework Decision on the Fight Against Organized Crime, Springer Heidelberg, Dordrecht, London, New York, 2010, p. 4.

The fundamental treaties do not define the principle of mutual recognition, neither in terms of its specific aspect regarding the internal market (since the concept has originated and developed in this context), nor in the field of judicial cooperation in civil or criminal matters. As regards the consequence of its application, namely the freedom of movement of judgments and judicial decisions, the Treaties do not even mention this notion. Thus, the Treaty on the Functioning of the European Union (TFEU) merely establishes that the principle of mutual recognition referred to in this study is the basis on which judicial cooperation in civil and criminal matters is built within the Union (Article 81 (1) and Article 82 (1) TFEU). As for the case of judicial cooperation in civil matters, the Treaty extends the field of mutual recognition of judicial also to extrajudicial decisions, while, in the field of judicial cooperation in criminal matters, the principle of mutual recognition remains strictly in the judicial area. The promotion of full application of mutual recognition in the area of freedom, security and justice is underlined by art. 70 of TFEU, which establishes the need for objective periodic evaluations regarding the application of this principle.

Another fundamental idea set out by the two articles mentioned above (Articles 81 and 82 of TFEU) is that the approximation of Member States' laws and regulations is subordinated to the aim of mutual recognition of judgments and judicial decisions (and regarding the case of judicial cooperation in civil matters also of extrajudicial decisions, such as the notary or arbitral ones).

Under these circumstances, it is up to other legal sources, doctrine and jurisprudence to define the concepts.

Thus, the European Commission Information Sheet entitled "*Recognition of decisions between EU countries"*[2] *states that "Mutual recognition of judicial decisions is a process whereby a decision usually adopted by a judicial authority in a Member State of the European Union is recognized and, where necessary, enforced by another State of the Union as if it was a decision taken by the judicial authorities of that latter State*".

Further, a distinction is made between traditional judicial cooperation involving an interstate relationship whereby a sovereign state is applying to another sovereign state, the latter having the power to decide whether to respond to the request and the system of mutual recognition of judgments and judicial decisions, which presupposes the automatic recognition by the judicial authorities of a State of "*decisions taken by the judicial authorities of another Member State of the Union with a minimum of formalities and with very few exceptions*".

The same document clearly underlines the idea that: „A free circulation of persons must correspond to a free circulation of judicial decisions. This is the point where the principle of mutual recognition leads to a real change in the philosophy of judicial cooperation. "

These ideas were synthesized on the basis of other documents, mainly the Presidency Conclusions of the meetings of the European Council, to which we will extensively refer within this study.

We consider this text of the European Commission to be of particular importance because it describes, in a highly concentrated, but at the same time very comprehensive manner, the strong connection between the principle of mutual recognition, its practical consequence, the free movement of judicial decisions and the fundamental freedoms of the Union, which make up its substantive law. Moreover, the free movement of judgments and judicial decisions itself becomes a fundamental freedom of the Union, a freedom that is generated by substantive law, but at the same time it facilitates the realization of the other four fundamental freedoms. Judgments and judicial decisions directly relate to individuals, to their legal status as parties of a litigation or judicial proceedings. Decisions of the judiciary also refer to the legal status of goods, services, capital and payments, depending on the subject matter of the dispute. All these entities enjoy the freedom of movement. It thus appears that those decisions, by means of an etiological effect, having as subjects or object, entities that enjoy the freedom of movement, enjoy themselves the same freedom, the one of being recognized and implemented anywhere within the European Union for the purpose of producing the legal effects for which they were adopted.

The reform regarding the concept of judicial cooperation requires that the freedom of movement of judicial decisions is, in principle, unconditional, with few exceptions and only minimal formalities. The basis of the new philosophy is the principle of mutual trust, according to which the Member States must trust the legal and judicial systems of other Member States. The principle was developed exclusively by jurisprudence, but built relating to a fundamental principle, provided by Article 4 (3) of the Treaty on European Union (hereinafter abbreviated as the TEU), the principle of loyal cooperation, under which "*Member States shall respect and assist each other in performing the tasks resulting from the Treaties*". These "*missions*" include the provision for the citizens of the Union, of an "*area of freedom, security and justice, without internal borders, under which the free movement of persons is ensured, in conjunction with adequate measures on external border control, asylum, immigration, crime prevention and combating of this phenomenon*" (Article 3(2) of the TEU). Combating the phenomenon of crime at the Union`s level and within its area of freedom, security and justice, referred to in the previous article quoted from the TEU, is nothing but the potentiation of police activity, of the law enforcement agencies in criminal matters, of the prosecutors and

[2] European Commission. Justice. Building a European Area of Justice. "*Recognition of decisions between EU countries*", only in English language, in electronic format at the address http://ec.europa.eu/justice/criminal/recognition-decision/index_en.htm , accessed on January 18, 2018.

courts, including the idea of building and developing the capacity of these bodies' decisions to take also effect in other states of the Union, different from those of the forum.

Another important reference to the free movement of judgments and judicial decisions is made in the preamble of the first concrete legal instrument developed by the Council, based on the principle of mutual recognition of judgments and judicial decisions in criminal matters, namely the Framework Decision 2002/584 /JHA[3]. Thus, the third sentence of paragraph 5 from the preamble to the Framework Decision states that: "*The classical cooperation relations which have so far dominated the Member States should be replaced by a system of free movement of judicial decisions in criminal matters, both those preceding the conviction and the final sentence, in an area of freedom, security and justice*. "

This is the point when we raise the issue of a system of free movement of judgments and judicial decisions in criminal matters, based on the principle of mutual recognition. In the case of the Framework Decision 2002/584 / JHA, the purpose of free movement of judgments and judicial decisions is that of the previous extradition procedure and of the surrender of defendants or convicts, for the purposes of prosecution, trial or execution of sentences in another State of the Union, other than the one in whose territory the defendant or convict is present at that specific moment.

Regarding this context, paragraph 6 of the preamble to the same Framework Decision states that: "*The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the «cornerstone» of judicial cooperation*".

In the field of judicial cooperation, a particularly important legislative act of the European Union, namely 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[4], at point 6 of the preamble clearly expresses the idea that the free movement of judgments in the matter of civil and criminal law represents an objective of the Union[5].

In view of the above, we define the free movement of judgments and judicial decisions as the consequence, expressed in the form of a freedom and specific to the substantive law of the European Union, of the application of the principle of mutual recognition of judgments and judicial decisions, representing the basis of judicial cooperation in civil and criminal matters, as instrument for achieving the legal integration at the Union`s level.

The principle of mutual recognition appears as a contemporary basis for judicial cooperation, but the TFEU seeks to approximate the laws and regulations of the Member States, in particular by laying down mandatory minimum standards, as an integration method that can be used to facilitate mutual recognition, or complementary to it (Article 81 (1) and Article 82 (1) TFEU). Thus, mutual recognition is a horizontal method of legal integration, and approximation of laws is the vertical integration method. The former is an application of mutual trust, which must exist between the judicial systems of the Member States, while the latter is an expression of the primacy of the Union law.

2. Historical milestones

As Union law rarely refers to the concept of free movement of judgments and judicial decisions, but it pays attention to the principle of mutual recognition as a precondition, we will continue to focus on the historical evolution of this principle. The origin of the concept of mutual recognition is found in the matter of the internal market of the European Union. The Treaty establishing the European Economic Community (TEEC) did not contain, in its original form, provisions regarding such a principle.

The principle was created by the case-law of the Court of Justice of the European Union and was designed to better respond to the desiderate of ensuring the free movement of goods within the common market (later, the Union's internal market).

2.1. The principle of mutual recognition in the matter of the internal market of the Union

In summary, "*Mutual recognition ensures market access for products that are not subject to EU harmonisation. It guarantees that any product lawfully sold in one EU country can be sold in another. This is*

[3] Framework decision from 13 June 2002 on the European arrest warrant and the surrender procedures between Member States 2002/584/JAI, OJ L 190/1, in electronic format at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32002F0584&from =EN, accessed on January 18, 2018.

[4] 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 judgements in civil and commercial matters, published in OJ L 351/1 from 20.12.2012, accessed in electronic format at the address, http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012R1215&from=EN on February 10, 2018.

[5] The Regulation quoted at note no. 4, preamble, point (6): "In order to attain the objective of free circulation of judgments in civil and commercial matters, it is necessary and appropriate that the rules governing jurisdiction and the recognition and enforcement of judgments be governed by a legal instrument of the Union which is binding and directly applicable".

possible even if the product does not fully comply with the technical rules of the other country."[6]

The Treaty establishing the European Economic Community (hereinafter abbreviated TEEC) did not contain, in its original form, provisions relating to such a principle.

The adopting of mutual recognition within the internal market has been achieved because all measures to harmonize / approximate the legislation adopted by the Union through a long standardization of goods have failed to fully ensure their free movement within the internal market. Since the free movement of goods constitutes one of the fundamental freedoms of the Union and is part of its substantive law, the assurance of the full exercise of this freedom is an important objective for the Union legislature.

2.1.1. The jurisprudential basis of the principle of mutual recognition. "*Cassis de Dijon*".

As we have expressed above, the principle of mutual recognition, as a general principle within the internal market, has been established by jurisprudence, through the so-called "*Cassis de Dijon*"[7] case. The legal fact that generated the dispute between the Rewe Zentral AG and the Federal Administration of the German Alcohol Monopoly, constituted a prohibition on the marketing of alcoholic beverages on the German market, which did not meet the standards laid down by the domestic law of that State. The applicant, the German company importing "*Cassis de Dijon*" fruit alcoholic beverage in Germany, argued that the German law in question constituted a "*barrier to the free movement of goods between Member States, going beyond the trade rules reserved to them"* and being *"an effect equivalent to a quantitative restriction on imports, contrary to the Art. 30 of the EEC Treaty*[8] "[9].

The Court of Justice ruled exactly according to the idea advocated by the applicant during the main proceedings, when the main questions were raised, but what is really important from the point of view of accrediting a principle of mutual recognition directly related to the free movement of goods, is the wording of point 14, paragraph 4 of the judgment, which states that *'there is therefore no valid reason to prevent alcoholic beverages from being lawfully manufactured and marketed in one of the Member States that may be introduced in any other Member State without the lawful prohibition on the marketing of such beverages having an alcoholic strength below the limit laid down by national legislation*."

The direct conclusion of this finding made by the Court of Justice was that any product lawfully marketed in a Member State market may be imported and marketed on the market of another Member State, even if it does not meet the requirements of the national law of that State. This idea is nothing more than the principle of mutual recognition applicable in the internal market of the Union, in a direct and indestructible relationship with the free movement of goods.

2.1.2. Single European Act

A first establishment within the EEC Treaty of the principle of mutual recognition in the matter of the internal market arose with the first regulation of the approximation of laws within the same context.

Thus, the Single European Act[10], by means of art. 18, introduced within EEC Treaty art. 100A, which provided for the possibility of approximating the laws of the Member States in order to facilitate the free movement of goods, persons, services and payments in the common market. At that time, the approximation of legislation, particularly through standardization, has been seen as the most appropriate and effective way to ensure the principles of substantive Community law. However, as a result of the decision of the Court of Justice, regarding" Cassis *de Dijon*" case and the development of the legal reflection on mutual recognition that followed, almost ten years later, Article 100B (1) (2) notes as follows: "*The Council, acting in accordance with the provisions of Article 100A, may decide that the provisions in force in a Member State shall be recognized as equivalent to those applied in another Member State* ".

Notwithstanding this highly progressive provision introduced within the EEC Treaty by the Sigle European Act, the community has not developed until late, specific instruments for the principle of mutual recognition in the internal market. The main reason for this situation lies in the excitement at the time with the approximation of laws, especially through standardization, which has been regarded for decades as the most appropriate method for creating and stimulating the internal market.

Thus, a prime example of this attitude is the Council Resolution of 1999 on the role of standardization in Europe[11], which represents a real worship of the idea, miraculous method of solving all problems related to the internal market of the Union.

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[6] The document" European Commission. Economic growth. Single European Market. Single Goods Market. Free movement in harmonized and non-harmonized sectors. Mutual recognition.", published in English language, in electronic format, at the address http://ec.europa.eu/growth/single-market/goods/free-movement-sectors/mutual-recognition_en , accessed on 19 January 2018.

[7] The decision of the Court of Justice from 20 February 1979 ruled in the case C-120/8, preliminary decision Rewe Zentral AG v. Bundesmonopolverwaltung für Brantwein, ECLI:EU:C:1979:42, in electronic format, at, http://curia.europa.eu/juris/show Pdf.jsf; jsessionid= 9ea7d2dc30dd7f53bdd76175434793478b6be99d05d3.e34KaxiLc3qMb40Rch0SaxyNb3v0?text=&docid=90055&pageIndex=0&doclang= EN&mode=req&dir=&occ=first&part=1&cid=230651 ,accessed on January 19, 2018.

[8] The article interdicts quantitative restrictions on import and measures with an effect equivalent thereto.

[9] Point 4 from the decision of the Court of Justice quoted in note 7 of this study.

[10] Single European Act signed in Luxembourg on 17 February 1986 and effective as of 1 July 1987, published in OJ L 189/1 from 29.6.87.

[11] The Council Resolution from 28 October 1999 on the role of standardization in Europe, published in OJ C 141 from 19.5.2000, p. 0001-0004, in English language, in electronic format at the address http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri= CELEX:32000Y0519(01)&from=RO, accessed on January 19, 2018.

In the sense of what has been said, we bring as a relevant example the preamble to the Decision 3052/95/EC[12], according to which the approximation of laws gives adequate results in the internal market, so that the principle of mutual recognition is not particularly relevant.

2.1.3. Subsequent to the Single European Act

The above presented vision, which gives an overvalued credit for the harmonization and approximation of internal market legislation, would last for a long time until the signing of the Treaty of Lisbon. Only at that moment, mutual recognition has been used to its true value for the Union's internal market.

Since we have referred to the Decision 3052/95 / EC of the European Parliament and of the Council, which is tributary to the approximation of laws within the common market, we note that it was repealed and that the priority given to harmonization would cease definitively by Regulation (EC) No. 764/2008 of the European Parliament and of the Council[13].

Thus, as the preamble to the regulation clearly states, the principle of mutual recognition within the internal market area, which has been judicially established and then introduced into the EEC Treaty by the Single European Act, was not given due consideration, but the steps initiated by that regulation would totally change this situation.

2.1.4. Mutual recognition of diplomas, certificates and other titles of formal qualifications

Considered as an application of the principle of mutual recognition in the field of freedom of movement of persons, in particular as regards the right of establishment, this type of mutual recognition was first established by the provisions of Article G.13 of the Treaty on European Union[14], which amended the provisions of art. 57 of the EEC Treaty, so that point 1 of the article acquires the following form: "*In order to facilitate the access to and the exercise of independent activities, the Council, acting in accordance with the procedure of art.189b, adopts directives on the mutual recognition of the diplomas, certificates and other administrative acts of the Member States which are the subject of a qualification*. "

A similar statement is also used by art. 53 par. (1) TFEU as a result of the Treaty of Lisbon [15].

2.1.5. Amsterdam Treaty and Recognition of Judicial and Extrajudicial Judgments in Civil and Commercial Matters

Article 2 (15) of the Treaty of Amsterdam[16] introduced within the text of the Treaty establishing the European Community (EC Treaty) Title III. a, entitled "*Visas, asylum, immigration and other policies related to the free movement of persons",* and the text of art. 73m (a), notes as follows: *"Measures in the field of judicial cooperation in civil matters with cross-border implications to be adopted pursuant to Article 73o as long as they are necessary for the proper functioning of the internal market include: (a) improving and simplifying: the cross-border system for the use of judicial and extrajudicial documents; cooperation in the administration of evidence; recognition and enforcement of judgments in civil and commercial matters, including decisions in out-of-court proceedings*."

Thus, the Treaty of Amsterdam established the principle of recognition and enforcement of judicial

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[12] Decision no. 3052/95/CE of the European Parliament and Council from 13 December 1995 establishing a procedure for the exchange of information on national measures derogating from the principle of free movement of goods within the Community (repealed), published in OJ L 321 from 30.12.1995, in electronic format at the address http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX: 32000Y0519 (01)&from=RO , accessed on January 19, 2018. Preamble: "*The Commission has, in accordance with Article 100b of the Treaty, drawn up the inventory of national laws, regulations and administrative provisions which fall under Article 100a of the Treaty and which have not been harmonized pursuant to that Article; (...) that inventory has revealed that most of the obstacles to trade in products reported by Member States are dealt with either by measures taken under Article 100a or through proceedings initiated under Article 169 of the Treaty for failure to fulfil obligations under Article 30".*

[13] Regulation (EC) no. 764/2008 of the European Parliament and Council dated July 9, 2008 laying down procedures relating to the application of certain national technical rules to products lawfully marked in another Member State and repealing Decision no. 3052/95/CE, published in OJ L 218/21 from 13.8.2008, at the address http://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX: 32008R0764&from=EN ,accessed on January 19, 2018. Points (3) and (4) of the Regulation provide the following: „ (3) *The principle of mutual recognition, which derives from the case-law of the Court of Justice of the European Communities, is one of the means of ensuring the free movement of goods within the internal market. Mutual recognition applies to products which are not subject to Community harmonisation legislation, or to aspects of products falling outside the scope of such legislation. According to that principle, a Member State may not prohibit the sale on its territory of products which are lawfully marketed in another Member State, even where those products were manufactured in accordance with technical rules different from those to which domestic products are subject. The only exceptions to that principle are restrictions which are justified on the grounds set out in Article 30 of the Treaty, or on the basis of other overriding reasons of public interest and which are proportionate to the aim pursued.*

(4) Many problems still exist as regards the correct application of the principle of mutual recognition by the Member States. It is therefore necessary to establish procedures to minimise the possibility of technical rules' creating unlawful obstacles to the free movement of goods between Member States. The absence of such procedures in the Member States creates additional obstacles to the free movement of goods, since it discourages enterprises from selling their products, lawfully marketed in another Member State, on the territory of the Member State applying technical rules. Surveys have shown that many enterprises, in particular small and medium-sized enterprises (SMEs), either adapt their products in order to comply with the technical rules of Member States, or refrain from marketing them in those Member States".

[14] Treaty on European Union (Treaty of Maastricht), published in JO C 191 dated 29.07.1992, p. 0001-0110, in English language, in electronic format at the address http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:11992M/TXT&from=RO , accessed on January 19, 2018.

[15] In the volume "*Fundamental Treaties of the European Union*", edition coordinated and prefaced by A. Fuerea, updated on 1.06.2017, C. H. Beck Publishing House, Bucharest, 2017, p.54.

[16] The Amsterdam Treaty, in English, in electronic format at the address http://www.europarl.europa.eu/topics/treaty/pdf/amst-en.pdf , accessed on January 19, 2018.

and extrajudicial civil and commercial judgments (e.g. decisions of arbitral tribunals, decisions taken in notary proceeding etc.) in connection with the internal market, but in order to achieve the goals of that part of the pillar III which it has communitarised, directly related to the freedom of movement of persons, as an essential element of the Union's substantive law.

It should not be forgotten that the Treaty of Amsterdam has communitarised the third pillar of the European Community, excepting the part relating to judicial cooperation in criminal matters between Member States.

2.2. The principle of mutual recognition in the field of judicial cooperation in civil and criminal matters

2.2.1. The Cardiff European Council, 15-16 June 1998

This European Council, which took place during the British Presidency of the Union in the first half of 1998, has included on the agenda, among the main issues, the common fight against cross-border criminality, with a particular focus on environmental crime, drug trafficking, as well as racism and xenophobia.

The works of this European Council would also mark the first step in imposing the principle of mutual recognition of judgments and judicial decisions in criminal matters.

Thus, point 39 of the Conclusions of the Presidency of the European Council[17] states as follows: "*The European Council underlines the importance of effective judicial cooperation in the fight against cross-border crime. Recognizes the need to strengthen the capacity of legal systems to work together more closely and asks the Council to identify areas for wider mutual recognition of judgments between Member States.*"

The idea of enhancing the application of the principle of mutual recognition of judgments in criminal matters is directly related to the concerns raised at that time about an unprecedented development of cross-border crime in the European Union and the implicit recognition that the approximation of the criminal laws by establishing common minimum standards did not generate the expected results. This moment is at the very end of the Corpus Juris project, which has, over the last decade of the past century, aimed to achieve a common criminal law of the Union. The project, concluded in 1999 and considered a failure, was definitely forgotten, and the future of criminal law and criminal procedure at the level of the European Union would be definitively redirected towards mutual recognition.

On the occasion of the British Presidency of the European Council "*the emphasis on mutual recognition was justified by the UK on the grounds that the differences between Member State's legal systems limit the progress which is possible by other means and render the harmonization of criminal law time consuming, difficult to negotiate and (in full scale) unrealistic* ."[18]

Moreover, "*according to Jack Straw, then UK Home Secretary, one could be inspired from the way in which the internal market was unblocked in the 1980's, instead of opting for total harmonisation, conceive a situation where each Member State recognises the validity of decision of courts from other Member States in criminal matters with a minimum of procedure and formality*"[19] This statement made by the British Home Secretary represents an additional proof of the origin of the free movement of judgments and judicial decisions in criminal matters, coming out of the concept of mutual recognition applicable to the internal market of the Union.

2.2.2. Tampere European Council, 15-16 October 1999

The Presidency Conclusions of this European Council[20] have become famous for the provisions of point 33, which expresses the idea that the principle of mutual recognition of judgments and judicial decisions should become the "*cornerstone of judicial cooperation in both civil and criminal matters within the Union* ".

The same conclusions expressly and distinctly refer to the principle of mutual recognition of judgments and judicial decisions in civil and criminal matters, as well as to the subordinating relation of the establishment of common minimum standards in procedural matters to their purpose, in the effective realization of mutual recognition.

The recalled point 33 will be the leitmotiv of all judicial instruments subsequently developed by the Union, based on the principle of mutual recognition of judgments and judicial decisions, and the expression "*the cornerstone of judicial cooperation*", became the preferred metaphor of preambles and programmatic discourses in this field.

We find that phrase, for example, in point 6 of the preamble to Framework Decision 2002/584 / JHA on the European Arrest Warrant and surrender procedures between Member States, the first instrument developed in the area of judicial cooperation in criminal matters, based on the principle of the mutual recognition of judgments and judicial decisions between Member States, and which also promoted the idea set out in point 35 of the Conclusions of the Presidency of the Tampere European Council, concerning the replacement of the

[17] The European Council from Cardiff, 15-16 June 1998, Conclusions of the Presidency, in original, in English language, at the address http://www.europarl.europa.eu/summits/car1_en.htm# , accessed on January 19, 2018.

[18] V. Mitsilegas, *EU Criminal Law*, Modern Studies in Criminal Law, Hart Publishing Ltd., Oxford and Portland, Oregon, 2009, p. 116, and UK delegation document no. 7090/99, Brussels, 29 March 1999, par. 7-8.

[19] Idem 18, p. 116, taken over by V. Mitsilegas from "*Ministère de la Justice, L' espace judiciaire européen. Actes du Colloque d' Avignon*", Paris, 2008, p. 89, in his own translation.

[20] Original in English, in electronic format on the webpage http://www.europarl.europa.eu/summits/tam_en.htm , accessed on January 19, 2018.

formal extradition procedure with a simple surrender system between Member States (an idea reiterated in the preamble to the Framework Decision, section (5)).

The measures regarding the fluency character of judicial cooperation in civil and criminal matters, mainly linked to the Union's reorientation from the principle of approximation of laws by establishing common minimum standards to the principle of recognition of judgments and judicial decisions between Member States, were subordinated by the Tampere European Council, to the extension of the freedom of movement, within the Union's justice area.

Thus, paragraph 5 of the Presidency Conclusions states that "*Extending freedom requires a genuine area of justice where people can appeal to courts and authorities in any Member State, as easily as in their own state. Criminals should not be able to find ways to exploit the differences between the judicial systems of the Member States. Judgments and judicial decisions must be respected and enforced throughout the Union, while guaranteeing basic legal certainty for individuals and economic operators. Greater compatibility and greater convergence between the judicial systems of the Member States must be achieved*. "

2.2.3. Commission`s communication to the Council and to the European Parliament - Mutual Recognition of Final Decisions in Criminal Matters[21]

This Commission`s Communication, created upon the invitation launched by the Tampere European Council, provides a wider perspective on the concept of mutual recognition and approaches a first definition of this term, which refers to the recognition of final foreign judgments.

It is possible to distinguish between the recognition of a foreign judgment or judicial decision *per se* and the situation of subsequent recognition of a foreign judicial decision for the purpose of establishing a factual or legal situation, in another case which takes place in a jurisdiction of another Member State of the Union. An example of this could be the case of a final decision, regarding a defendant, for committing a serious crime that may be the basis for executing prison sentences in the state of recognition (e.g. by applying the exception to the European Arrest Warrant, when the defendant remains on the territory of the executing State and that State undertakes to impose the prison sentence on its territory) - *per se* (direct) recognition - as compared with the recognition of a foreign conviction judgment in a sentence for deeds of a certain gravity and committed under certain conditions, provided by the recognition right of the State, in order to establish the existence of recidivism or concurrent offenses during the main proceedings regarding a defendant, for other offenses subsequently committed on the territory of the State of recognition - (indirect)[22].

Within point 3.2., the Commission`s Communication defines the idea of a "*final decision*", in order to prevent any possible confusion, as long as such a notion has different meanings within the law of the Member States. By the instrumentality of a functional definition, the Commission states that the final decisions are "*all those decisions governing the substance of a criminal case and against which ordinary means of redress cannot be exercised, or even if an appeal is still possible, it does not have suspensory effect* ".

2.2.4. Program of Measures to Implement the Principle of Mutual Recognition of Judgments in Criminal Matters[23]

The Program provides for the adoption of concrete measures in the following issues of mutual recognition of judgments and judicial decisions in criminal matters. Thus, as regards *ne bis in idem* principle, the measures must be taken to strengthen legal certainty within the Union in the sense that a final conviction ordered by a court of a Member State is not called into question by another Member State.

In the area of individual sanctions, it is necessary to adopt instruments establishing the principle that a court in a Member State may take into account the final judgments of courts of other Member States for the purpose of assessing the criminal record of the defendant in order to determine the persistence in the criminal behaviour for justify properly the sanction and the way of executing it.

The orders regarding the purpose of obtaining evidence must ensure the admissibility of evidence, prevent the disappearance of evidence, and facilitate the searching procedures, so that the evidence

[21] COM/2000/0495 final, in electronic format, in English language, at the address http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52000DC0495&from=EN, accessed on January 21, 2018. Point 3.1 of the Communication provides: "*Mutual recognition is a principle that is widely understood as being based on the thought that while another state may not deal with a certain matter in the same or even a similar way as one's own state, the results will be such that they are accepted as equivalent to decisions by one's own state. Mutual trust is an important element, not only trust in the adequacy of one's partners rules, but also trust that these rules are correctly applied. Based on this idea of equivalence and the trust it is based on, the results the other state has reached are allowed to take effect in one's own sphere of legal influence. On this basis, a decision taken by an authority in one state could be accepted as such in another state, even though a comparable authority may not even exist in that state, or could not take such decisions, or would have taken an entirely different decision in a comparable case.*

Recognising a foreign decision in criminal matters could be understood as giving it effect outside of the state in which it has been rendered, be it by according it the legal effects foreseen for it by the foreign criminal law, or be it by taking it into account in order to make it have the effects foreseen by the criminal law of the recognising state".

[22] The direct/indirect recognition notions are also referred to in the introduction to the Program of measures to implement the principle of mutual recognition of decisions in criminal matters, published in OJ C 012 from 15/01/2001, p. 0010-0022, in electronic format, in English language, at the address http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001Y0115(02)&from=EN , accessed on January 21, 2018.

[23] The Program of measures to implement the principle of mutual recognition of decisions in criminal matters, published in OJ C 012 din 15/01/2001, p. 0010-0022, in electronic format, in English language, at the address http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001Y0115(02)&from=EN , accessed on January 21, 2018.

administered can be obtained as quickly as possible during the criminal case.

Measures for the confiscation of the proceeds of crime and granting of damages for the victims aim to ensure the recognition and enforcement of freezing orders, for the purpose of confiscation and granting for damages for the victims.

Arrest warrants must be progressive, so that they can be implemented throughout the European Union and alternative measures to detention should be assured by cooperation between the competent authorities of the Member States, when a person is subject to supervision during the criminal proceedings.

Taking into account the indictments is intended with a view to avoid jurisdictional conflicts between several Member States.

Other measures concerned the following issues: the immediate recognition and the enforcement of a final decision of a Member State, when extradition is refused by a Member State that has declared that it does not extradite its own citizens; the transfer of persons who have fled from justice after having been finally convicted in a Member State; the transfer of convicted persons in the interest of social reintegration; fines, confiscation, prohibitions and incapacities; follow-up measures to the obligations established by final judgments, following the execution of sentences and the establishment of a peer review mechanism for assessing the progress made by Member States in the area of the recognition of judgments and judicial decisions in criminal matters.

2.2.5. The European Council. The Hague Program: Strengthening Freedom, Security and Justice in the European Union[24]

Paragraph 3) is pointing out the need to intensify the efforts regarding the building of a justice area of the Union, The Hague Program would place particular emphasis on the principle of recognition of judgments and judicial decisions in civil matters and, in particular, in criminal matters.

Thus, point 3.3.1. of The Hague Program refers to mutual recognition in criminal matters, indicating that the measures to be adopted must relate to judicial decisions at all stages of the criminal proceedings or any other decision relating to the gathering and admissibility of evidence, conflicts of jurisdiction and *non bis in idem* principle, as well as the execution of final convictions to imprisonment or other sanctions; equivalent standards for procedural rights should also be created. Other envisaged activities included adopting of the draft of the Framework Decision on the European Evidence Warrant[25] and the invitation to the Commission to present its proposals on promotion of the exchange of information in national criminal records, related to convictions and forfeits, particularly in the matter of sex offenders, as well as on electronic information exchange system.

2.2.6. The European Council. Stockholm Program - An open and secure Europe serving citizens and protecting their rights[26]

Within point 3 of the Program, the connection between the principle of mutual recognition and mutual trust, which should be strengthened between the Member States' judicial systems, is seen as a situation that will lead to the creation of a common legal culture. Also, the approximation of legislation in criminal matters, in particular by establishing common minimum rules in criminal and procedural criminal law, is entirely subordinated to creating the best conditions for facilitating the application of mutual recognition.

Point 3.1.1.of the Program approaches the issue of mutual recognition of judgments and judicial decisions in criminal matters strictly from the point of view of judicial cooperation, identifying new areas where specific legal instruments can be developed, including the protection of victims of crime and witnesses, a unitary system for the administration of evidence in cases of cross-border crime, given the fact that the one existing until that time was a fragmented one, but which still has the flexibility of judicial assistance in criminal matters (see, for example, the functioning of joint investigation teams, especially when mediated by Eurojust); minimizing the reasons regarding the refusal of execution. Other targeted areas were: the procedures for obtaining information on convictions and sanctions, the rapid procedures for transmitting information from private law legal entities of other States without coercive measures, improving of the framework of the European Arrest Warrant, executing in other states the administrative sanctions applied for contraventions in connection with road traffic etc.

As regarding the civil matters, mutual recognition is approached within point 3.1.2. of the Program, insisting on the elimination of the exequatur procedure, along with the adoption of a series of rules on conflict of laws and procedural measures.

2.2.7 The principle of mutual recognition – a transplant from the internal market of the Union to the judicial cooperation area

Versus the historical developments presented above, we have no doubt that there is an indestructible connection between the four fundamental freedoms of the Union, forming its substantive law and the freedom of movement of judgments and judicial decisions, both

[24] Council. The Hague Programme: Strengthening Freedom, Security and Justice in the European Area, OJ C 53/1 3.3.2005, in original in English language and electronic format on the webpage http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:053:0001:0014:EN:PDF , accessed on January 20, 2018.

[25] EEW = European Evidence Warrant, regulated by Framework Decision 2008/978/JAI of the Council dated 18 December 2008 on the European Evidence Mandate for the purpose of obtaining objects, documents and data for use in the proceedings in criminal matters, published in OJ L 350/72 date 30.12.2008;

[26] Published in original in OJ C 115/1 dated 4.5.2010, in electronic format on the webpage http://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=OJ:C:2010:115:FULL&from=RO , accessed on January 19, 2018.

in civil and criminal matters. As long as the judicial cooperation in civil matters is more closely related to these fundamental freedoms and extends through the application of the principle of mutual recognition to civil and commercial extrajudicial documents and decisions, judicial cooperation in criminal matters, as it depends on public law, relevant to the Member States' sensitivity to possible concerns regarding the integrity of their national sovereignty, has a narrower and a much more carefully defined content. However, the ideological origin of the principle of mutual recognition in this field can also be found in the creative effort of constructing the internal market[27], because everything has begun at that specific point, when trying to structure the concept of integration: horizontal (through harmonization), vertical (by approximating of the legislation and by setting the minimum rules) and transversal (by adopting the principle of mutual recognition).

Every step by which a refinement of a fundamental freedom of the Union was achieved, corresponded to a creative approach of conceiving a new subsidiary and instrumental "*freedom of movement*". The freedom of movement of judgments and judicial decisions in civil matters was absolutely necessary for the development of the free movement of goods, persons, services and capital, and the freedom of movement of judgments and judicial decisions in criminal matters developed, as a result and in close connection to the freedom of movement of persons and the right to establishment, as an effort to prevent the spreading of cross-border crime and the creation of shelters for offenders in other Member States of the Union, in order to escape from the justice.

However, there are prestigious authors who do not share this opinion, including Valsamis Mitsilegas[28], who insists on the legal difference between the commercial law and the criminal law, the latter considering the state as a subject of the legal relationship and assuming a very scrupulous respect for human rights and fundamental freedoms (the right to liberty, to a fair trial, to defence, the presumption of innocence, etc.). Moreover, the author insists that the essence of the rule of law is represented by the fact that the rules of the criminal law should be publicly debated (as opposed to accepting them based on a presumed mutual trust).

Within the above-mentioned ideas, the author refuses to consider the origin of mutual recognition of judgments and judicial decisions in criminal matters in the principle of mutual recognition in the matter of internal market, but the reasoning he builds is related to the internal constitutional legitimacy, at the level of the Member States, related to applying such a principle. There is no doubt, however, that the empirical vision adopted by the Union regarding this principle, which solves the dilemmas and finds appropriate solutions to the progress regarding the area of freedom, security and justice, which could not be solved by harmonizing or approximating the laws is a British cultural characteristic. It should not be forgotten that the idea of changing the paradigm from harmonization to mutual recognition in criminal matters was launched during the British Presidency of the Union during the first half of 1998. The new paradigm has the legitimacy required by the principle of the primacy of the Union law and this results from the mutual trust between the legal systems of the Member States. Moreover, the desire to respect the constitutional traditions of the Member States is much better achieved by means of the principle of mutual recognition, than by establishing common minimum rules on criminal offenses, punishments and criminal proceedings.

2.2.8. Schengen Agreement and the Convention Implementing the Schengen Agreement (CISA)[29]

As a result of art. (1) of the Protocol integrating the Schengen acquis into the framework of the European Union annexed to the Treaty of Amsterdam, the Council adopted Decision 1999/436 / EC on 20 May 1999 determining, in accordance with the relevant provisions of the EC Treaty and of the EU Treaty, the legal basis for each of the provisions and decisions that make up the Schengen acquis together. The Council thus selected Art. 31 and 34 EU Treaty (consolidated post-Amsterdam and Nice version), which are part of Title VI of the EU Treaty: "*Provisions on police and judicial cooperation in criminal matters*" as the legal basis for the integration of Art. 54-58 CISA. These latter provisions make up Chapter 3, entitled "*Applying ne bis in idem principle*", from the Title III "*Police and Security*" of the CISA.

Article 54 of the CISA refers to the principle *ne bis in idem*, a principle that implies *ipso facto* a recognition form of a judgment of another Member State, but aimed at avoiding the duplication of that criminal procedure in another Member State of the Union.

According to art. Article 54 of the CISA: "*A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting*".

[27] A. Klip, European Criminal Law. An Integrative Approach, 3rd edition, Ius Communitatis Series, Volume 2, Intersentia, Cambridge-Antwerp-Portland, 2016, p. 395: "*Mutual recognition is inspired by the principle of the internal market (...)*"

[28] V. Mitsilegas, The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU, Common Market Law Review 43, 2006, Kluwer Law International, p. 1280.

[29] The Convention Implementing the Schengen Agreement dated June 14, 1985, concluded among the governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, hereinafter abbreviated CISA.

This wording of *ne bis in idem* principle implicitly results in a negative recognition of the convicting judgment in another Member State and it is based on the trust that must exist between the judicial systems of the Member States.

One convincing example in that regard is the judgment of the Court of Justice of 11 February 2003 in Joined Cases C-187/01 and C-385/01, concerning the preliminary rulings in criminal proceedings concerning Hüseyin Gözütok and Klaus Brügge[30].

This decision raises the issue regarding the interpretation of art. 54 of the CISA, stipulating that a decision taken by the Prosecutor's Office on the basis of a court settlement concluded between the prosecutor and the defendant in the absence of any form of judicial control, but which produces authority of the national law of the state in which it was adopted, hinders the prosecution criminal proceedings or conviction of the person concerned in criminal proceedings for the same acts in the territory of another Member State.

In order to come to this conclusion, the Court's legal syllogism also made an important point in the finding made in paragraph 33 of the judgment: *" In those circumstances, whether the ne bis in idem principle enshrined in Article 54 of the CISA is applied to procedures whereby further prosecution is barred (regardless of whether a court is involved) or to judicial decisions, there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied*."

Also, regarding this case, we note the emphasis on the mutual trust that the Member States' criminal justice systems should have expressed by the Court of Justice.

A fact that is not clear regarding the mutual trust in justice, is whether it exists or it should exist. Returning to Mitsilegas argument, presented above within the point II.2.7. of this study, that such a trust is hard to exist in the absence of a public negotiation of criminal law, the conclusion that we might draw is that trust must exist, even if it does not form spontaneously. Along the same lines, see also André Klip's position[31].

3. The principle of mutual recognition in the field of judicial cooperation in criminal matters - concrete legal instruments

3.1. European Arrest Warrant (EAW)

As I pointed out above, within the section I of this study, the European Arrest Warrant was the first concrete legal instrument that relied entirely on the free movement of judgments and criminal judicial decisions.

The Framework Decision 2002/584 / JHA, which governs it, shows within its text the connection that the EAW has with the principle of mutual recognition of judgments and judicial decisions, as seen in the light of the Conclusions of the Tampere European Council Presidency. Thus, points (5) to (7) of the preamble to the Framework Decision refer to the replacement of the classical extradition system between the judicial authorities of the Member States, mainly based on conventions of public international law with a surrender system of the suspects, of the defendants and of the indicted persons.

Thus, point (5) of the Framework Decision provides, inter alia, that: „*Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice*."

It is easy to notice that the texts referred to above are directly inspired by paragraphs 33 and 35 of the Presidency Conclusions of the Tampere European Council of 15-16 October 1999 as discussed above under point II 2.2. of this study.

Immediately after entering into force of the Framework Decision 2002/584/JHA, the EAW was questioned before the Court of Justice of the European Union in the context of a request for a preliminary ruling by a Belgian court which specifically concerned the Council's possibility of regulating an arrest and surrender procedure based on the principle of mutual recognition of judgments and judicial decisions in the field of extradition, which was still considered at that time to belong to international public law based on international conventions and treaties.

The problem was settled in favour of EAW by means of the judgment of the Court (Grand Chamber) of 3 May 2007 in Case C-303/05, request for a preliminary ruling made by Arbitragehof (Belgium), regarding the procedure Advocaten voor de Wereld VZW against Leden van Ministerraad [32].

Advocaten voor de Wereld thus argued that Art. 34 par. (2) lit. (b) of the EU Treaty refers only to framework decisions which can be adopted exclusively for the harmonisation of laws and regulations of the Member States.

The applicant in the Belgian internal litigation focused on the list of criminal areas provided by the provisions of Article 2 par. (2) of the Framework Decision as embodied in the Belgian transposing law, stating in respect of that list that it "*infringes the principle of equality and non-discrimination in that, for the offences mentioned in that latter provision, in the*

[30] ECLI:EU:C:2003:87, in electronic format, in the English language, on the webpage http://curia.europa.eu/juris/document /document.jsf?text=&docid=48044&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=446188 ,accessed on 19 January 2018.

[31] Idem point 27, p. 400: "The Rule is that there "should" be mutual trust among the member states."

[32] ECLI:EU:C: 2007:261, , in electronic format on the webpage http://curia.europa.eu/juris/document/document.jsf?text= &docid=61470&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=422244 , accessed on January 19, 2018.

event of enforcement of a European arrest warrant, there is a derogation, without objective and reasonable justification, from the requirement of double criminality, whereas that requirement is maintained for other offences."(point 12 of the judgment). Concerning the same list, another criticism of the complainant was that "it lists, not offences having a sufficiently clear and precise legal content, but only vague categories of undesirable behaviour" (paragraph 13).

All these criticisms were brought by the Advocaten voor de Wereld before the Arbitragehof, referring to the Belgian law transposing the framework decision on the EAW, but the court found that the criticisms in fact refer to the Framework Decision itself (point 14 of the judgment).

The Court of Justice, analyzing the issues, essentially points out that judicial cooperation in criminal matters should be favoured in order to contribute to the achievement of the Union's objectives (Article 34 (2) EU Treaty), in which the Council, pursuant to Article 34 (2) (a) to (d) EU Treaty, has the possibility of adopting both framework decisions, but also to initiate conventions, and no order of priority has been established between these instruments. The quintessence of the Court's interpretation is exposed, however, in paragraphs 28-32 of the judgment.

Thus, with regard to the first question referred, the Court of Justice has concluded that the Framework Decision was not adopted in breach of the provisions of Art. 34 par. (2) (b) of the EU Treaty, the Council being empowered to regulate the issue of the surrender of persons sought by Member States in others for the purposes of prosecution, judgment or execution of a sentence by a framework decision, and not necessarily by an extradition convention in the classical sense of the concept.

With regard to the possible violation of the principle of legality of criminalisation and punishment, in the context of the list of criminal areas exempt from double criminality, in paragraph 53 of the judgment, the Court states that "*the definition of those offences and of the penalties applicable continue to be matters determined by the law of the issuing Member State, which, as is, moreover, stated in Article 1(3) of the Framework Decision, must respect fundamental rights and fundamental legal principles as enshrined in Article 6 EU, and, consequently, the principle of the legality of criminal offences and penalties*".

The Court's conclusion is that, in the light of the arguments put forward by Advocaten voor de Wereld, there is no breach of the principle of legality.

The latter aspect examined by the Court was intended to determine whether the exclusion of the requirement of double criminality for a part of the offenses, namely those listed in Art. 2 par. (2) of the Framework Decision, combined with the maintenance of this requirement in respect of other offenses, violates the principle of equality and non-discrimination.

The legal syllogism of the Court has been built on the idea that equality and non-discrimination require "*comparable situations not to be treated differently and different situations not to be treated in the same way unless such treatment is objectively justified*"(point 56 of the judgment). Next, in paragraph 57, the Court points out that the establishment of the list of criminal areas for which there is no need to verify the condition of double criminality corresponds to an objective criterion: the gravity of the affectation of public order and security through those offenses.

The conclusion was that the different legal regime regarding the list of criminal fields for which double-criminality is not required and all other offenses is justified on the basis of the objective criterion of their gravity, assessed *in abstracto*.

Finally, the Court of Justice found that none of the arguments put forward by Advokaten voor de Wereld against Framework Decision 2002/584 / JHA is valid. We believe that this judgment of the Court of Justice is highly important, because it carries out a substantive examination of the Council's empowerment to use the Framework Decision as an act that regulates the surrender procedures of suspects, defendants and of the convicts who escape criminal prosecution, judgment or the execution of punishment on the territory of other Member States of the European Union, procedures based on the principle of mutual recognition of judgments and judicial decisions, that is a completely different legal paradigm than the classic one, represented by the international conventions on extradition.

EAW was not only the first legal instrument based entirely on the principle of mutual recognition of judgments and judicial decisions, but was and still is the most widely used, the most prolific and most effective instrument. The fulminating success it had in the field of criminal judicial cooperation between the Member States of the European Union, made the principle of mutual recognition affirm and acquire the trust of many sceptics.

Starting from the success of the EAW, a plethora of other legal instruments based on mutual recognition in criminal matters have emerged and proved to be effective in the context of judicial cooperation in criminal matters.

3.2. Other legal instruments based on the mutual recognition of judgments and judicial decisions in criminal matters

In chronological order, the second instrument that used the freedom of movement of judgments and judicial decisions in criminal matters was the freezing order of goods and evidence. It was governed by the Council Framework Decision 2003/577 / JHA[33]. Very

[33] Framework decision 2003/577/JAI from July 22, 2003 on the execution within the European Union of the freezing property or evidence orders, published in JO L 196/03 dated 2.8. 2003, in electronic format, at the address: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:196:0045:0055:en:PDF , accessed on January 21, 2018.

similar in many respects to the Framework Decision 2002/584 / JHA, the preamble this Framework Decision also invokes the principle of mutual recognition of judgments and judicial decisions in the perspective of the Tampere European Council. Along with the situation of the Framework Decision on the European arrest warrant, this Framework Decision contains, in Article 3 (2), the same list of criminal areas which exempt the implementation of the freezing order or evidence from verifying the condition of double criminality.

Generalizing, we find that there is a common structure for all of these Council Framework Decisions that govern the application instruments of the principle of mutual recognition in criminal matters, which encompasses the following regulatory chapters: the preamble (inspired by the Conclusions of the Presidency of the Tampere European Council), definitions, offenses for which double-criminality does not need to be verified, other offenses to which the instrument applies, the procedure for issuing, transmitting and enforcing the instrument, grounds for non-recognition of the order, postponement of execution, refusal to execute, judicial review and remedies, certificates or other documents to be filled in and transmitted with the enforcement order.

The principles underlying the concrete instruments for achieving mutual recognition in criminal matters are as follows:

a) the typology of those instruments: warrants and orders - these are not requests from the judicial authorities to the equivalent of other Member States, but imperative requests, true orders, the execution of which is mandatory;
b) direct communication between the competent judicial authorities of the issuing State and of the executing State, respectively; this involves directing the warrant/ order directly by the issuing authority to the competent judicial authority to execute it;
c) the complete elimination of the recognition of the warrant/order so that it becomes effective at the time of issue, except for the restrictive and express cases set out in the Union's legislative act governing it;
d) the express mention of the mandatory and optional grounds for refusal of execution;
e) the partial removal of the double criminality verification requirement - as we have seen in the Framework Decision 2002/584/JHA, but also in the Framework Decision 2003/577/JHA, or other legislative acts of the same type, there is a list of offenses that, due to their seriousness assessed *in abstracto*, are exempted from verifying the double criminality as a precondition for the execution of the warrant /order;
f) the elimination of the condition of reciprocity, which makes no sense any longer, while the Member States are however legally obliged to ensure the same treatment, considering the nature of the implementing instrument, based on mutual recognition;
g) the principle of specialty - according to which the judicial authorities of the issuing state can use the execution of the warrant /order only in direct connection with the material crimes in respect of which it was issued; extending the purpose of the warrant/order may be achieved only with the express consent of the executing authority or on the basis of the consent of the person to whom the warrant or order refers;
h) respect for human rights and fundamental freedoms in criminal proceedings, both those relating to the suspect, defendant or convicted person, as well as those concerning the legal situation of the other participants in the criminal proceeding: victims, injured or civilians, witnesses, experts and so on; these rights include: the right of respecting the presumption of innocence, the right to freedom, the right to a fair trial, the right to defence, the right to translation and interpretation, the right of access to the case file and all the evidence administered, the right to be judged in attendance, the right to execute custodial sentences in conditions that ensure the dignity and safety of the person; some of these rights have been diachronically subject to measures establishing minimum standards for criminal proceedings.

On the basis of the same principles and structure, many legal instruments have been elaborated in a diachronically, which enhance the value of the free movement of judgments and judicial decisions in criminal matters.

4. Conclusions

The free movement of judgments and judicial decisions in civil and criminal matters is a method of achieving the legal integration of the European Union and the consequence of the principle of mutual recognition, being also the expression of the substantive law of the Union. The free movement of persons and the right of establishment have given rise to the freedom of movement of judgments and judicial decisions in criminal matters, while the four fundamental freedoms have caused the free movement of judgments, judicial and extrajudicial decisions in civil and commercial matters.

The source of this legal paradigm lies in the effort to build the internal market of the Union, a field from which it was transplanted into the area of freedom, security and justice, together with its creation and operationalization in the era of the Treaty of Amsterdam and the forthcoming times.

As a fundamental principle in civil and commercial matters, the free movement of judgments essentially means abandoning the necessity of an exequatur to produce the effects of the judgments

within a Member State, other than the one of the judicial authorities which has ruled them.

In criminal matters, this principle has given rise to a large number of distinct legal instruments, among which the first and the most important is the European arrest warrant, but very important are also: the European order for the freezing of property and evidence, the European Investigation Order (that partially replaces the precedent order, but also the European Evidence Warrant), the European Protection Order (of victims and witnesses) etc.

From the point of view of what judicial cooperation in criminal matters means, the emergence and application of these legal instruments based on the free movement of judgments and judicial decisions has truly constituted a "*cornerstone*" (as the Tampere European Council names it within the Presidential Conclusions) and has greatly replaced the previous instruments of judicial assistance in criminal matters (such as, for example, the practice of joint investigation teams - JIT).

If up to present, among all these instruments, the most prolific and most effective has proved to be the European arrest warrant, we believe that in the future, the place it will occupy will be equal to, if not even beyond, the European Investigation Order, an instrument that has recently entered into force (2017) and practically replacing almost all the previous instruments of judicial assistance in criminal matters between the Member States of the European Union.

References

- Calderoni, Francesco, 2010, Organized Crime Legislation in the European Union – Harmonization and Approximation of Criminal Law, National Legislation and the EU Framework Decision on the Fight Against Organized Crime, Springer Heidelberg, Dordrecht, London, New York
- Klip, André, 2016, European Criminal Law. An Integrative Approach, 3rd edition, Ius Communitatis Series, Volume 2, Intersentia, Cambridge-Antwerp-Portland
- Mitsilegas, Valsamis, 2009, *EU Criminal Law*, Modern Studies in Criminal Law, Hart Publishing Ltd., Oxford and Portland, Oregon
- Mitsilegas, Valsamis, 2006The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU, Common Market Law Review 43, Kluwer Law International
- "*Fundamental Treaties of the European Union*", 2017, edition coordinated and prefaced by A. Fuerea, updated on 1.06.2017, C. H. Beck Publishing House, Bucharest
- 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 judgements in civil and commercial matters, published in OJ L 351/1 from 20.12.2012
- The European Council. Stockholm Program - An open and secure Europe serving citizens and protecting their rights, published in original in OJ C 115/1 date 4.5.2010
- Regulation (EC) no. 764/2008 of the European Parliament and Council dated July 9, 2008 laying down procedures relating to the application of certain national technical rules to products lawfully marked in another Member State and repealing Decision no. 3052/95/CE, published in OJ L 218/21 from 13.8.2008
- Framework Decision 2008/978/JAI of the Council dated 18 December 2008 on the European Evidence Warrant for the purpose of obtaining objects, documents and data for use in the proceedings in criminal matters, published in OJ L 350/72 date 30.12.2008
- Court (Grand Chamber) judgment of 3 May 2007 in Case C-303/05, preliminary ruling made by Arbitragehof (Belgium), regarding the procedure Advocaten voor de Wereld VZW against Leden van Ministerraad, ECLI:EU:C: 2007:261
- Council. The Hague Programme: Strengthening Freedom, Security and Justice in the European Area, OJ C 53/1 3.3.2005
- Framework decision 2003/577/JAI from July 22, 2003 on the execution within the European Union of the freezing property or evidence orders, published in OJ L 196/03 date 2.8. 2003
- Court of Justice judgment of 11 February 2003 in Joined Cases C-187/01 and C-385/01, concerning the preliminary rulings in criminal proceedings concerning Hüseyin Gözütok and Klaus Brügge, ECLI:EU:C:2003:87
- Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, published in OJ L 190/02 date 18.7.2002;
- Program of measures to implement the principle of mutual recognition of decisions in criminal matters, published in OJ C 012 from 15/01/2001
- Commission`s communication to the Council and to the European Parliament - Mutual Recognition of Final Decisions in Criminal Matters, COM/2000/0495 final
- The Council Resolution from 28 October 1999 on the role of standardization in Europe, published in OJ C 141 from 19.5.2000
- The Cardiff European Council, 15-16 June 1998, Conclusions of the Presidency
- European Commission. Justice. Building a European Area of Justice." *Recognition of decisions between EU countries*"
- The document" European Commission. Economic growth. Single European Market. Single Goods Market. Free movement in harmonized and non-harmonized sectors. Mutual recognition."

- Decision no. 3052/95/CE of the European Parliament and Council from 13 December 1995 establishing a procedure for the exchange of information on national measures derogating from the principle of free movement of goods within the Community (repealed), published in OJ L 321 from 30.12.1995
- Treaty on European Union (Treaty of Maastricht), published in OJ C 191 dated 29.07.1992
- Single European Act signed in Luxembourg on 17 February 1986 and effective as of 1 July 1987, published in OJ L 189/1 from 29.6.87
- The Convention Implementing the Schengen Agreement dated June 14, 1985, concluded among the governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders
- Court of Justice judgment from 20 February 1979 ruled in the case C-120/8, preliminary decision Rewe Zentral AG v. Bundesmonopolverwaltung für Brantwein, ECLI:EU:C:1979:42

VARIOUS HISTORICAL CONNOTATIONS OF THE CONCEPT OF SOVEREIGNTY

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Abstract

Sovereignty as a feature of state power, shall be expressed in terms of organizing and exercising, determining and resolving internal and external problems, freely and according to its will, without any interference, respecting the sovereignty of other states, as well as European and international law norms. The sovereignty of the people may remain a mere fiction, in the conditions in which the people, as a whole, does not become or is not aware of its complete and complex role as the sole sovereign owner of state power. The people assuming and exercising this role implies not only that it has the right to participate in government, which is in fact an essential aspect of democracy, but also the fundamental duty to achieve social, economic prosperity accompanied by cultural development to ensure the freedom it needs in order to fulfil its civic obligations and duties. From this point of view, the state has the aim of realizing the social expectations of the people, the requirements laid down by various groups or social categories in decisions for the exercise of state power. Rather controversial, the concept of sovereignty, from the perspective of its historical imposition and configuration, involves at least two connotations likely to cause an active and permanent controversy in specialized literature - a simple statement and a political and legal concept.

Keywords: *sovereignty; rule of law; power of state; concept of law.*

1. Introductory elements regarding the concept of sovereignty

The very controversial concept[1] of *sovereignty* involves, from the perspective of its historical imposition and configuration, at least two positions likely to cause and active and permanent controversy in literature.

So, from a first perspective, the concept of *sovereignty*, coinciding with the *State* itself, as a concept, exists as such, in itself, sovereignty being understood as an attribute of the State for the first time, establishing this positive predicate, according to the precept by which words would exist before things, existential states.

2. General considerations regarding the historical evolution of the concept of sovereignty

In such an opinion[2], being a majority one, there are, on the one hand, a logical-semantic reduction of *sovereignty*, as a concept, to the *state*, but, at the same time, on the other hand, *sovereignty* is only the result of a statement on a note, on a predicate that can be said about the *state* as meaning, at the same time, *its external independence* in relation to other entities of political organization[3] in statal form of communities of the same rank, as well as *an internal supremacy*. Therefore, any member must be characterized, at least historically, as both *independent* as an actor on the international scene, and as holding *an internal supremacy* by exercising certain royal rights[4].

From the second political-theoretical perspective, *sovereignty* is a concept existing, pragmatically, before Bodin. [5] Building - from a certain ideological motivation, wanting, in fact, to impose a theory of the Christian republic - the principle of sovereignty and the theory of a sovereign republic, but the result being the elimination of the Christian fundamentals of authority, Bodin argues that sovereignty, in itself, in its very concept, is nothing more than the power to make laws, or, in other words, the *will of the sovereign*, an ordering power, from a normative point of view, of the Republic. In this sense, sovereignty is therefore "the principle of the profane foundation of power". As a matter of fact, the concept of *sovereignty*, associated with that of the *state*, emerges from the legal doctrine of Bodin, therefore, starting with the 16th century, taking into account that the concept of *state* is a modern epistemological creation, with anthropologists noting that certain societies, which did not know the functional differentiation of power in accordance with the classic *check and balance* formula, highlighted by

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[1] Hans Kelsen, Les rapports de système entre le droit interne et le droit international public, (Paris, Hachette, 1927), 35-41.

[2] Jean Bodin, *Les Six Livres de la République* (éd. Gérard Mairet), (col. "Le Livre de Poche. Classiques de la philosophie", nr.4619), (Paris, Gallimard 1993).

[3] Constantin Dissescu, *Constitutional Law*, ("Soce & Co" Publishing House, Bucharest, 1915), 315.

[4] Alexandru Bolintineanu, Mircea Malita, *Carta ONU*, (Politica Publishing House, Bucharest, 1970), 13-15.

[5] Olivier Beaud, *La puissance de l'État*, (Presses Universitaires de France, Pars, 1994), 35-36.

Montesquieu[6] and John Locke, did not know the *state*, being, in a modern formula, non-statal societies[7].

Even if, as regards the concept of *sovereignty*, it has been the object of debate ever since the Middle Ages, without, however, the use of the concept of sovereignty[8], during this period, having the same political and legal significance of what the medieval people understood by the statal sense of the concept.

Carré de Malberg[9] noted, moreover, that in the medieval period, the term of *sovereignty* rather designated, used comparatively, a certain level of *Power.*

In the 13th century, the term of *sovereignty* acquires and is enriched with a legal-technical meaning, expressing not only a relationship of power, but a certain supreme attribution, a single *authority*, namely to settle, as a last resort, a legal conflict. A second and richer meaning in relation with the somewhat constrained sense of the 12th century, so that another customary law, the *Usages d'Orlenois* from the middle of the 13th century, governing the distribution of jurisdictional attributes between the monarch and his barons, states that the royal justice remains as a last judgment (in the sense of a decision which can no longer be attacked in front of another power, either vertically and, as such, understanding it as superior, or by conceiving it horizontally, the concept of *sovereign* reflecting, therefore, the recognized faculty of the monarch[10] to resolve a judicial conflict by a non-appealable decision, since " *le roi est souverains, si doit être ça cora souverain*[11]".

Thus, for the political-legal mentality and the appropriate language, *sovereignty* alludes to the *sovereign* who can, either as baron or king, within his sphere of given and recognized dominance, decide independently of another person. A mentality on *sovereignty* somewhat opposed to the modern meaning we give to the concept, beginning especially with Rousseau, the opposition being between the *judicial* conception of sovereignty and the modern, *legislative*, one, the idea of a unique and effective public power with exclusive competence - namely, legislative power - being foreign to the medieval conception, which will later make Kelsen[12] state that the constitutional order of the Middle Ages and in general was established as a decentralized legal order but without a precisely located center, i.e. the unifying power which sovereignty is for the modern state.

For the Middle Ages, in European political practice, *sovereignty* shows only the concepts of double *power* and *judicial power relationships*, and which generates, in the era, the content of the expression of *rights of sovereignty* as an unlimited and general attribute of the monarch, not infrequently a result of limitation by military force of the sovereignty of its barons. In this way, by the Treaty of Brétigny (1360), Charlemagne assumes in the content of his sovereignty a series of royal prerogatives which are considered today, in the doctrine of public law, as pertaining to the essence of sovereignty: *ius belli*, *ius iudicii* et al., however, all of these rather representing attempts of introducing the decisive concepts of Imperial Roman law, but without their full reception.

Therefore, the thesis according to which the concept of *sovereignty* was present before Bodin of course, the French legalists of the first half of the 16th century, such as Grassaille, Seyssel, or Chasseneuz, have certain merits in substantiating modern public law on the principle of sovereignty, but that which was the object of their theses was the justification of the supremacy of the monarch within the state, based on the theory of divine law as basis of his prerogatives. Thus, the great jurist Charles Dumoulin[13] admitted the absolute character of sovereignty, substantiating royal power on divine investiture, thus identifying, the same as his predecessors, *sovereignty* with *royalist absolutism*, identification which has, as such, consecrated the medieval adage, as quoted in the work of the medieval public law works, that persons governed by public law, that *Rex Franciae est in regno suo tanquam quidam corporalis Deo* - "the King of France, in his kingdom, is God embodied". It's true, a logical identification, that does not exclude, however, the at least formal recognition of a certain constitutional legal limit of such an absolutism of power, the limits being the *oaths* and the *principle of consent of statuses*.

Bodin managed to achieve the great leap toward the modern concept of *sovereignty* by understanding, however, that sovereignty is not the principle of the authority within the state, but the principle of the State from which all powers[14] originate, for Bodin the sovereign and the sovereignty which he exercises, either directly or indirectly - only operates in order to found and preserve a Republic - the state, because sovereignty is the principle of the state itself. For Bodin, sovereignty is based on law[15], which implicitly

[6] Montesquieu Charles., *Despre spiritul legilor*, vol. 1. ("Stiintifica" Publishing House, Bucharest, 1964), 11.
[7] Charles Loyseau, *Le prince*, (Gallimard, Paris, 1952), 290.
[8] Paul Negulescu, *Curs de drept constituțional român*, (Alex Th. Doicescu Publishing House, Bucharest, 1927), 94-95.
[9] Carré de Malberg, *Contribution à la théorie générale de l'État*, tome I, (Sirey 1, Paris, 1920), 74.
[10] Genoveva Vrabie, Organizarea politico-etatica a Romaniei. Drept Constitutional si institutii politice. Vol. 2. (Cugetarea Publishing House, Iasi, 1999), 74.
[11] Paul Viollet (éd.), Les Établissements de saint Louis accompagnés des textes primitifs et de textes dérivés, avec une introduction et des notes, 4 tomes, (Société de l'histoire de France, librairie Renouard, Paris, 188), 515-517.
[12] Hans Kelsen, *Das Problem der Souveränität und die Theorie des Vökerrechts* (2.Ausg.), (Aalen, Scientia Verlag, 1981), 55.
[13] Jean-Louis Thireau, Charles Dumolin, 1500-1566. (Droz, Geneva, 1980), 28.
[14] Gérard Mairet, Le principe de souveraineté. Histoire et fondements du pouvoir moderne, (Gallimard, Paris, 1997), 34.
[15] Jean Bodin, Les Six Livres de la République, 58.

makes *the sovereign state* a *state governed by the rule of law* - in Bodin's terminology, "an *État de justice"*.

Jean Bodin marks, in the history of the concept of *sovereignty*, *the* principle of individualizing historical peoples, of building the poitical territoriality of the states, of political modernity in general, a process which continues with Thommas Hobbes, with his *Philosophical Rudiments of Government and Politics*, repeating the exposure of the conceptual system of sovereignty through *Principes fondamentaux de la philosophie de l'État* and *Du citoyen, a* work through which Hobbes inaugurates, for the modern era, the philosophy of the state.

For Hobbes[16], by following Bodin, *positive law*, the law in force, is an expression of the will of the sovereign who uses his power in this way. As an immanent form of civil human existence (i.e., within the Roman sense of *civis*), with its determining factor and political significance, the law is a condition of civilization, the law "playing", in order to achieve such a purpose, a double function: moral and pragmatic, is in the service of (social) justice and peace. Therefore, law summarizes and expresses the essence of the state, namely the *union* of individuals within the same political body and their *subordination* to the same rules.

What is interesting in Hobbes is the fact that law as an expression of sovereign power is only meant to repress, to penalize guilt, without, however, aiming to carry out justice. The law does not express fairness. *Fairness*, as a value, constitutes only a procedure of sovereignty, in the sense that law constitutes what the sovereign wishes and what the sovereign wants constitutes law. Hobbes, by supporting the thesis that the State is a profane state, gives up, as a landmark, any divine norm, and, as such, the divine norms and values are no longer the landmarks of fairness, but the will of the sovereign is, the law having a deeply profane nature. The sovereign must be the only one able to determine what is and what is not fair: the law being a lexicon, a code, the sovereign is the one who lays down such a code, imposing the current and official definition of language terms.

As a matter of fact, for a long time, the concept of *sovereignty* was treated as a function of the *state*, as an essential and specific element of the state, the view of an anthropomorphic theory of legal scholastic which built law through a scientific technique of legal fictions being later abandoned.

From such a perspective, the concept of *sovereignty*, referring to the alliance between *property* and will, had been based on the political and legal trinity of:

a) personality;
b) the hierarchy of wills;
c) patrimony.

Although, in the modern classic conception, the holder of the right to property is the king and then the nation, the French Revolution of 1789, following in the footsteps of Locke's theory, transfers the subjective right to property from the king to the nation, not noticing, however, that the holder of the right to property of the national heritage was not the king, but that the property belonged to the institution of the Crown. The revolutionary theory which laid the foundation for 1789, and in particular the legal ideology of Rousseau, conceived sovereignty as an expression of three basic elements[17]:

a) indivisibility;
b) imprescriptibility;
c) inalienability.

However, these three determinants of the sovereignty of the nation are nothing more than the consequences of the *theory of the sovereignty of the crown*.

For the classic doctrine, distinctions must be made between the German School - Gerber, Jhering, Laband and Jellinek - and the French School - Rousseau and A. Esmein, the latter also being the author of the theory of the assignment of national sovereignty, therefore, between the *German positivist theory* and the *French positivist theory*, both approaches having features in common, namely legal positivism and judicial voluntarism - both opposing almost equally the English School of public law, by rejecting the theory of national sovereignty, the English substituting the analysis of the concept of *sovereignty* with the *theory of the sovereignty of Parliament*. Coming back to the distinctions between the German and French schools in the discussion on sovereignty, it should be noted that, for the German thinkers, the *State* is a legal person, his being an *a priori* assumption. As such, law arises out of the will of the State, sovereignty belonging to the state as a person[18]. Whereas for the French, the *State*, as the nation's legal expression, is *a posteriori* assumption, the Nation existing before the State, the State and Law arising out of the Nation; therefore, sovereignty belongs to the Nation - according to the theory of nation-people. Such a theory of the State generates two principles, namely:

1. the principle of national sovereignty;
2. the principle of the assignment of sovereignty.

However, Kelsen and Krabbe cause a change of paradigm. It is true, Krabbe[19] stops at an opposition between the *sovereignty of law* and *state sovereignty*. However, by analyzing the concept of *sovereignty* as a notion *of itself* and *in itself*, Kelsen triggers a breakthrough in deepening the theory and the notion of *sovereignty*, by studying the legal logic of the concept, by issuing a new hypothesis on sovereignty, by releasing the own function of the concept of

[16] Thomas Hobbes, *Du citoyen (De cive), Principes fondamentaux de la philosophie de l'État* (éd. Gérard Mairet), (col. ,,Le Livre de Poche. Classiques de la philosophie"), (Paris, Gallimard 1996), 270.
[17] Tudor Draganu, *Drept constitutional si institutii politice. Tratat elementar*, vol.1, (Lumina Lex Publishing House, Cluj-Napoca, 2000), 208-212.
[18] Bertrand de Jouvenel, *Du pouvoir, Histoire naturelle de la croissance*, (Hachette, Paris, 1972), 23.
[19] Francis Jaeger, Le problème de la souveraineté dans la doctrine de Kelsen (Exposé et critique), (E. de Boccard édit., Paris, 1932), 2-4

sovereignty in the theory of law. For Kelsen, sovereignty is no longer and can no longer be seen as an exclusive attribute of the state, but sovereignty is and becomes an attribute of international law - *droit des gens*, by exceeding the limits classically imposed by positive law and statal law. Already, with Kelsen, the problem of sovereignty becomes and is established as the issue of the unity of legal order, of the scientific systematization of law.

Conclusions

Sovereignty, is an *element of logic*, which gives a part of positive law priority over the other subsystems of positive law. As such, it is logical that sovereignty must be assigned, as a predicate, to internal public law - internal public order - rather than to the State, in order to arrive at a single source of the norms of jurisdiction, sovereignty being, in conclusion, a *criterium*, a synthetic principle in establishing the hierarchy of the different systems/orders of positive law, for the introduction of the logical-theoretical unity of law, through a common value.

References

- Alexandru Bolintineanu, Mircea Malita, *Carta ONU*, (Politica Publishing House, Bucharest, 1970)
- Bertrand de Jouvenel, *Du pouvoir, Histoire naturelle de la croissance*, (Hachette, Paris, 1972)
- Carré de Malberg, *Contribution à la théorie générale de l'État*, tome I, (Sirey 1, Paris, 1920)
- Charles Loyseau, *Le prince*, (Gallimard, Paris, 1952)
- Constantin Dissescu, *Constitutional Law*, ("Soce & Co" Publishing House, Bucharest, 1915)
- Francis Jaeger, Le problème de la souveraineté dans la doctrine de Kelsen (Exposé et critique), (E. de Boccard édit., Paris, 1932)
- Genoveva Vrabie, Organizarea politico-etatica a Romaniei. Drept Constitutional si institutii politice. Vol. 2. (Cugetarea Publishing House, Iasi, 1999)
- Gérard Mairet, Le principe de souveraineté. Histoire et fondements du pouvoir moderne, (Gallimard, Paris, 1997)
- Hans Kelsen, Das Problem der Souveränität und die Theorie des Vökerrechts (2.Ausg.), (Scientia Verlag, Aalen, 1981)
- Hans Kelsen, Les rapports de système entre le droit interne et le droit international public, (Hachette, Paris, 1927)
- Jean Bodin, *Les Six Livres de la République* (éd. Gérard Mairet), (col. "Le Livre de Poche. Classiques de la philosophie", nr.4619), (Paris, Gallimard 1993)
- Jean-Louis Thireau, Charles Dumolin, 1500-1566. (Droz, Geneva, 1980)
- Montesquieu Charles, *Despre spiritul legilor*, vol. 1. ("Stiintifica" Publishing House, Bucharest, 1964)
- Olivier Beaud, *La puissance de l'État*, (Presses Universitaires de France, Pars, 1994)
- Paul Negulescu, *Curs de drept constituţional român*, (Alex Th. Doicescu Publishing House, Bucharest, 1927)
- Paul Viollet (éd.), Les Établissements de saint Louis accompagnés des textes primitifs et de textes dérivés, avec une introduction et des notes, 4 tomes, (Société de l'histoire de France, librairie Renouard, Paris, 188)
- Thomas Hobbes, *Du citoyen (De cive), Principes fondamentaux de la philosophie de l'État* (éd. Gérard Mairet), (col. „Le Livre de Poche. Classiques de la philosophie"), (Paris, Gallimard 1996)
- Tudor Draganu, *Drept constitutional si institutii politice. Tratat elementar*, vol.1, (Lumina Lex Publishing House, Cluj-Napoca, 2000)

WHAT MEANS DISCRIMINATION IN A NORMAL SOCIETY WITH CLEAR RULES?

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Abstract

The concept of discrimination is relatively new which has already issued various interpretations and approaches. Discrimination manifests itself on various criteria such as gender, religion, race and others. We arrived in such a point that the idea of indirect discrimination was pointed out provided that certain act or deeds affect the person who may be discriminated. The present study intends to analyse the concept of discrimination, the persons affected by this kind of behaviour and how the legislation tries to correct the human conduct in order not to affect the dignity of individuals. All concepts from legislation are analysed under the precedent of the Romanian authority empowered to sanction the discrimination deeds. Also, we analyzed the issue of discrimination from the point of view of the Council for Combating Discrimination, the sole authority competent to pronounce on first instance if we face of an act or deed of discrimination nature which could affect human values that characterize an individual. The study starts from the presentation of general concepts as they are taken into account by the legislation, but also by the case-law of the National Council for Combating Discrimination or of the domestic or international courts. Starting from this general concept, we finally reached the particularization of certain specific situations of discrimination. Despite this, the analysis was always performed in relation to concepts clearly established, as we have shown, by the legislation or by the case-law.

Keywords: *discrimination, rules of law, applicable legislation, CNCD, discriminated person.*

1. Introduction - Presentation of Discrimination Concept

1.1. The defining elements of the concept of discrimination. Notion. Definition

Ab initio, we believe that we need to perform a brief analysis in terms of the terminology of word *"discrimination",* for a better understanding of the situations it comprises.

In this respect, we hereby point out that, in accordance with the *Explanatory dictionary of the Romanian language*[1], "***to discriminate***" means, *inter alia*:

- "to make a difference";
- "to separate";
- "to make a distinction";
- "to pursue a policy by which a category of citizens of a state are deprived of certain rights on racial, ethnic origin, sexual grounds, etc.".

Furthermore, the same source defines the term of "***discrimination***" as being:

- "the action of discrimination and its result";
- "net difference, distinction made between several objects, ideas, etc.";
- "policy by means of which a state or a category of citizens of a state are deprived of certain rights on the basis of illegitimate considerations".

Therefore, given this first aspect, it can be concluded that the notion of "discrimination" implies unequal treatment, materialized in a distinction, differentiation between certain categories of objects/persons, a distinction which is performed based on specific criteria.

In what concerns second aspect, in terms of the normative definition of **"*discrimination*"**, we hereby state that both the national law maker[2], and the community law maker[3] defined **"*discrimination*"** as

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[1] See in this respect, https://dexonline.ro/intrare/discrimina/17069, site accessed on 10.02.2018.

[2] See in this respect the provisions of art. 2 para. (1) of Government Ordinance no. 137/2000 on the prevention and sanctioning of all forms of discrimination, republished in Official Journal, Part I no. 166 of March 7th, 2014 (hereinafter referred to as "***G.O. no. 137/2000***"), according to which: "*[…] any distinction, exclusion, restriction or preference on the grounds of race, nationality, ethnicity, language, religion, social category, beliefs, gender, sexual orientation, age, disability, non-contagious chronic disease, HIV, infection, affiliation to a disadvantaged category, as well as any other criteria of which scope or effect is the restriction, removing, recognition, use or performance, on an equal footing, of human rights and fundamental freedoms or of the rights recognized by the law, in the political, economic, social and cultural field or in other fields of public life"*;

[3] See in this respect the provisions of art. 2 para. (1) and (2) of Council Directive 2000/43/EC of June 29th, 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, published in Official Journal of European Union no. 180 of July 19th, 2000 (hereinafter referred to as "***Directive no. 43/2000***"), according to which:

(1) The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment.

(2) For the purpose of para. (1):

(a) direct discrimination: shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation, on grounds of race or ethnic origin;

representing "***different treatment applied to individuals in a comparable situation"***. In other words, to discriminate means to make a *difference or distinction, to distinguish, reject or apply arbitrary or unequal treatment, **in unjustified way**, **between two persons or situations in comparable positions***. Furthermore, differences, restrictions, exclusions or preferences related to an individual's characteristics ***are discriminatory if their purpose or effect is the reduction or exclusion of rights, opportunities or freedoms***.

In what concerns third aspect, any criterion according to which a person is treated differently may represent a criterion of discrimination; there can be **discrimination** when two or more persons are treated identically, despite the fact they are in different situations. These persons are treated identically due to the fact a specific characteristic that differentiate them from other category is not taken into account.

From this perspective, if the differential treatment or the identical treatment has an objective justification does not represent discrimination, in which respect the national and community case-law appreciated unanimously that differential treatment becomes discriminatory when distinctions are made between analogous and comparable situations without being based on a reasonable and objective justification, as we are to detail below.

2. Content

2.1. National and International Case-Law Matters

The following were established in the judicial practice of the contentious constitutional court:

"the violation of the principle of equality and non-discrimination occurs **when different treatment is applied to equal cases, without any objective and reasonable grounds** or if there is a disproportion between the scope aimed by means of the unequal treatment and the used means"[4].

Therefore, the discrimination is not only an action or a conduct, but also the intention to promote social inequalities, by being a form of marginalization, therefore discrimination is related to different categories of persons who are marginalized, isolated or unprivileged based on prohibited criteria.

In this respect, the following were stated in the case law of the European Court of Justice[5]: "the principle of equal treatment prohibits comparable situations to be treated differently and different situations to be treated identically".

Furthermore, it was stated that „*the right to non-discrimination prohibits situations in which persons or groups of persons in a similar situation are treated differently, as well as situations in which persons or group of persons in different situations are treated identically*"[6].

In the case law of the European Committee of Social Rights, **the notion of discrimination** was defined as representing: "the differential treatment applied to persons in comparable situations, difference which does not have a legitimate purpose and/or is not based on objective and reasonable grounds".

Furthermore, the **non-discrimination principle** is provided both by the provisions of **art. 14** of the **European Convention on Human Rights,** and by **Additional Protocol no. 12** which sanctions all forms of discrimination.

In this respect, the High Court of Cassation and Justice established the following in its constant judicial practice:

"The principle of non-discrimination is provided by all international treaties and documents on human rights protection. This principle entails the application of an equal treatment to all individuals who have equal rights. Drawn up this way, non-discrimination

(b) indirect discrimination: shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared to other persons, unless the respective provision, criterion or practice is objectively justified, by a legitimate purpose and the means for reaching the respective purpose are appropriate and necessary.

Furthermore, see the provisions of art. 2 para. (1) and (2) of Council Directive of November 27th, 2000 establishing a general framework for equal treatment in employment and occupation (2000/78/EC), published in Official Journal of the European Union no. 303 of December 2nd, 2000 (hereinafter referred to as "***Directive no. 78/2000***"), according to which:

(1) For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

(2) For the purposes of paragraph (1):

(a) direct discrimination shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or

(ii) as regards persons with a particular disability, the employer or any person or organization to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice;

[4] See in this respect, Constitutional Court, Decision no. 82 of February 7th, 2012, published in Official Journal of Romania no. 250 of April 13th, 2012, available on http://legislatie.just.ro/Public/DetaliiDocument/137137, site accessed on 10.02.2018.

[5] See in this respect, Case C-106/83, *Sermide SpA c. Cassa Conguaglio Zuccero* and others, available on: http://curia.europa.eu/juris/celex.jsf?celex=61983CJ0106&lang1=en&lang2=RO&type=TXT&ancre, site accessed on 10.02.2018.

[6] See in this respect, the Decision of the European Court of Human Rights, *Hoogendijk/the Netherlands (dec.)* (58641/00), January 6th, 2005;

principle appears as a modern and improved form of the principle regarding the equality of all individuals before the law. Furthermore, art. 7 of the Universal Declaration provides that all individuals are equal before the law and are entitled without any discrimination to equal protection of the law.

As a legal matter, the right to non-discrimination, provided for by art. 14 of the European Convention on Human Rights, is a substantially subjective right. The text in question lists 13 non-discrimination grounds, but this list is not limited. ***In other words, any form of discrimination shall be prohibited, regardless the criterion it is based on.***

The right to non-discrimination provided for by art. 14 of the European Convention on Human Rights does not have an independent existence in the system of European protection of the fundamental rights and freedoms established by the Convention, due to the fact it can only be claimed in connection to them. It can also emerge autonomously, meaning that, it may be violated in a given situation without a violation of the rights in connection to which it was found being ascertained. The ascertainment of a violation of these provisions can only be performed in connection with another right protected by the Convention and/or its additional protocols, and, as of April 1st, 2005, when Protocol no. 12 to the Convention on the general interdiction of any form of discrimination entered into force, in connection with any other right recognized in the national legislation of any contracting state.

By making a specific interpretation of the provisions of the Convention, its bodies concluded that to distinguish does not mean to discriminate, by noting the existence of situations the peculiarities of which require to be treated differently.

The difference in treatment becomes discrimination, under art. 14 of the Convention if state authorities introduce distinctions between analogous and comparable situations, without being based on a reasonable and objective justification"[7].

Therefore, discrimination does not operate in any situation, but entails the existence of a criterion of those provided by the law, therefore differentiation does not represent discrimination if there is an objective justification for this differentiation.

In the same respect, the Court of Appeal Bucharest noted in its constant judicial practice the following:

„Not any differential treatment means discrimination; in order for unfair differential treatment to be ascertained, it is required to establish that ***persons in analogous or comparable situations benefit from a preferential treatment****, and if such distinction between analogous or comparable situations occurs,* ***it must not find any objective or reasonable justification"***[8].

Therefore, in order to find ourselves in a situation of discrimination, the differentiation, exclusion, restriction or preference has to be **based on one of the prohibited criteria provided by the law,** to be arbitrary. Furthermore, it is required that all the aforementioned refer to persons in comparable situations and their scope or effect is the restriction or removal of a right granted by the law**.**

Furthermore, the relevant doctrine in the field provided the following:

„The differential treatment shall be deemed discriminatory if the operated distinction is objective and reasonable. The distinction is admissible if it has a legitimate purpose, by following, at the same time, the reasonable report of proportionality between the means used and the achieved aim. To say that differentiation is objective means that it does not have to be subjective and arbitrary. Reasonable nature of the differentiation is subject to the same logics and concerns to avoid arbitrary: this has to occur in certain limits, so that the operated differentiation cannot violate principle of equality by protecting the interests of the group in question. This is the application of the proportionality principle".[9]

Therefore, any time there is a reasonable and objective justification of the differential treatment, we cannot talk about a discrimination action.

In this respect, we hereby mention that the provisions of art. 2 para. (3) of Government Ordinance no. 137/2000 expressly establish that there is no discrimination if there is an objective justification of a certain behavior: [...] „*unless these provisions, criteria or practices are objectively justified by a legitimate purpose, and the methods of reaching the respective purpose are appropriate and necessary"*.

In connection to the notion of differential treatment, the High Court of Cassation and Justice noted the following:

„[...] the criterion based on which the differential treatment apply must be the determinant factor in the application of the differential treatment, meaning that this element is the cause of the discrimination deed.

In case of discrimination, the differential treatment is determined by the existence of a criterion, which entails a causality relation between claimed differential treatment and the criterion claimed in case of the person who considers himself/herself discriminated, and the scope or effect of the differential treatment must be the restriction or removal of the

[7] See in this respect, Decision no. 2808/2015, pronounced by the High Court of Cassation and Justice, Division of Contentious Administrative and Fiscal. The whole material can be accessed by using site: https://lege5.ro/App/Document/gi3diojrgq3q/decizia-nr-2808-2015-anulare-act-administrativ?d=18.09.2015&pid=250376975#p-250376975, site accessed on 10.02.2018.

[8] See in this respect, the Court of Appeal Bucharest, Division VIII civ. and mun. asig, Decision no. 562R/2010, quoted by **Loredana-Manuela Muscalu**, *Discriminarea în relațiile de muncă*, Hamagiu Publishing House, Bucharest, 2015, p. 4;

[9] See in this respect, **J.-F. Renucci**, *Tratat de drept european al drepturilor omului*, Hamangiu Publishing House, Bucharest, 2009, pp. 153-154, quoted by **Loredana-Manuela Muscalu**, *Discriminarea, op. cit.*, p. 7**;**

admission, use or exercise, under equality terms, of human fundamental rights and freedoms, or of the rights admitted by the law, in the political, economic, social and cultural area or in any other areas of public life[10]*."*

Therefore, objective justification includes the existence of a legitimate purpose reached by appropriate and mandatory methods. In other words, objective and reasonable justification must follow a legitimate purpose, and the applied measures must be proportional to the purpose.

If differential treatment is on grounds of race, color or ethnic origin, the notion of objective and reasonable justification must be construed as strictly as possible. Therefore, in case *D.H. and others against Czech Republic*, the European Court of Human Rights (hereinafter referred to as "***ECtHR***") established the following:

"The court was not convinced that the difference in treatment between Roma and non-Roma children was based on objective and reasonable justification and that there is a reasonable proportionality between the means used and the aim to be achieved. Therefore, the application of the relevant Czech legislation had, in fact, at that time, disproportionate prejudicial effects on the Roma community, and the plaintiffs, by being members of the respective community suffered the same discriminatory treatment" [11].

The national courts ruled in the same matter in their constant judicial practice, namely: "*the legal differential treatment is admissible for different situations, when it is rationally and objectively justified*"[12].

In conclusion, according to the national and community judicial practice, discrimination can operate only if it is determined by the existence of unjustified criterion/criteria, of those forbidden by the legislation, and not if there is a simple difference in treatment which is reasonably and objectively justified, at the same time requiring the existence of analogous and comparable situations in relation to which the differential treatment is to be assessed.

2.2. Features of the notion of discrimination. Classification of the forms of discrimination

2.2.1. Discrimination features

First of all, we consider necessary to carry out a brief analysis of the main features of the concept of discrimination, in order to show the absence of any discrimination action in the present case.

Therefore, the supreme court, by means of the interpretation of the provisions of Government Ordinance no. 137/2000, noted the following:

„[...] in order for an action to be qualified as a discrimination action, ***it must meet the following conditions at the same time****:*

- the existence of a differential treatment expressed by difference, exclusion, restriction or preference **(the existence of persons or situations in comparable situations);**
- the existence of a discrimination criterion according to art. 2 para. (1) of G.O. no. 137/2000 republished, **differential treatment is not objectively justified by a legitimate aim, and the means of achieving that aim are not appropriate and necessary;**
- **the aim or effect of the differential treatment is the restriction, removal of the acknowledgment, use or exercise, under equality terms, of a right established by the law**.

In other words, in order for a certain conduct to be considered discrimination, it is required to fulfill the following conditions:

a) the difference in treatment of two or more persons in identical or comparable situations or the failure to treat differently certain different situations;
b) the lack of objective and reasonable justification for differential treatment;
c) the scope or the result of the differential treatment is the restriction or illegal refusal of the exercise of certain rights.

Therefore, as the Court of Appeal Bucharest noted, ***not any difference in treatment means discrimination***, taking into account that, in order for unfair differential treatment to be ascertained, **it is required to establish that persons in analogous or comparable situations benefit from a preferential treatment, and if such distinction between analogous or comparable situations occurs, it does not find any objective or reasonable justification**[13].

In the same respect, opinions were expressed in legal specialized literature[14], meaning that an action can be qualified as discrimination if it fulfills *certain conditions at the same time*, namely:

- **the existence of a differential treatment** applied to certain analogous situations or the omission to treat differently certain different, not comparable situations;
- differential treatment is expressed by **exclusion, difference, restriction or preference**;
- **the existence of a discrimination criterion**

[10] See in this respect, Decision no. 2808/2015, pronounced by the High Court of Cassation and Justice, Division of Contentious Administrative and Fiscal. The whole material can be accessed by using site: https://lege5.ro/App/Document/gi3diojrgq3q/decizia-nr-2808-2015-anulare-act-administrativ?d=18.09.2015&pid=250376975#p-250376975, site accessed on 10.02.2018.

[11] See in this respect, Decision ECtHR, *D.H. and others against Czech Republic*, November 13th, 2007 (Case no. 57325/00), available on: https://jurisprudentacedo.com/D.H.-c.-Republicii-Cehe-Plasamentul-copiilor-romi-in-scoli-speciale-incalcare.html. In the same respect, see Decision ECtHR, *Sampanis and others against Greece*, June 5th, 2008, site accessed on 10.02.2018.

[12] See in this respect, Constitutional Court, Decision no. 168 of December 10th, 1998, published in Official Journal of Romania no. 77 of 22 02 1999, quoated by **Loredana-Manuela Muscalu**, *Discriminarea, op. cit.*, p. 7;

[13] See in this respect, Court of Appeal Bucharest, Division VIII civ. and mun. asig, Decision no. 4463/R/2009, Dec. No. 2295R/2009, Dec. No. 1715R/2009, Dec. No. 4204R/2009 and Dec. No. 2020R/2009, quoted by **Loredana-Manuela Muscalu**, *Discriminarea, op. cit.*, p. 4;

[14] See in this respect, **Loredana-Manuela Muscalu**, *Discriminarea, op. cit.*, pp. 4-5;

provided by the law;

- **the scope or effect** of the differential treatment has to be the restriction, removal of the acknowledgment, use or exercise, under equality terms, of a right provided by the law (exempli gratia: the violation of the right to work);
- differential treatment **is not objectively justified by a legitimate purpose**, and the means of reaching that aim **are not appropriate and necessary.**

Therefore, we hereby reaffirm that in order to ascertain the existence of an action of discrimination, the claimed actions must result in the *restriction or removal of a right provided by the law.* Not any abuse or violation of human fundamental rights and freedoms or of the rights provided by the law fall under the scope of the notion of discrimination.

2.2.2. Discrimination categories

From another point of view, we hereby state that, both from the perspective of the European Convention on Human Rights (hereinafter referred to as "***ECHR***"), and in what concerns the relevant European case law, several categories of discrimination are identified, namely: *direct discrimination* and *indirect discrimination, harassment and incitement to discrimination.*

- In this respect, ECtHR uses the formulation that there must be "a difference in the treatment of persons in analogous or relevantly similar situations", which is "based on an identifiable characteristic" [15].

Therefore, "***direct discrimination***" occurs when[16]:

- *a person is applied unfavorable treatment* – this can be relatively easy to identify compared with indirect discrimination. Actual examples of unfavorable treatment expressing direct discrimination are, *inter alia*, the following:
  - refusal of entry to a restaurant or shop;
  - receiving a smaller pension or lower pay;
  - having a higher or lower retirement age;
  - being barred from a particular profession;
  - not being able to claim inheritance rights;
  - being excluded from the mainstream education system;
  - being deported;
  - not being permitted to wear religious symbols;
  - being refused social security payments or having them revoked;
- *unfavorable treatment is relevant by comparison with how other persons in a similar situation were or would be treated* – this criterion is of the essence of a direct discrimination action, which is why it is inconceivable to retain discrimination in the absence of the fulfillment of such requirement. Therefore, providing a comparator is often a controversial issue, and sometimes neither the parties to the dispute nor the court explicitly discuss the comparator[17]. Despite this, it has been held that there is a clear exception to the rule of finding an appropriate "*comparator*", in the context of the European Union law regarding employment, meaning that there is discrimination if the person concerned is treated differently because the respective person is pregnant. In such cases, it will be considered that there is direct discrimination on grounds of sex and that there is no need to have a comparator[18];
- the ground of this treatment is represented by an actual feature of them, which falls under the scope of the "protected ground" category – in detail, the "protected grounds" are exhaustive, representing the factor that practically leads to a different behavior towards a person in relation to other persons in similar situations, id est: sex, sexual orientation, disability, age, race, ethnic origin, national origin and religion or belief. We have to keep in mind that in order to talk about discrimination, it is required to exist a causality connection between less favorable treatment and "protected ground"[19].

By summing up the above, it can be noted that direct discrimination is characterized by differential treatment, meaning that the following ***must be shown****: alleged victim has been treated less favorably based on the possession of a characteristic falling under a "protected ground" and Less favorable treatment is*

[15] See in this respect, European Union Agency for Fundamental Rights, European Council, *Handbook on European non-discrimination law*, Imprimerie Centrale, 2010, p. 24;

[16] Ibidem;

[17] See in this respect, Decision of the European Court of Justice, *Allonby/Accrington & Rossendale College and others*, case C-256/01 [2004] RJ I-873, January 13th, 2004. In this case, the complaint, who worked for a college as a lecturer, did not have her contract renewed by the college. She then went to work for a company that supplied lecturers to educational establishments.

This company sent the complainant to work at her old college, performing the same duties as before, but paid her less than her college had done. She alleged discrimination on the basis of sex, saying that male lecturers working for the college were paid more. The ECJ held that male lecturers employed by the college were not in a comparable situation. This was because the college was not responsible for determining the level of pay for both the male lecturer who it employed directly and the complainant who was employed by an external company. They were therefore not in a sufficiently similar situation. In the same respect, see: Decision ECtHR, *Moustaquim/Belgium* (12313/86), February 18th, 1991; Decision ECtHR, *Luczak/Poland* (77782/01), November 27th, 2007; Decision ECtHR, *Gaygusuz/Austria* (17371/90), September 16th, 1996, quoted by the European Union Agency for Fundamental Rights, European Council *Handbook on European non-discrimination law, op. cit.*, p. 26;

[18] See in this respect, Decision of the European Court of Justice, *Dekker/Stichting Vormingscentrum voor Jong Volwassenen* (VJV-Centrum) Plus, case C-177/88 [1990] RJ I-3941, November 8th, 1990; Decision of the European Court of Justice, *Webb/EMO Air Cargo (UK) Ltd*, case C-32/93 [1994] RJ I-3567, July 14th, 1994, quoted by the European Union Agency for Fundamental Rights, European Council *Handbook on European non-discrimination law, op. cit.*, p. 28;

[19] See in this respect, Decision of the European Court of Justice, *Maruko/Versorgungsanstalt der deutschen Bühnen*, case C-267/06 [2008] RJ I-1757, April 1st, 2008. See in this respect Decision ECtHR, *Aziz/Cipru* (69949/01), June 22nd, 2004;

determined through a comparison between the alleged victim and (iii) another person in a similar situation who does not possess the protected characteristic[20].

- In what concerns the second category of discrimination, the European legislation and case law note that discrimination can result not only from the application of different treatment to persons in similar situations, but also from the application of the same treatment to persons in different situations, the latter hypothesis being known as "***indirect discrimination***".

Unlike direct discrimination, in case of indirect discrimination, the treatment is not the one that differs, but its effects, which will be felt differently by people with different characteristics. In this respect, Directive no. 43/2000 provides *expressis verbis*, in the content of art. 2 para. (2) letter (b) the following:

"Indirect discrimination shall be taken to occur where an apparently ***neutral provision, criterion or practice would put persons*** *of a racial or ethnic origin* ***at a particular disadvantage compared with other persons****, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary".*

From the interpretation of the normative text quoted above, the conditions in which indirect discrimination occur are evident, namely:

- *the existence of a neutral provision/criterion/practice* – the particularity of this criterion is given by the fact that the neutral provision/criterion/practice applies to all, not only to those subject to unequal treatment. *Exempli gratia*, in case *Schönheit*, the pensions of part-time employees were calculated using a different rate to that of full-time employees. This different rate was not based on the differences of the time spent in work. Thus, part-time employees received a smaller pension than full-time employees, even taking into account the different lengths of service, effectively meaning that part-time workers were being paid less. Despite the fact that this neutral rule on the calculation of pensions applied equally to all part-time workers, taking into account that around 88% of part-time workers were women, the effect of the rule was disproportionately negative for women as compared to men [21].
- *neutral provision/criterion/practice places a "protected group at a particular disadvantage"* – this is defining by the fact that when considering statistical evidence that the protected group is disproportionately effected in a negative way by comparison to those in a similar situation, evidence is sought that a particularly large proportion of those negatively affected is made up of that "protected groups"[22]. *Exempli gratia,* Advocate General Léger, on the discrimination on grounds of sex in case *Nolte*[23], referred to a number of previous cases, considering that: "*in order to be discriminatory, the measure must affect «a far greater number of women than men»*"[24] or "*a considerably lower percentage of men than women*"[25] or "*far more women than men*[26]".
- *the existence of a comparator – other groups in a similar situation* – similar to direct discrimination, the existence of a "*comparator*" is mandatory in order to determine whether the effect of the particular rule, criterion or practice is significantly more negative than those experienced by other individuals in a similar situation.

Given all the above, proving indirect discrimination requires an individual to provide evidence that, as group, those sharing their protected characteristic are subject to differential effects or impact, by comparison to those without this characteristic[27].

- In what concerns the third form of discrimination, we hereby state that harassment, while treated separately under EU law, is a particular manifestation of direct discrimination [28]. This is contemplated by a detailed analysis performed in the next chapter of this study, in relation to the de facto situation claimed by petitioner Nicoleta Crenguța Ciocea.
- In what concerns instigation to discrimination, this is expressly provided both in the content

[20] See in this respect, the European Union Agency for Fundamental Rights, European Council *Handbook on European non-discrimination law*, *op. cit.*, p. 46;

[21] See in this respect, the European Court of Justice, *Hilde Schönheit/Stadt Frankfurt am Main şi Silvia Becker/Land Hessen*, related cases C-4/02 and C-5/02 [2003] RJ I-12575, October 23rd, 2003. Furthermore, see Decision ECtHR, *D.H. and others/Czech Republic* [GC] (57325/00), November 13th, 2007, item 79;

[22] See in this respect, the European Union Agency for Fundamental Rights, European Council *Handbook on European non-discrimination law*, *op. cit.*, p. 33;

[23] See in this respect, the Opinion of Attorney general Léger of May 31st, 1995, items 57 and 58 in the Decision of the European Court of Justice, *Nolte/Landesversicherungsanstalt Hannover*, case C-317/93 [1995] RJ I-4625, December 14th, 1995;

[24] See in this respect, Decision of the European Court of Justice, *Rinner-Kühn/FWW Spezial-Gebäudereinigung*, case 171/88 [1989] RJ 2743, July 13th, 1989;

[25] See in this respect, Decision of the European Court of Justice, *Kowalska/Freie und Hansestadt Hamburg*, case C-33/89 [1990] RJ I-2591, June 27th, 1990;

[26] See in this respect, Decision of the European Court of Justice, De Weerd, fostă Roks, şi alţii/Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and others, case C-343/92 [1994] RJ I-571, February 24th, 1994;

[27] See in this respect, the European Union Agency for Fundamental Rights, European Council *Handbook on European non-discrimination law*, *op. cit.*, p. 47;

[28] Ibidem;

of Directive no. 78/2000[29], and by the provisions of art. 2 para. (4) of Directive no. 43/2000[30].

3. Conclusions

Given all the aspects detailed in this section, especially with regard to the first two forms of discrimination, it is obvious that, regardless if the discrimination is direct or indirect, discrimination entails the fulfillment, at the same time, of several mandatory conditions, namely:

- differential treatment;
- the person subject to differential treatment or in relation to which the differential effect of a general treatment is materialized is part of a "protected group" and, last but not least,
- the absence of an objective justification or legitimate aim for different treatment/effect of a particular treatment;
- the existence of a comparator,

therefore, we cannot speak about discrimination in the absence of any of the aforementioned requirements.

References

- Loredana-Manuela Muscalu, *Discriminarea în relațiile de muncă*, Hamagiu Publishing House, Bucharest, 2015
- J.-F. Renucci, *Tratat de drept european al drepturilor omului*, Hamangiu Publishing House, Bucharest, 2009
- The European Union Agency for Fundamental Rights, European Council, *Handbook on European non-discrimination law*, Imprimerie Centrale, 2010
- Allonby/Accrington & Colegiul Rossendale and others, case C-256/01 [2004] RJ I-873, January 13th, 2004
- De Weerd, ex Roks, and others/Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and others, case C-343/92 [1994] RJ I-571, February 24th, 1994
- Dekker/Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus, case C-177/88 [1990] RJ I-3941, November 8th, 1990
- Hilde Schönheit/Stadt Frankfurt am Main and Silvia Becker/Land Hessen, related cases C-4/02 and C-5/02 [2003] RJ I-12575, October 23rd, 2003
- Kowalska/Freie und Hansestadt Hamburg, case C-33/89 [1990] RJ I-2591, June 27th, 1990
- Maruko/Versorgungsanstalt der deutschen Bühnen, case C-267/06 [2008] RJ I-1757, 1.05.2008
- Nolte/Landesversicherungsanstalt Hannover, case C-317/93 [1995] RJ I-4625, 14.12.1995
- Rinner-Kühn/FWW Spezial-Gebäudereinigung, case 171/88 [1989] RJ 2743, July 13th, 1989
- Webb/EMO Air Cargo (UK) Ltd, case C-32/93 [1994] RJ I-3567, July 14th, 1994
- Case C-106/83, Sermide SpA c. Cassa Conguaglio Zuccero and others
- Sampanis and other against Greece, June 5th, 2008
- Aziz/Cyprus (69949/01), June 22nd, 2004
- Moustaquim/Belgium (12313/86), February 18th, 1991
- Hoogendijk/the Netherlands (dec.) (58641/00), January 6th, 2005
- Luczak/Poland (77782/01), November 27th, 2007
- Gaygusuz/Austria (17371/90), September 16th, 1996
- D.H. and others/Czech Republic [GC] (57325/00), November 13th, 2007
- Decision no. 82 of February 7th, 2012
- Decision no. 168 of December 10th, 1998
- Decision no. 562R/2010
- Decision no. 4463/R/2009
- Decision no. 2295R/2009
- Decision no. 1715R/2009
- Decision no. 4204R/2009
- Decision no. 2020R/2009
- Government Ordinance no. 137/2000 on the prevention and sanctioning of all forms of discrimination
- Council Directive 2000/43/CE of June 29th, 2000
- Council Directive 2000/78/CE of November 27th, 2000
- https://dexonline.ro
- http://legislatie.just.ro
- http://curia.europa.eu
- https://lege5.ro/
- https://jurisprudentacedo.com/

[29] See in this respect, the provisions of art. 2 para. (4) of Directive no. 78/2000, according to which: "Any conduct which consists in ordering someone to practice a discrimination against certain individuals for any of the grounds referred to in art. 1 is deemed discrimination under para. (1)";

[30] See in this respect, the provisions of art. 2 para. (4) of Directive no. 78/2000, according to which: „The instigation to discrimination against persons based on grounds of race or nationality is deemed discrimination for the purpose of first paragraph";

VIDEO SURVEILLANCE: STANDPOINT OF THE EU AND NATIONAL LEGISLATION ON DATA PROTECTION

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Abstract

Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27th, 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC ("GDPR") entails a series of major changes in the field personal data protection.

The new developments mainly concern the introduction of data protection controller, of specific rights of data subject, such as: the right to be forgotten and the right to data portability, as well as special provisions on minors.

Notwithstanding, certain items seem at first sight to be left untreated by G.D.P.R., which is not true! GDPR applies to all data processing operations, even if not all of these are expressly regulated. One of these personal data modalities is represented by the video surveillance. Despite not expressly regulated by G.DP.R., this is one of the most commonly used means of personal data processing.

The particular importance of this subject is given by the potential issues that may occur when the captured images clearly disclose the identity of a person, so that they lead to the unique identification of the data subject. In this case, the issue that arises is whether the processed data would somehow fall under the scope of special data, such as biometric data.

Keywords: *data protection, data subjects, video surveillance, identity, special categories of data*.

1. Introduction

1.1. Data Protection Legislation

Changing the legislation regarding the personal data protection emerged as a necessity taking into consideration the exchange of personal data determined by day by day technology evolution.

The current possibility that every individual has I what concerns the publishing of personal data information imposed a framework regulation within the Member States to protect as much as possible the interest of the individual.

At European Union (the "*EU*") level, the personal data protection was governed by Directive 95/46/EC of the European Parliament and of the Council of October 14th, 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data.

Taking into consideration the increase in cross-border flows of personal data, at EU level the adoption of Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27th, 2016 on the protection of individuals with regard to the processing of personal data and the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

1.2. What is the G.D.P.R.?

G.D.P.R. means Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27th, 2016 on the protection of natural persons with regard to the processing of personal data and the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

G.D.P.R. was adopted on April 27th, 2016, being published on May 4th, 2016. G.D.P.R. entered into force on May 24th, 2016 and it shall become applicable for all Member States as of May 25th 2018.

G.D.P.R. is a legally binding act. It shall apply directly, in its entirety, in all Member States.

1.3. Who does the G.D.P.R. affect?

The G.D.P.R. applies to both organisations/entities located within the European Union (the "*E,U.*") and organisations/entities located outside of the EU if they offer goods or services to, or monitor the behaviour of, EU data subjects[1].

Moreover, the G.D.P.R. applies to all companies processing and holding the personal data of data subjects residing in the E.U., regardless of the location of the company.

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[1] See https://www.eugdpr.org/gdpr-faqs.html;

1.3. National Legislation

In Romania, the applicable legal provisions on Data Protection are comprised in Law no. 677/2001 on for protection of persons with regard to the processing of personal dataa and the free movement of such data ("*Law No. 677/2001*").

As of May 25th, 2018, the provisions of such national legislation shall be repealed and the G.D.P.R. shall fully apply in all E.U. Member States, including Romania.

Nonetheless, it may be held that the current national legal provisions on data protection may also apply after the G.D.P.R. becomes applicable, but only as a recommendation and only to the extent that the GDPR does not provide for such a situation or does not provide a provision contrary to the repealed national legislation.

2. Video Surveillance from G.D.P.R.'s perspective

2.1.Short considerations from the perspective of the ECHR

As regards the recent case law of the European Court of Human Rights (the "ECHR"), there are several key-cases that enable us to determine how the Court assesses the breach of human rights via video surveillance, as well as the requirements that have to be met in order to value one's legitimate interest more than the protection of the right to privacy (Art. 8 of the European Convention on Human Rights - Right to respect for private and family life).

Hence, the following cases shall be deemed as eloquent:

- **Case Köpke v. Germany** – October 5th, 2010 (decision as to the admissibility)
  - The applicant – cashier in a supermarket was dismissed without notice for theft;
  - A private detective agency carried out covert video surveillance whereby the theft was found;
  - The dismissal decision was unsuccessfully contested before the competent domestic courts;
  - The European Court of Human Rights (the "Court") dismissed the applicant's claim as inadmissible under article 8 of the Convention, given the following:

a) the domestic authorities achieved a fair balance between the employee's right to respect for her private life, the employer's interest in the protection of its property rights and the public interest in the proper administration of justice;
b) the contested measure was limited in time (two weeks) and covered only the area around the cash desk– this area being accessible to the public.
c) the visual data obtained were processed by a limited number of persons working for the detective agency and by staff members of the applicant's employer. The data was used only for the purposes of the termination of the employment relationships, including the proceedings the applicant brought in this respect in the labor courts;

The Court: the overlap with the applicant's private life was limited to what was necessary to achieve the scope pursued by the video surveillance. Notwithstanding, the Court noted that, in this case, the competing interests concerned might well be given a different weight in the future, having regard to the extent to which intrusions into private life are made possible by new, more and more sophisticated technologies".

- Case Antović & Mirković v. Muntenegru – November 28th, 2017
  - The applicants – two professors of the School of Mathematics of the University of Montenegro, after video surveillance had been installed in areas where they taught;
  - They stated that they had had no effective control over the information collected and that the surveillance had been unlawful;
  - The domestic courts rejected the compensation claim, finding that the question of private life had not been at issue as the auditoriums where they taught were public areas;
  - The Court found that there had been a violation of Article 8 of the Convention, the video surveillance in this case being unlawful **on the following grounds:**

a) the Court noted that it had previously found that private life might include professional activities, as in case of the applicants;
b) the evidence showed that surveillance had violated the provisions of domestic law – the domestic courts had never even considered any legal justification for the surveillance because they had decided from the outset that there had been no invasion of privacy.

The Court: private life might include professional activities, as in case of the applicants. The video surveillance of the classroom represented an interference with the applicants' right to private life".

- Case López Ribalda & others v. Spain – January 9th, 2018
  - Applicants: employees of a Spanish supermarket chain, suspected of theft;
  - Contested video materials – the ground of the applicants' dismissal;
  - The domestic courts accepted the video materials as evidence and confirmed the dismissal decisions;
  - The Court found that there had been a violation of article 8 of the Convention, given that:

a) the domestic courts failed to strike a fair balance between the rights available in this case, respectively the applicants' right to private life and the employer's property right;
b) under Spanish data protection legislation, the applicants should have been informed that they were under surveillance, but they had not been;
c) the employer's rights could have been safeguarded

by other means and it could have provided the applicants at the least with general information on the surveillance;

d) Notwithstanding, the Court found that there had been no violation of article 6 § 1 (the right to a fair trial) of the Convention. The Court found that the proceedings as whole had been fair because the video material was not the only evidence the domestic courts had relied on when upholding the dismissal decisions and the applicants had been able to challenge the recordings in court.

The Court: there was not a fair balance between the rights available in this case (the employees' right to private life/the employer's property right); the applicants should have been informed that they were under surveillance; the employer's rights could have been safeguarded by other means".

To conclude with, the Court determines whether the video surveillance of employees violates their right to privacy, according to the following criteria:

1. Prior notification of supervised employees;
2. Grounds justifying the application of the surveillance measure (scope);
3. Proportionality between the measure adopted and the aim pursued;
4. Level of intrusion and use of data obtained through surveillance (e.g., data retention time).

2.2. G.DP.R. – how does it apply on Video Surveillance

Apparently, the GDPR does not contain an express regulation on video surveillance. However, this is a false representation, as the G.D.P.R. does not expressly regulate every circumstance or situation governed by its provisions.

In order ti understand its scope, it is necessary to define the key-elements that the G.D.P.R. sets forth. Some of these are the following (G.D.P.R., Art. 4):

1. "personal data" = any information relating to an identified or identifiable natural person ("data subject");

- any information = subjective or objective information; information in term of its content; information format; regardless the modality of capture, storage or presentation (i.e. including images, audio or video recordings, etc, etc.);
- identified natural person = a person who differentiates himself into a particular group of persons from the other members of the group;
- identifiable natural person* = a person who can be identified, directly or indirectly, in particular by reference to an identifier (i.e. a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the natural person);

2. "controller" = means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data;

- (!) he / she shall be held liable for the following: (a) how the processor is chosen; (b) to ensure the CONTROL on the processing operations performed by the processor (as a general rule, by inserting minimum clauses in the contract);

3. "processor" = means a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller;

- (!) he/she shall be held liable for the following: (a) THE FAILURE TO MEET THE OBLIGATIONS incumbent on him/her under GDPR; (b) THE FAILURE TO MEET THE INSTRUCTIONS of the controller.

The controller and the processor shall be held JOINTLY liable before the data subject!

2.2.1. Principles relating to processing of personal data (G.D.P.R., Art. 5)

1. Lawfulness, fairness and transparency (the existence of the GROUND of the processing and the NOTIFICATION[2] made available to data subject);
2. Limitations as to the scope (establishing the purpose BEFORE the processing);
3. Data minimization (i.e. only NECESSARY data is processed);
4. Accuracy (in relation to processed data – it has to be UPDATED and ACCURATE);
5. Storage limitations (the data is erased when it is no longer NECESSARY);
6. Integrity and confidentiality (LIMITATION AND SECURITY OF THE ACCESS to processed data);
7. Accountability (existence and storage of justifying DOCUMENTS on conformity).

2.2.2. The main elements to be established/identified in relation to every processing

For every type of data processing, there has to be a **scope** well established by the personal data processing. G.D.P.R. does not limit this scope, the controller is the one who exclusively establishes it.

The scope of the processing must be found in the relationship between the controller and the data subject.

Another main element provided and established by G.D.P.R.. as opposed to the scope, **the ground** is expressly and restrictively provided by GDPR, in Art. 6). This may be one or more of the following:

1. Legal obligation;
2. Execution of an agreement (the stages of the execution of an agreement – negotiation, conclusion, execution, etc.);
3. Legitimate interest – the performance of an assessment is required (it is not expressly indicated, but can be derived from art. 6(1) letter f)

[2] The information must, in order to be valid, present the following features: (i) be made in a concise, transparent, intelligible and easily accessible form; (2) using clear and simple language, especially for any information specifically addressed to a child; (iii) free of charge;

and para. 47 - preamble) – Legitimate Interest Assessment;(„LIA"). This assessment can entail the answer to the following questions:

- Is there any legitimate interest in the processing? The answer to this question can be given by taking into account the following elements: it complies with lato sensu law; it is sufficiently specific/specified; it is real and present.
- Is the processing required? (i.e. is there another way to reach the identified interest?). the so-called "Balancing Test" is used in this respect – the assessment of the opportunity to establish the legitimate interest as the ground for such processing. The conclusion of this test shall be the importance and nature of the identified legitimate interest > fundamental rights and freedoms of the data subjects (otherwise, there is NO LEGITIMACY for processing)

The peculiarity of the legitimate interest as the ground of processing is that it entails the right of opposition of the data subject and the information must mention this (GDPR, art. 21).

1. **Consent** (when there is a legal obligation[3]; when NO other ground can be used[4]);
2. **The protection of vital interests of data subject/other natural persons;**
3. **The performance of a task that is in the public interest or which results from the exercise of the public authority** by the controller.

Another essential element, the importance of which is crucial in establishing a violation of G.D.P.R., from the perspective of the national supervisory authority, is the **storage period**. This must be predetermined/identifiable and limited to what required. A processing longer than necessary and unjustified is a violation of G.D.P.R.

2.2.3. GDPR and video surveillance – what is the connection?

Why is it important for surveillance camera users to acknowledge the GDPR impact? The answer is a natural one: surveillance cameras capture data!

In this respect, it is particularly important to know **data classification** (according to WP29[5]). Therefore, data is classified as follows:

I. Data provided directly by the data subject;
II. Observed data;
III. Derived data.

Given the aforementioned classification and the type of data processing by video surveillance means, the data obtained by video surveillance is observed data.

Further on, we have to identify the capacity of the person performing the processing by video surveillance means and/or equipment. Therefore, the supervision can be performed by the **controller**, if he/she is the one who effectively processes the data (i.e. video recordings); or by the **processor**, if the controller entrusts the processing to the processor (i.e. the conclusion of an agreement with a security service provider).

As in case of any type of personal data processing, the processing by video surveillance equipment requires the **assessment of its main elements**, therefore:

1. in terms of the ground, the following can be identified as potential grounds of personal data processing:

a) legitimate interest – the analysis of the legitimacy of the identified interest is required;
b) legal obligation – Law no. 333/2003: art. 2 and the Methodological regulations for the application thereof (!) video surveillance is mandatory in the following cases: public units and institutions; credit institutions which fall in the category of banks; trading companies the scope of business of which is the foreign exchange; pawn shops, metal or gemstone jewelry shops or weapons and ammunition shops; mail service providers; fuel marketing stations; commercial properties with areas larger than 500 sq.m., gambling facilities; the cashiers of utility suppliers; cash dispensers; cash processing centers.
c) execution of an agreement (in case of the processor – security service provider).

2. from the perspective of the person performing the processing, the assessment of the processing operation must be viewed and analyzed distinctly, depending on the controller and processor. Therefore, from the perspective:

of the CONTROLLER

The scope can be defined as the security of persons and goods.

The ground can be either a legal obligation or the legitimate interest.

Storage term: as a general rule, 30 days/the deadline established by the law.

of the PROCESSOR

The scope can be defined as the security of persons and goods.

The ground is, as a general rule, the execution of an agreement.

The storage term is the deadline established in the agreement by the controller/deadline established by the law (as a general rule, 30 days).

[3] *E.g.* GDPR – art. 8, 9, 22 (1) – the processing of sensitive data regarding children; fully automated decisions with significant effect; Law no. 504/2006 (the storage of information on terminal – cookies); Law no. 356/2004 (marketing by phone and e-mail, except the existent customers);

[4] Especially if the assessment of the legitimate interest shows that the interest of the data subject prevails;

[5] Article 29 Working Party on Data Protection (WP29) - Handbook on the Right to Data Portability, p. 10, available on: https://iapp.org/media/pdf/resource_center/WP29-2017-04-data-portability-guidance.pdf. A se vedea și: Avizul nr. 4/2007 privind conceptul de date cu caracter personal, disponibil pe: https://www.google.ro/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwirhvOSxPbZAhVSI1AKHTExDxgQFggoMAA&url=http%3A%2F%2Fwww.dataprotection.ro%2Fservlet%2FViewDocument%3Fid%3D288&usg=AOvVaw3hbKD20dAykEhu6bjHoXnu;

(!) The processor is bound to appoint a Data Protection Officer ("DPO")[6], on the following grounds:

- his/her main activities consist in processing operations which,
- by their nature, scopes and/or purposes, require periodic and systematic monitoring of data subjects on a large scale.

3. The approach of video surveillance performed by the Member States from the GDPR perspective

For a better understanding of the way the Member States approached the issue of the implementation of the regulations of G.D.P.R. which leaves at their discretion the regulation of certain areas, it is important to analyze various measures and perspectives that some of them have already applied.

1. Bavaria – Germany

– June 6th, 2016 – The Data Protection Authority of Bavaria ("Bavarian ***DPA***") issued a short guide on the conformity of video surveillance with GDPR.

"GDPR does not contain guidelines on regulatory requirements for video surveillance. The legitimacy of video surveillance measures falls under the scope of art. 6 paragraph (1) letter (f) of GDPR, according to which the processing is lawful if «the processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child»".

The Bavarian DPA identified the following criteria for the compliance with GDPR, namely:

- Study of impact on private life – the controller performs a study of impact before the processing, especially in what concerns the area accessible to the public – GDPR, preamble 91, art. 35;
- Documentation of the study of impact – the controller shall keep the required documentation in order to prove the conformity with the legal requirements on the performance of the study of impact - GDPR, art. 5 para. (2);
- The storage of sufficient evidence on the processing operations – GDPR, art. 30 GDPR. According to Bavarian DPA, this includes especially the obligation to indicate every camera, the scope, reason for which the surveillance system is necessary and proportionate, any risk for the data subjects and the measures envisaged/taken in order to approach risks.
- Consultation before processing – the consultation of the authority is necessary before the processing, if the study of impact indicates that the processing would result in a high risk in the absence of the measures adopted by the controller in order to mitigate the risk – GDPR, art. 36[7].

2. Belgium

– March 8th, 2018 – a draft amendment to "Surveillance camera law" of March 21st, 2007 was adopted, which is to become effective as of May 25th, 2018.

This draft provides mainly the following:

- Surveillance cameras located on public roads: security agencies will be able to watch real-time images of these cameras, installed in open spaces;
- Surveillance camera located in closed and publicly accessible spaces (i.e. a store), can be accompanied by a public display where the images can be watched, located near the camera to reinforce its preventive effect;
- Surveillance cameras used to monitor compliance with municipal parking regulations and tolls: the compliance with all municipal regulations falling within its scope shall be checked;
- The use of mobile surveillance cameras (portable cameras, mobile phones, drones, etc.) shall be authorized in a closed space in three cases exclusively:
- the use by police officers of their competencies under the private security law (article 142 of private security law);
- in closed spaces or parts thereof, where nobody should be present (unoccupied place, industrial place at night, shop outside the working hours, etc.);
- the use by a natural person for personal and household purposes in a closed place that is not accessible to public (owner of a large private property).
- The use of "smart surveillance cameras": they are classified as follows:
- cameras which are not connected to personal data files (cameras that detect sounds, movements, etc.): such cameras shall be authorized;
- cameras connected to personal data files (recognition of number plates, faces, etc.) – only ANPR cameras (with number plate recognition capabilities) and the personal data file is required to be processed according to the legislation regarding the respect for private life;
- The obligation to inform the authorities: two amendments occur:
- the use of surveillance cameras shall be notified only to the police, as well as to the Data Protection Authority. This statement must be updated, a new online notification application is to be implemented;
- the persons liable for the processing of this type of data shall keep a register of image processing activities (in electronic format or not) which entails information established by the royal decree and shall be made available to the Data Protection Authority and police departments, upon request. On the other hand, the citizen who wants to install a surveillance camera

[6] GDPR, art. 37 (1) - the designation of the DPO is also mandatory for public authorities / bodies (except courts) and where the principal activities of the operator / proxy are to process large-scale special categories of data;

[7] Source: https://www.lda.bayern.de/media/dsk_kpnr_15_videoueberwachung.pdf

within his/her house for personal and internal purposes shall not be bound to make a statement, to fill in a register or to use a pictogram (which does not mean that he/she can film people without their consent). Furthermore, when a person installs a surveillance camera in accordance with surveillance camera law, but also uses this camera for other purposes which are regulated by other laws, the legislation on video surveillance shall prevail if different provisions which are not compatible apply[8].

3. Great Britain

- March 14th, 2018 – The Commissioner for video surveillance announced the adoption of a national strategy on video surveillance for England and Wales.

Scope of the Strategy: the provision of guidelines in the field of surveillance cameras in order to enable system controllers to understand good and best practices and their legal obligations (such as those provided by Freedoms Protection Law, Data Protection Law and Private Security Industry Law).

Vision of the Strategy: "to make sure that the public is confident that any use of camera surveillance systems in a public place helps in protecting them and keeping them safe, while complying with the individual right to private life".

- to exist proportionality with a legitimate purpose and transparency proving the fulfillment of good and best practices and relevant legal obligations.

Object of the Strategy: The sector of surveillance cameras includes CCTV, body worn video, automatic recognition of number plates, vehicle borne cameras and unmanned aerial vehicles (*i.e.* drones). Indicative estimates of the number of CCTV cameras are available (closed-circuit video surveillance), yet these only cover part of surveillance camera coverage and capability.

Compliance with the security legislation: The strategy complies with the obligations to keep Great Britain safe from the threat of terrorism and to mitigate and prevent crime and to make sure that people feel safe in their homes and communities.

Challenges: cyber security incidents,

Strategic goals:

1. Enable certification against a range of recognisable standards for the whole spectrum of the industry (manufacturers, installers, designers, system controllers) in delivering surveillance camera solutions;
2. Establish an early warning system to horizon scan for technological developments with implications for the scope and capability of surveillance cameras;
3. Make information freely available to the public about the operation of surveillance camera systems;
4. The police pro-actively share relevant information about their own operation of surveillance camera systems and use of data;
5. Local authorities pro-actively share information about their operation of surveillance cameras and use of data;
6. Enablers and incentives are in place to encourage the voluntary adoption of the Surveillance Camera Code;
7. Surveillance camera systems associated with protection of critical national infrastructure are operated in compliance with the SC Code;
8. Organisations involved in the manufacture, planning, design, installation, maintenance and monitoring of surveillance camera systems are able to demonstrate that they understand and follow good and best practice and legal obligations;
9. Make information freely available about training requirements and provision for all those who operate, or support the operation of, surveillance camera systems and those who use the data for crime prevention/detection or public safety purposes;
10. Establish and make greater synergies between regulators and those with audit and oversight responsibilities in connection with surveillance cameras;
11. Develop a well-publicised digital portal housing information about surveillance camera regulation, how to achieve compliance and what individual's rights are[9].

4. Conclusions

Video Surveillance is one of the most popular type of personal data processing methods when it comes to ensuring protection of individuals and property.

Thus, it is paramount that controllers and processors comply with the provisions of the G.D.P.R. when using such data processing method, as this might be one of the key-issues with which national authorities shall begin when investigating possible breaches of the legislation on data protection.

On the other hand, it is as much as important that data processing subjects are well informed on their right to refuse this type of personal data processing before any recording is made, as well as eventual actions that they may take against an illegal processing of video or images exposing their person.

To conclude with, video surveillance as a data processing method should be assessed very carefully by any company/entity /institution or organization that has the capacity of controller or processor, in order to be fully compliant with the provisions of the G.D.P.R.

[8] Source: http://www.lachambre.be/flwb/pdf/54/2855/54K2855001.pdf;

[9] Source: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/608818/NSCS_Strategy_post_consultation.pdf.

References

- Regulation (EU) 2016/679 Of The European Parliament And of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) – the G.D.P.R. - available on: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN
- Follow-up Report to the 2010 EDPS Video-Surveillance Guidelines, available on: https://edps.europa.eu/sites/edp/files/publication/12-02-13_report_cctv_en.pdf
- European Data Protection Supervisor Guidelines, available on: https://edps.europa.eu/data-protection/our-work/our-work-by-type/guidelines_en

THE PLACE OF TRANSILVANIA WITHIN THE POLITICAL AND ETHNIC FRAMEWORK OF THE ROMANIAN STATE[1]

"Our sun rises from Bucharest"

Ioan CHIȘ*

Abstract

The First World War bought unimaginable suffering to the Romanian people, tragic consequences for thousands of families who saw their sons lives squandered on the fields of defense of the territory as well as the riches and wealth of the country destroyed and stolen for the benefit of looters who considered that the exploatation of the Romanian territories was a right of the winner. The payment for the sufferings has never been done for the families of the Romanians, but the history of Transylvania and the Romanian lands has the mercy to place all Romanians in their place next to the ethnic homeland, as it was written in the eternal and fascinating fate of Dacia Felix.

Now, 100 years after the union, the sun of the Romanians, from Bucharest, pale and hidden among the clouds of neighboring intterests, like then, tries to shine through the eyes and souls of the three brothers: the Vallachian, the Moldavian and the Transilvanian.

1. Preparing the robbery and exploitation of the country by occupants during the war

The Romanian regiments were sent to the slaughter of the First World War, headed by the tricolor and under the motto of the anthem "Deșteaptă-te, române!", which reminded of the ordeal of the forced union of Transylvania with Hungary within the Austro-Hungarian Monarchy. For the Romanians called at arms from Transylvania, called at arms by Austro-Hungary, it was a whole tragedy, as Romanians, to fight against their own people, especially since after Romania's declaration of neutrality, Budapest in the words of Count Tisza, said as reply to a Romanian deputy: "I know that Romania wants Transylvania. They will have it, perhaps, but without Romanians." The Romanian regiments were sent to the most dangerous places, so as the Romanians would fight among themselves as assault regiments, the result being 100,000 dead soldiers, yet there would be the millions of families who benefited the result of their sons' sacrifice. As their sons were fighting on the front, families at home were subjected to a relentless program of denationalization, they suffered mistreatment and a chauvinist policy.

In the first part of the war, in the conditions of a better equipped, armed and supranumeric army, as well as by the exit from the war of Russia, Romania had to fight Germany, Austria, Hungary, Bulgaria and Turkey, so most of the territory was occupied by enemies, the surface of the enemy military administration being in an area of 65064 sqkm, half of the area of the old kingdom of Romania. The occupation included the counties: Mehedinti, Gorj, Dolj, Râmnicu-Vâlcea, Prahova, Ilfov and Ialomita. Here there was an odious economic exploitation by the "Major Economic State", which was already established since 1916, the territory to be occupied being allocated for economic expulsion in favor of the armies and "the homesteads"[1], for the food and feed necessary for the troops on the front, the raw materials being sent to the enemy countries, according to a predetermined algorithm.

The guiding idea was not the occupation of Romania to take it out of the war, but the occupation for exploitation, the supreme Commandamnet being of the opinion that the military governor is obliged to "take great care as to rise from Romania all that can be lifted up." All products, materials will serve the economies of the conquering countries, to support the arms of the front, the distribution being made with the requisited means of transport. Wagons loaded with products or materials had a direct stop-free line to Germany, Austria, Hungary, Bulgaria, Turkey, returning immediately to recharge. The Transport Office organized the shipments from the requisites by attaching transport bulletins, the value of the materials, the weight, the name of the consignee and the owner, the destination station. The distribution ratio was established weekly. The major economic state initially had its headquarters at Drobeta Turnu Severin, after the occupation of Bucharest the headquarters moved to the capital, the economic exploitation being organized quickly, this being explained by the fact that the plan was drawn up before the war, the circumstances being favorable to its realization.

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[1] This Communication was drawn up on the basis of data and information resulting from two papers:

a) The work published within the General Statistics Department – The service of classification of documents left by the enemy, **Romania under the enemy occupation**, fascicle II - Economic exploitation of the country - author Ilie I. GEORGIANU, Tipografia Publishing House "Culture of the Romanian Nation" 1020;

b) Transylvania in the light of the geopolitical, historical and statistical data - author Dr. Stefan PASCU, head of the Institute of National History from Cluj-Sibiu, Lumina Publishing House - Miron Rosu, Blaj, 1944;

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[1] Governor was the German general Tulff von Tscherppe und Weidenbach, and empowered by the attacking countries were General V.Sandler for Austro-Hungary, General Osman Nizami Pasa for Turkey and General Tantiloff from Bulgaria (n.a.)

In the first part of the war there were 10 economic exploitation sections as follows:

1. The geography of the country;
2. Finance;
3. Food and feed;
4. Raw materials;
5. Fatty materials and mineral oils;
6. Agriculture;
7. Wood;
8. Workers;
9. Expedition;
10. Use of machines.

The exploitation areas have increased with the occupation of Romania, as follows:

1. Bucharest Command Area, with the Ilfov area on the northern side;
2. Pitesti area with counties Vâlcea, Romanați, Argeș, Olt and Teleorman;
3. Craiova area, of which Mehedinți, Gorj and Dolj counties also belonged;
4. Ploiești area with the counties Muscel, Dâmbovița, Prahova and Vlașca;
5. Călărași area, where the southern part of the Ilfov county and the Ialomița county also enter.

Nr. Crt.	**County**	**Commandment**	**Nr. Crt.**	**County**	**Commandment**
1	Mehedinți	German	8	Teleorman	German
2	Gorj	German	9	Muscel	German
3	Dolj	German	10	Târgoviţte	Austrian
4	Vâlcea	Austrian	11	Vlașca	German
5	Romanați	Austrian	12	Prahova	German
6	Argeș	German	13	Ilfov	German
7	Olt	German	14	Ialomița	German

In its last organization, the enemy Command of Economic Operation had 17 sections because the huge riches found in Romania exceeded by far their most optimistic hopes. Thus, since 1917, during full occupation there were the following sections:

1. Procurement of food and feed with subdivisions: export, exploitation of mills, oils and fatty materials, egg collection, tobacco and other state monopolies, wine, gathering of fruits and vegetables of all kinds;
2. Agriculture with its subdivisions: field work, animals, administration of state and crown domains, agricultural industries, agricultural machinery, dairies;
3. Expeditions - transport with subsections: wagon procurement, shipment of goods on the Danube and railway to the border, preparation of transport documents, centralization of data regarding the transports carried out;
4. Raw materials and manufactures for war, with subdivisions: textile materials, raw and manufactured hides, skins and furs of all kinds, metals, chemicals and raw materials, unspecified in group A and C, forwarding and transport;
5. Statistics and distribution with: the distribution stations of the major economic state of T. Severin, Vârciorova, R. Vadului, Predeal, Giurgiu, the distribution of products between the central authorities, the export statistics on the Danube and on land;
6. Mineral oils, with: exploitation of factories and oil refineries, oilfield headquarters;
7. Wood industry: operation of saws and timber factories, timber shipment;
8. Forestry and hunting, with: exploitation of State and Crown forests, forestry and hunting police, log cuts, firewood, luxury essences, wood charcoal, other forest derivatives;
9. Electrotechnics, with the following subsections: technical issues, procurement of electrical materials and cables for the plant and branches in Câmpina and Craiova;
10. Use of machines with the following subsections: procurement of machinery, machine installation, transmission belt assembly;
11. Fishing with the following subsections: Administration of State Fisheries, Purchase and Maintenance of Equipment, Distribution, Sale and Conservation of Fish;
12. Mines with subsections: mining of coal and salt, exploitation of other minerals, mining of state mines;
13. Industrial enterprises for war;
14. Economic Issues: Safeguarding Creditors, Forced Administrations;
15. Financial matters: settlement, issuance of general bank tickets
16. Proceedings;
17. Labor matters and the compensation office.

On April 28, 1917, the "Mixed Economic Commission in Romania" was set up with the purpose of the Confidential Circular of 3 May 1917 to intensify the efforts of the enemy administration to send to the "countries" the necessary cereals so long as they still existed in the country, through " volunteering "of the population to the requisites. Practically, the requisition orders could be handed over by a Romanian organ so as the inhabitants should understand the orders of the military administration more quickly. In determining the quantities to be requisitioned, it was not taken into account the domestic consumption needs of the civilian population, so that the entire cereal stock had to be exported. Another monstrous task of this committee

was to evaluate the next year's harvest as the cereals were harvested 6 weeks before the harvest in Germany and Austria, so that the Romanian production was to be shipped during that time in the occupying countries. For this, the commission was to review the quantities, establish rationalized consumption, protect crops, work with the agricultural population. In each commune people of "trust" were recruited, subordinated to the economic offices, that had to work together with the mayor, the notary, the priest and the teacher to convince the population about the obligation to give the crops.

We exemplify below the quantities of grain, fodder, and other food exported by the enemy from 1 December 1916 to 31 October 1918[1]:

Product name	DESTINATION COUNTRY				**TOTAL**
	GERMANY	AUSTRO-HUNGARY	TURKEY	BULGARIA	
	TONS				
Wheat	483002	643957	140273	5950	**1273182**
Corn	224613	242089	22921	5747	**485370**
Other Cereals and beans	43716	45770	553	4574	**94613**
Other food and feed	195540	62879	3702	471	**262592**
Oleaginous	24239	11843	60	6	**36148**
TOTAL	**971110**	**1006538**	**167509**	**16784**	**2161905**

The exploitation of the occupied territory, apart from the requisites for the states mentioned above, was also made individually by the soldiers who were on leave or on vacation and who simply took large quantities of products from the citizens of the area where they were housed, food up to a weight of 25 kg personally or sending parcels of 10 kg /pack as much as they wanted. Based on Order no. 172 of the Superior Commander v.Mackensen from March 3rd, 1917, it was permissible for the departure of soldiers in the permits or holidays to be supplied from Romania with foodstuffs, so that they were dispatched to the "homeland" only in August 1917, 322 wagons with goods. In total, 1002 wagons with parcels were dispatched during this plunder, of which 970 in Germany and 32 wagons in Austro-Hungary[1].

An unimaginable operation of "lifting" animals and birds from the courtyards of disobedient inhabitants has been carried out during the war, according to official data, that were often forged in minus, they exported to the enemy countries 25,870 birds, 86,292 horned cattle, 97,563 sheep and goats, 106,331 pigs, as follows:

Name	**Destination countries**					**TOTAL**
	Germany	Austro-Hungary	Turkey	Second stage	Dobrogea	
Poultry	15881	9995	-	-	-	25870
Horned cattle	7217	55436	76	23563	-	86292
Sheep and goats	1900	9579	135	85424	326	97563

[1] Export statistics from Romania during December 1, 1916 - October 31, 1918, made on 4 November 1918 by the Romanian Railways Commander.

[1] On a simple calculation, assuming 6,000 kg in a wagon, it is estimated that the total expedition from Romania until the end of August 1917 was 6,000,000 kg. various items mostly food belonging to the military of the German and Austro-Hungarian military formations. At the time of the official export report, the number of military "beneficiaries" was 480,000 people. (N/A.)

Pigs	29323	72535	-	4491	-	106351
Other	100	-	-	-	-	100

From the calculations of the Austro-Hungarian foresight service, the food and fodder requisitioned in Romania in the harvest of 1917, would have arrived to feed 53.5 million inhabitants of Austro-Hungary for 26 days on wheat, and 37 days on wheat and corn, considering the ratio of 280 gramms per resident. Excepting the food, the occupation army took from the country raw materials and other products, during December 1 - October 31, 1918, as follows:

Name	**Destination Countries**				**TOTAL**
	Germany	Austro-Hungary	Tukey	Bulgaria	
	Quantities in tons				
Raw and manufactured skins	9017	5348	12	302	14679
Wood	80792	92035	6292	22034	201153
Salt	2403	7654	-	8388	93945
Machines, tools, iron and metals	6351	36284	8312	6528	57475
Chemicals	629	1042	130	258	2059
Alcohol, spirits, tobacco, tobacco products	5916	2686	85	-	8687
Various goods	20965	9998	783	2662	34408
TOTAL	131441	159666	15623	115704	422434

The plundering of natural wealth meant 42,243 wagons of raw materials, of which on the first was wood with 201153 tons, salt from which 93945 tons were exported, but also all the metals, the division between the occupying countries being made in the extent that they were needed in country which did not had such products for the needs of the army or the population.

The most exported products, which lacked the central powers, especially Germany, which were usually imported from Romania, were the pertrolifer products that constituted a first-rate target for the enemy, the febrile setting up of the facilities being done in the shortest amount of time. Austro-Hungary received crude oil, which they transferred to Galicia for refining, while gasoline and diesel oil were shipped to Germany for the supply of war machines. From 1 December 1916 to 31 October 1918 1,140,809 tonnes of oil products were exported to the occupying countries, as follows:

Name	**Destination countries**				**TOTAL**
	Germany	Austro-Hungary	Turkey	Bulgaria	
	Quantities in tons				
Gas	127127	227	710	770	128834
Light gasoline	102158	229	1315	125	103827
Unrefined gasoline	101858	3983	8094	1686	115621
Diesel	206610	112	-	-	206722

Crude oil	1371	226172	4	9	227556
Other oil products	60566	406	159	164	61295
TOTAL	889944	231176	13825	5864	1140809

The entire maintenance of the occupying troops was based on requisitions from the population of Romania, so the rations of the military were generously increased, as Romanians had to survive with a minimum of food[1].

Monthly occupation troops consumed an amount of 19290 tons of hay, 4280 tons of wheat, 4448 tons of flour, 259 tons of semolina, 35 tons of pasta, 3140 tons of bran, 10175 tons of barley, oats including corn, 940 tons of corn meal, 550 tons of barley and coffee surrogate, 1628 tons of vegetables, a total of 4474 food and feed wagons. From the report of the head of the Austro-Hungarian Economic Committee of Section I, in eight months, 40,000 pigs were consumed for the needs of the army. The occupying army consisted of 480,000 people and 140,000 horses, these numbers being taken into account in all calculations with food and feed needs, in 23 months, as follows:

Cereals and feed / tons	**Quantity**	**Observations**
Wheat	98440	
Flour	102304	
Semolina	5957	
Pasta	805	
Corn meal	21620	
Vegetables	37329	
Oats, barley and corn	234025	
Barley and coffee surrogate	12650	
Bran	72920	
Hay	443670	
TOTAL	**4029029**	

Between December 1916 and November 1918, the maintenance of the occupying troops consumed more than 100,000 food and feed wagons.

2. Procurement of goods and merchandise during occupation

The goods and merchandise necessary for the enemy were categorized into two large groups, the first being the ones intended to support the occupation army, the second being needed for the internal consumption of the enemy[1].

Both categories were "procured" in Romania by three methods:

a) Requisitions for the acquisition of the goods, the goods being taken from the owners and becoming property of the army[2];
b) Usage requisitions, the owners retaining their right to property on the goods but losing the right of use throughout the period of their use by the army[3];
c) Goods held by the owner, the purpose being to be lifted when the army needs them[4];

There were also so-called small requisites, that were simply taken from several owners at once. The requisitions were made without the owners agreeing, the property takeover was done by announcing the inhabitants through "Ordinances", by terrorizing the population, applying harsh punishments, fines, imprisonment or executions by shooting. For example, on May 8, 1917, in Văleni, the following order was issued to the population:

"The Command will buy supplies of lard and bacon. Prices will be settled afterwards. Mayors will immediately start collecting items in their communes. Let it be known that if enough quantities of lard and bacon are not to be handed over, forced requisitions will be made in this case, of course, without any payment."

In Cîmpina with "Order no. 8 of 30 November 1917" the Economic Command communicates:

"Due to the limited harvest of potatoes and beans in Prahova County, the Command sees itself obliged to

[1] For a soldier the following food grade was allocated: 500 gr / bread, 200 gr / meat, 20 gr / lard, 25 gr / sugar, 2 cl.rom, 100 gr / marmalade, 250 gr / vegetables, 125 gr / millet, 200 gr / pea flour, 60gr / dried vegetables, 750 gr / potatoes, 200 gr / pasta, 450gr / cabbage, 1200 gr / fresh vegetables, 30 gr / tobacco. These quantities were modified by adding extras from May 1, 1918. Ten thousand men were distributed 10 candles, 100 packs of matches, 125 grams of clothing soap, 50 grams of soap for individual washing, ½ liter of wine, ¾ liter of beer, 1/10 liter of alcohol, ½ liter of milk. The officers had extra rations, and the animals like horses and service dogs had special rations.

[1] Feldrequisitionsguter - goods and merchandise needed by the army of occupation
Wirtschaftsgüter - products and merchandise for export to the countries of occupation (n.a.)

[2] Aneigungsbeschlagnanmes or Entneigung (n.a)

[3] Gebrauchsbeschlagmahme (n.a)

[4] Sicherungssbeschlagnahme (n.a.)

seize all potatoes and beans supplies. Whoever sells from these foods will be fined up to 3000 lei or imprisonment up to 6 months, by election, or with both punishments at once and the products will be seized free of charge."

For requisitioned products, the owners received a "requisition letter" or "receipt". On the basis of these, indemnities were given, the bills being drawn up in duplicate (white and red), the white ones being received by the owner and the other by the town hall. The price or value was never listed on the white papers, but only on those that were retained by the town hall, so that the owner did not know upon requisition what price he would receive for the goods he was taken. For the property let in custody at the owner no receipt were received, but they were requisitioned in the extent in which the goods were owned by the state (not paid), the owners (the owner lost the right of use) or if the articles were clandestinely brought to the market they were confiscated.

3. Settlement of requisitioned goods

In a meeting held on October 29th 1916 at the Berlin War Minister, attended by the allies: Germans, Austro-Hungarians, Turks (arrived after the debates), a protocol was drawn up on the means of payment for the purchase of products which will be raised from Romania. In order not to jeopardize the finances of Germany and its allies, it was decided to grant the Romanian General Bank, contrary to the existing laws of the occupied country, the right to issue banknotes - new lei - with a forced course for all the inhabitants. " The central purchasing society in Berlin" took these banknote issues with which they bought the Romanian goods, practically the occupation forces did not pay for the requisitioned goods, in fact theese being taken free of charge. The Ministry of War was part of these financial operations through "forced agreement", the General Bank of Romania making this issue of new banknotes in the Bank of the German Empire, but could not make any financial operation, had no right over loans and deposits open into the account of the issue section. The Romanian Genaral Bank received "once and for all", a benefit of 1/8 of the value of banknotes issued by the new lei issue section. The banknotes were used according to the provisions of the German Ministry of War to cover the expenses in the occupied territory for the payment of the goods "purchased" by the economic major state, as well as for covering the expenses of the administration of the occupied territory.

At the War Ministry meeting of October 28th, 1916, it was shown the purpose of the issue of new lei regarding the covering of war expenses. Until the "settleing of peace" the central powers had no expense account obligation, the 50 million marks placed on the settlement accounts had to remain intact, and at the conclusion of the meeting it was stated that: "The payment of the issued banknotes will be made at the end of peace talks, when the Romanian government will be forced to pay the entire issue. Thus the deposits covered by the Bank of the Empire will be returned to the parties, and the allies of the central powers will have received free of charge the goods procured from Romania. " It was also shown in this meeting that after the conclusion of the peace, for a period of 6 months, the Romanian General Bank will be obliged to pay out of its own funds a new issue of tickets, for theese ones lose their validity after they will be covered. As a result of this state fraud, it was proceeded to the issue of new Lei in divisions of 1000, 100, 20, 1 lei, 50 and 25 bani, that were used to pay in the occupied territory. Later, divisive bundles of 5 and 2 lei were also introduced. By May 8th, 1918, banknotes worth of 1.6 billion lei were issued, all of which were used to undergo productive and directly exporting operations, productive but non-exportable operations and unproductive operations. Basically, with the money made in Romania, which later could not be used anymore, financed all production, transport and pay-for-service operations. After the war, debts to Romania resulting from the looting of the country through this system were never paid.

In the autumn of 1917, right after Russia came out of the war, the Central Powers, not having the guarantee of the peace signed with Romania, in the chancelleries of the German and especially the Austro-Hungarian war ministries, raised the issue of the economic exploitation of Moldova, that was to be occupied, so that in September 1917 a plan for the occupation of Moldova was made. The Austro-Hungary was not pleased that Germany took the lion's share of Romania's occupied part, so it announced on September 23rd a circular stating that "the experience gained with the occupation and exploitation of Wallachia and Oltenia by the armies of the central powers determines the idea of taking early measures to conclude a convention on the exploitation of Moldova, in case this territory will also have to be occupied[5]".

This odious plan concretizes the exploitation intentions by dividing the territory, by a petroleum convention, an economic convention, a navigation convention on the Danube. Historical events, Romania's strong return to war for the liberation of the occupied territory, the resounding victories over the enemy through the unparalleled bravery of the Romanian soldiers in the struggles on all fronts led the liberation of the entire territory, and even to the special retaliation against the Hungarian army that wanted to act after the theoretical termination of the war until the liberation of Budapest and the defeat of the communist factions allied with Soviet Russia.

[5] The Confidential Report of 31/8/1917 of General V.Sandler specified the need to establish a ratio on the division of territory between occupants for exploitation regarding the railways, the formation of requisition Commands, the exploitation of goods, incomes and resources under the conditions of occupying the territory up to Siret or up to the Prut.

4. The World War and Transylvania

The war found Transylvania in an intense process of denationalization of the Romanian population. The politics of feudal features of the Hungarians who do not recognize any rights for the majority population, neither political, nor religious, nor economic, materialized in the permanent offensive to denationalize the Romanians, to change the Romanian-speaking population with traditions, culture and religion, led after1848.

The beginning of the war in 1914 finds exceptional measures in Transylvania where the assembly is forbidden, the integrity of the churches is violated, the freedom of the press is abolished, the autonomy of the Romanians' religion is suppressed, the population is threatened with trial in the "Martial Court", and the Romanians who sympathize with their brothers across the border are considered "homeland traitors" and confiscated their possessions.

Romanian intellectuals are constantly watched, arrested, confined in concentration camps and prison rooms. Officials, Romanian teachers, priests were deported, and more than 50% of Romanian schools are closed. The prisons of Brasov, Fagaras, Cluj, Seghedin were full of "traitors", especially after Romania declared war on Austro-Hungary. The statements of Prime Minister I.C.Brătianu showed the state of the Romanians which Hungary held in social and national exploitation. It should be noted that in 1915 the Hungarian government prepared a colonization project for the Romanian population from Transylvania, in the counties of the Hungarian denture, a Hungarian population being supposed to be brought in their place. A so-called protection area is being designed not to allow the Romanians to settle less than 10 km from the border. All Romanian newspapers and magazines were to be banned or drastically censored. The greatest blow was on church life. Through infiltrated agents, instead of metropolitan Metianu who was deceased, they assigned the renegade metropolitan Vasile Mangra who signed a document unfavorable to the Romanian people, the priests refused to sign, and thus were thrown into dungeons where they found their end. A special blow was given to Romanians in 1917 when at the proposition of Count Appony the Hungarian government approved the closure of the Romanian schools and the Romanian Church until new provisions, so that the confessional schools in Sibiu, Arad, Caransebes, Blaj, Oradea and Gherla were closed motivated by the fact that Romanians have an "antipatriotic" attitude due to school education.

I will not approach in this paper the entire epic of struggles for the recapture of the Romanian positions in front of the enemy troops, nor the struggles led with a bravery worthy of the ancient heroes for our country to be reunited. This was a work that can not be described in a few pages. However, I have to mention that after the dismantling of the Austro-Hungarian monarchy, on October 7, 1918, in the request for truce made by the Hungarian President to the President of the United States, on October 12th, 1918, in a statement made by Vasile Goldiş, it was affirmed the right of the Romanian people to represent themselves, the Hungarian government losing that right. The Romanian national guards in Transylvania were trying to defend the population against a terror unleashed by the Hungarian forces. The talks with Jászi Oscar, the minister of nationalities, failed mainly in the aftermath of the mass murder of Romanians by Urmánczy in Beliș[6]. As a result, the National Assembly in Alba Iulia

[6] Cicerone Ioniţoiu foaienationala.ro / romani-arşi-pe-rug.html, accessed on 03.02.2018:

"Octavian Goga's 19th of April 1915 predictions were true:

In such circumstances, it is imperative for any true thinker that Austro-Hungarian populations need to be desorbed so that they can also be introduced into the serene world of the ideal; that is why the crushing of the Habsburg kingdom, the cleansing of this moral cancer from the body of Europe is a deep duty of international sanitation. At this gloom, we owe to assist. We, the Romanian people, are called to throw the first ball of dust on this guilty coffin.

We, because we have a greater war of suffering, and we present ourselves to this burial with the greatest pain in the soul ... The Romanian people in Transhilvania served with gold, served with blood a millenary ingratitude, a thousand years of lying." He was a correspondent member of the Romanian Academy since May 29th, 1914 and a member of the Romanian Academy since June 4th, 1919. He was vice-president of the Romanian Academy from 1st of June 1929 to 30th of May 1932. From this prediction, much blood was to be spilled out by the poor Romanian serf. In the wake of the struggle, some were thrown into prison, others executed, others fought on the fronts to defend the cape that was not theirs, while the children and wives worked as slaves on the ancestral lands stolen by the groves, counts, magnates. As the end of the bloody reign was approaching, the oppression was even worse. The lack of arms made the petty Hungarians to bring Italian, Serb and Russian war prisoners to work. In the land of moats, 35 km south of Huedin, near the Izvorul Somesului Cald, a Hungarian magnate in Belis, Ioan Urmanczy had made a field of 28,000 yugur, on which he built a monumental castle and a fir processing industry. In order not to cease work and lose profits, especially because of the Romanian serfs on the fronts, hundreds of war prisoners had been brought. The news of the imperial chaos was borne by the quarter-million Imperial soldiers, deserters, who roamed the land of the former monarchy. That's how it got into the heart of the mountains. And when the dismemberment had led to the outbreak of the Revolution in Budapest from November 1st, fear encompassed those who did not know themselves as masters on their land, but only oppressive enemies. Then, on November 4th, 1918, the Hungarian gendarmes with about 60 Romanian peasants from Giurcuţa de Jos, Mărişel and Beliş led Ioan Urmanczy to Călăţele, where he left for Budapest where he had a brother deputy in the Hungarian parliament. Prisoners of war worked hard under the burden of beatings and died of hunger. The most tortured were the Serbs. After the master's flight, the prisoners revolted leaving work and asked the administration to give them food to go home. Being refused they broke the storehouses, they killed the storekeeper, they took everything they could and went in different directions. Fearful, the Hungarian gendarmes fled to Huedin and announced Budapest. John URMANCZY formed a detachment of 65 people, whom he had armed with the help of the war ministry, putting in their arms weapons, bulky cartridges and machine guns. Under the command of Captain Antal Dietric they were sent with a special train to restore order to Belis. In Bologa, a group of peasants who went to the woods to cut their logs for the winter stopped by curiosity of seeing a train of soldiers and the train stopped as well. The Hungarian soldiers jumped out and with the bayonet on the weapon they surrounded them. Some managed to escape. Others were forced to board the train. Among them, Ioan Molnar, Teodor Crisan, Ion Potra, Ignat Potra and Teodor Potra al Tifri. The train then crossed in front of the Morlaca stone quarry

was convened, under the chairmanship of the octogenarian Gheorghe Pop of Băseşti and with a number of 1228 delegates, with the presence of over 100,000 people, it was decreed "The union with Romania of all Romanians from Transylvania, Banat and the Hungarian Country and of all the territories inhabited by them".

5. A few years after the Union, the interwar period

Romanians will never forget the sufferings of their ancestors in Transylvania, the suffering caused by a xenophobic, chauvinist, irrational policy directed at the destruction of the national being in long periods of time, and if this could not be accomplished due to the vitality of our people, culture and the belief in God, the hope that an astral moment of the union of all Romanians will emerge, they tried to magnetize the

in the valley of Călăţele stream, where another group of Romanian peasants was also looking out of curiosity. The train stopped and the same Hungarians turned the machine guns and reaped the crowd. Numerous Romanian peasants have died, among them being recognized Jacob LUCACI, Maria BOCA, ... and the train continued its way to Huedin, where the Hungarian soldiers were welcomed with music and chorus. Captain Antal Ditrich ordered the detachment to shoot the peasants from Bologa. At the intervention of a Hungarian lawyer in Huedin, after much talk, their lives were spared, but they were badly beaten and disfigured. All bloody, barely able to stand on their feet, they were let go. Apart from the young Teodor Potra who was taken as a guide because he knew the Hungarian language. Of those from Bologa that had been "released", two peasants died because of the terrible beating, namely, old Ion POTRA of Tifri and Ion MOLNAR. The train of horror continued its way to Călăţele and, on the way, the detachment thickened the number of Hungarians employed in the communes of Hungarian Mănăştur, Sâncrai, Huedin, Horlacea, which besides the equipment were offered 300 crowns a day. From Călăţele the detachment walked down the direction of the Belis castle, stopped Mitrea TRIFON and Maria TRIF, whom they shot at the entrance to Beliş village, the injured woman managing to escape by throwing herself in river. On November 7th, 1917, near noon, the detachment settled in the castle and the soldiers went to the hunting of the Romanian peasants. Eleven men and a woman were brought in and after they tortured them, they were shot. In the village there were also many peasants shot. The houses were robbed, the cattle raised and brought to the castle where the pigs were killed and the lard sent to Budapest by train. On the day of St. Michael and Gabriel, on November 8th, 1918, dozens of moons were killed. During this day, Nicholas Neagu, a former caretaker at the castle, took the carriage and lifted the dead from the village and the roads. He was terrified to find people slayed with the bayonet and their guts on the ground, others leaning on pillars, with an empty bottle in his mouth, in mockery. After the peasants were robbed after they were killed, they were thrown into the fire. On Todea Gheorghe Dodu, after repairing the telephone threads, under threat of death, they forced him to throw the dead in the fire. Over 25 corpses in the first line. They then continued to burn them. More than 40 died in the flames. The number of deaths was yet much higher. In the spring through the woods they would uncovered dead bodies, perhaps even of the wounded or fugitive peasants. In fact, the moons have been hiding for weeks in the mountains out of fear, naked and without food. When the commission from Cluj arrived, on November 12th, it was astounding. Captain Advocate Valentin Poroutiu said: "... the most frightening scene of the revolution appeared to us. The potato store of the factory was burned to the ground. Only the cellar remained untouched. There's a pile of bodies in this cellar. On top there was a gypsy woman with clenched fists and a young military man aged 18-19. We were horrified and ran to Cluj in our cars. "This was during the negotiations in Arad when the Hungarians were still trying to obtain the Romanian goodwill for the continuation of cohabitation. The massacre at Belis led to: TOTAL DISSOLUTION. Here is a part of the reenactment made with those martyred on November 8th, 1918 in Belis, a commune located at the connection of the Hot Somes with the Belis brook.

BOLOGA Commune: Ion Potra of Trifi and Ioan Molnar

MORLACA Commune: Maria BOCA of Petri Halamului, Iacob LUCACIU, wife of Teodor FORT

BELIŞ Commune: Ioan BÂLC for 36 years burned at the stake, after him a child and his wife; Nicolae BÂLC of Luchi, 24 years old, burned at the stake, remaining helpless mother; Gheorghe MIHUŢ of Vili, 35 years old, burned, reamining wife and three children: Pascu, Măria and Laura; Şimion MIHUŢ, the postmaster, burned at the stake, 60 years; Varvara POP, born FORT, 44 years old burned at the stake, the remaining husband Vasile POP and three children Teodor, Ilie and Justina; Maria MATIS, shot and burned at the stake; Pascu POPA of Focuţ, shot at 24 years; Alexandru PUICA, 49 years old, blacksmith, shot; Alexandru Puica, the 41-year-old wife shot dead; Dumitru TRIPON, 26 years old, burned, remaining Ana Tripon (wife) and one child.

VĂLENI Commune (Cluj): Ion VLAIC of Cotreşti, of 35 years burned at the stake, widowed wife Caterina and a son: Traian Vlaic.

TUFENI Commune (Cluj): Gavril DREVE, 54 years old shot on Dambul Negri, remaining the daughter Floarea; Ion DREVE, 22 years old shot with his father, remaining the widow Anuţa Dreve, wife.

MÂNASTIRENI Commune: Peter CALO, 38-year-old blacksmith shot, left a son: Peter; Ioan GOIA; Ion NISTOR; Peter GIURGIU, shot at 54, remained a son: Ion; Ion MICHILIE, shot at age 18; Ioan MORAR, butcher, shot at 57, there are two sons; Gavril VASĂR, shot at 6, left two children.

MARISEL Commune (Cluj): Avram COSTEA, burnt on the stake. His wife died shortly. Their little girl Maria remained orphaned on the roads; Dumitru Giurgiu, burned at the stake, dead wife, children on the roads; Ion LAZAR; Francisc MULLER; Gheorghe MARIŞ, burned at the stake, left Silvia and two orphaned children: Vasile and Avram.

ARADA Commune (Cluj): Ioan NEAGU, burned at the stake, remaining wife Rafila and three children: Ion, Vasile and Ana; Peter TODEA, burned at the bridle, his wife widowed with daughter Rafila; Nicolae RADAC burned at the stake, left Anuţa and the child Gheorghe; NEAG SAVU, burned at the stake, left Ana and the children Nicolae, Iosif, Mariuta; Sântioana STAN; Jujiu's Gheorghe NEAG; Ana LAZAR; Dumitru LAZAR; Gavril NEAG of Luchia; Rafila ONET; Dumitru NICOLA; Ana TODEA.

Crimes against Romanians are generalizing. While the desire for liberation under the Hungarian yoke was manifested openly, upon the Romanians broke most extreme oppression. The Hungarian gendarmes were lurking in the flesh on the "white shirt", on November 5th, when the horror train advanced to Belis, and the Hungarian gendarmes acted by killing more peasants in Sanmartin.

In Mihalţ, the descendants of "St. Stefan" killed 10 peasants, and injured another 28. The priestess and the notary in Filea de Jos returned with 25 Hungarian gendarmes in order to secure a field he exploited, met near the village of Filea de Sus Romanian soldiers returning from the front. He opened fire on them and shot nine men. In the same period and in the same region of the motians, other Hungarian peasants were shot by the Hungarian gendarmes: Cherelus (6 deaths), Covasinti (3 deaths), Tăuţi other three, Mandruloc others ... everywhere.

Another act of barbarity by the Hungarian detachment that had acted in Belis was at the Poieni railway station near Ciucea. In retreat, after the massacre at Urmanczy Castle, they captured the Romanian sub-lieutenant Tamas in the Poieni station and after beating him terribly, they cut off his ears, forced him to dig a pit at 10 meters from the railroad and after they took out his eyes, they killed him and buried him there. In their bloodshed in the village of Sohodol they killed two priests, Leucutia and Popescu. In those days of horror for the Transylvanian peasants, Iuliu MANIU could not make a wiser decision than: TOTAL DISSOLUTION. And we should not let our forgetfulness drop over the sufferings of our ancestors cause it would be an unforgivable crime."

population by granting privileges, by changing religion, by administrative, legal measures or even by force.

Romanians are not from the same mold, they are hospitable to strangers, they are friendly and refuse hatred and revenge. In 1934, in the Chamber of Deputies sitting, the great poet Octavian Goga showed: "Our people are not xenophobic; the psychology of the Romanian people refuses the hatred on racial and confessional cryteria. Our entire past is a proof of tolerance that inspired this people ... Every thread of grass was talking about the secular sufferings of the Romanian people ... Or, there is no movement against the aliens. There was no bloodshed as in 1848, and this people, with their painful memories, with this agitation in their hearts, was of a magnificent generosity in its behavior towards strangers .... This people seemed to take part - after one thousand years - at the great banquet of its freedom, desiring the good of the whole world, and stretching his arms in a broad reception."

First of all, the Romanians through its legislative bodies have laid down the humanitarian principles of their existence:

- Full freedom for all congregational peoples;
- Equal rights and full confessional autonomy to all religions of the state;
- Every people should be trained, administered, judged in their own language by people elected from their keen;
- Every nation has the right to be represented in the legislative bodies and in the government of the country in proportion to its number.

The 1923 Constitution consented to the provisions of the "Peace Treaty" by granting equal, civil and political rights, irrespective of race, religion or language. All the political parties that ruled after 1918 had in their programs the guarantee of the rights established by the Transylvania Conducting Council, so that Hungarians, as well as other nationalities, enjoyed their status as state-protected minorities. Contrary to Hungary's political doctrines that did not grant the right of existence to non-Magyar nationalities, the issue of nationalities in Romania was definitively and fully resolved.

For a share of 7.7% of the country's population, the Hungarians had in all post-EU legislatures, from 6 to 26 representatives in Parliament. Unlike Hungary, which in the mandate after 1918, for 3 million and a half Romanians only had 5 representatives out of the 256 members of the Hungarian Parliament.

The liberation of the people from social and national oppression has led to the development of the business initiative and the country's economy: increased production of goods from 34% to 50% in metallurgy and chemistry, with 100% growth in textile production. If in 1919 there were 1161 industrial enterprises with a production of 4,446,411,000 lei, with a capital of 1,048,468,000 lei with a work occupation of 8,158 workers, in 1937, after the restoration of the country, the number of enterprises reached 1619, with a capital of 16,683,148,000 lei and a number of 129,603 workers.

For example, we show below a table of comparative achievements between 1919 and 1940:

INDUSTRY	**The industry founded under the Union with Romania 1919 - 1940**							
	Number of enterprises	Capital	Workers	Production value mil. lei	Number of enterprises	Capital	Workers	Production value mil. lei
Food	165	1833	6877	2345	181	1400	5520	2812
Chemicals	34	1551	3695	1089	89	855	8035	1990
Metallurgy	52	5472	32569	5261	110	8679	26723	7730
Textile	47	1121	10626	2499	196	1598	15094	3046
Wood	105	336	7725	639	280	640	10904	1491
Leather	25	307	4810	1281	38	137	3028	635
Paper	18	11920	2704	752	42	138	1953	279
Building materials	81	23789	5417	690	55	468	3498	366
Glassware	2	117	365	23	16	474	3525	403
Electronics	-	-	-	-	20	47	730	187
Ceramics	5	18	190	14	12	84	933	67
T O T A L	**534**	**12429**	**74978**	**14593**	**1039**	**14520**	**79943**	**18966**
The growth achieved by the industry of Transylvania					**+66%**	**+54%**	**+52%**	**+57%**

Extractive industry grew after World War I in Transylvania, coal production, methane, silver doubled in the first seven years, and gold extraction tripled. Absolutely all sectors have doubled or tripled their activities, demonstrating the possibilities of a nation unleashed from national exploitation, which for hundreds of years has been defeated and defamed only to be held in control and humiliation. This lesson is equally valid nowadays when other masters pretend to use the riches and vital force of our people.

For the economic development of Romania, of state bank capital and capital of industrial, commercial, insurance and other companies, after the war, a total

capital of 10,441,995,953 lei was used, of which 4,314,329. 880 lei for investments.

Romania's promise, made by its king, accomplished through the agrarian reform, was an act of social justice for those innocents who bore the difficulties of the war or sacrificed themselves for the country, so that the ideal of union would be accomplished.

If, prior to the war in Transylvania, 3,306,345 Romanians possessed 3,448,602 yokes of land, that is to say barely one yoke per person, a year after the war, in 1919 the situation was as follows:

- property from 0 to 10 yokes, from 4,407,889, after reform 7,289,953;
- property from 10 to 100 yokes, from 3,741,700, after the reform 3,741,300;
- property over 100 yokes, from 4,980,985, after the reform 1,889,916.

The expropriation of the great foreign landowners and the ownership of the peasants with the ancestral land was not only an act of historic reparation, but also a mechanism of agricultural production growth, that in a few years reached a share of 35% of the Gross Domestic Product of Transylvania.

2269 km of railway tracks were rebuilt and 1,069 km of new railway were built and the roads were restored, 5182 bridges destroyed by retreating enemies were rebuilt and 2348 new bridges were built in the next 15 years.

Particular achievements in the interwar period can be seen in Transylvania in the health and medical field. It is a breakthrough because there were 1 physician at 5183 inhabitants in cities and 1 doctor at 6770 people in the villages in 1938, compared to 8375 and 11599 in 1919. It was the time when there were 185 doctors in Timișoara and 748 doctors in Brasov. 69 general hospitals and 372 dispensaries were built, and in Cluj there were built the Clinics of the University with all the necessary sections, clinics that over time have gained an international fame. However, in rural areas health care was almost abandoned in the Austro-Hungarian regime, and after the war a number of deficiencies were reported on the sanitary hygiene level. Still, we can see an improvement in health status, a decrease in morbidity from 26% (1904-1914) to 18% (1935-1940) is a significant index.

On a religious level, the freedom of confessions being guaranteed, the Romanian state sealed a "Concordat" through its government with the Holy Seige in 1927, granting it a wide autonomy. Roman Catholic, Reformed, and Unitarian bishops sworn oath to King Ferdinand and, as a result, received tremendous benefits, the so-called sacrum heritage, privileges that did not even exist in Hungary. All representatives of minorities found that under the Ministries of Goga, Banu, Lapedatu, Goldiș the state's support for minority beliefs and their culture was continuous and progressive. If the Romanian Orthodox parishes were able to support themselves financially in proportion of 2.5%, the other cults could sustain themselves financially up to 5% Greek-Catholic, 21% Unitarian, 53% Roman Catholic, 83% Lutheran. However, in 1920, minority churches received a budget 20 times the one of the Orthodox Church. In the interwar period 718 churches were built in Transylvania, many of which were cathedrals, and over 987 churches were repaired. Unfortunately, the Romanians remaining within the border of Hungary, for a population of 80,000 people, had only 34 parishes and 9 priests, the Hungarian state did not give any assistance to the Romanian church and its servants.

If in 1907 in Transylvania there were no primary schools with teaching in Romanian, the purpose being that of forced magyarization of the Romanian population, since 1919 in communal, confessional, private schools, the language of teaching was established as that of those who administrated the school. The primary state school would have as language of teaching Romanian, secondary state schools the language of teaching would be the language of the majority of the population, and in the higher education the language of the majority of the inhabitants of the region was to be used.

The situation of education in the interwar period was the following:

School situation in 1918					
Primary state schools	Primary Hungarian schools	Saxon primary schools	Romanian civil schools	Hungarian civil schools	Saxon vicil schools
2392	2588	207	3	109	5

Minorities schools in 1918 - 1930					
Primary state and confesional Hungarian schools	Secondary state and confesional Hungarian schools	Saxon primary schools	Saxon secondary schools	Swabian primary schools	Swabian secondary schools
1362	57	517	43	136	20

In terms of Romanian education in Transylvania in the interwar period, 2,553 new school places were built, 8,962 teachers were enrolled, so 14,455 posts were filled. In Higher Education, a University with 4 faculties was established, an Academy of High Commercial and Industrial Studies, a Music Academy, a Theater Academy, two Theological Academies in Cluj. In Oradea a Law Academy was established, merging in 1934 with the one in Cluj, a Polytechnic School in Timisoara, and seven other Theological Academies (3 united and 4 Orthodox) in the main metropolitan cities. Famous professors were teaching in these faculties, of the 83 university professors, 68 were diplomats who had studied in the most advanced foreign universities. In these faculties there were conducted 3,329 studies in Romanian, 1,837 in foreign languages, and 46 publications. In Cluj, they began elaborating the great Dictionary of the Romanian language, from which four volumes appeared, the Romanian linguistic Atlas with two volumes, and the history and archeology professors were trained at the National History Institute and the History Museum of Transylvania. There was a new science, caving.

All these benefits made in the Kingdom of Romania, in which Transylvania was the heart of this country returned to international life through remarkable achievements, was "rewarded" by the barbarian hordes in 1940, when Transylvania was "stabbed" to death when hatred and chauvinism without the edges exploded. The indescribable cruelties made in Transylvania, where the killings among priests, teachers and intellectuals or even the peasantry related to the land they did not want to leave, materialized in the villages of Ip and Trăsnea where the members of the families of priests Traian Costea and Moldovans were killed mercilessly after the collective murder of all people, 155 in the first and 280 in the second village. The same happened in the commune of Marcu - Sălaj, in the town of Huedin where the deacon Aurel Munteanu and the policeman Gheorghe Nicola were killed in the most terrible tortures. As a punishment, the 6 criminals judged by the Hungarian authorities were applied sentences of 2 months in prison, and for the 7th the was maximum ruthlessness - 3 months imprisonment. The explanations of the crimes and such sentences are frightening madness. "The intention of killing was not found but only the provocation of curable injuries within 20 days," the perpetrators (killers) "were in a state of mood suitable to explain ... the strong emotion they were ruled and which could cause excesses from the part full of the happiness of liberation and enthusiastic patriotic feelings. " My comment is one: well, it did not hold too much "patriotic happiness and feelings" that it would have killed all the Romanian priests, teachers and intellectuals trapped in the enthusiastic operations.

Transylvania is linked to Muntenia and Moldova as in the biblical example of brick made of earth, water and fire. Transylvania is inseparable, even though the hostility of its fate has made it disputed, writhing, negotiated, sold, betrayed, treated with indifference, or with the passivity of those who say: what do the Transylvanians still need?, confusing them with the whole of Transylvania. Even nowadays we are not doing much better, because Transylvanian patriotism is considered to be nationalism, a feudal atavism in a Europe with barriers of the new migrants.

The history of Transylvania in the First World War and after the war can be characterized as being properly understood by the political leaders of the country, who believed evil is to be paid with good, that the Romanians only have to suffer and they can enjoy only when they are allowed. The foreign heel from the necks of Romanians has never risen, and the revanchists in their madness want a new Ip and Tranznea. Watch out, good Romanians! while you still have the country as a whole. I tell you this as a son who had his parents banished from Cluj at the cession of northern Transylvania, whose grandparents were imprisoned by other unscrupulous Romanians because they were supporters of Maniu, the maker of Great Romania, whose names were changed in civil status registers and on the crosses in the cemetery. Careful!

References:

- ILIE I. GEORGIANU - România sub ocupație dusmană, fascicola II – Exploatarea economică a țării, Editura Tipografia ”Cultura neamului Românesc ” Bucuresti, 1020;
- ȘTEFAN PASCU - Transilvania în lumina datelor geopolitice, istorice și statistice, Institutul de Istorie Națională din Cluj – Sibiu, Editura ”Lumina” – Miron Roșu, Blaj, 1944
- D. DRĂGHICESCO – La Transylvanie – Esquisse historique, geografique, etnographique et statistique, Paris, librairie Felix Alcan, 1918
- UNIVERSITE ROUMAINE DE CLUJ – Centre d,Etudes et de recherches relatives a la Transilvanie – LA TRANSYLVANIE, BOINVILE ET comp Editeurs, rue Palatine – Paris, 1946
- ION MUREȘANU – ARDEALUL, scriere premiată de ”Cartea Românească” , ed. Caretea Românească – București, 1919

CASE LAW OF THE COURT OF JUSTICE OF EUROPEAN UNION: A VISIT TO THE WINE CELLAR

Alina Mihaela CONEA*

Abstract

`It must be observed that a quality wine is a very specific product. Its particular qualities and characteristics, which result from a combination of natural and human factors, are linked to its geographical area of origin and vigilance must be exercised and efforts made in order for them to be maintained. (Court of Justice of European Union, Rioja Wine Judgement)`[1]

The present paper will consider some of the most relevant judgements of the Court of Justice of European Union regarding wine. Coincidentally or not many of this cases are also landmark decisions of the European Union law.

The purpose of this paper is to present the variety of European Union law areas enriched through the Court wine judgments: intellectual property, free movement of goods, fiscal barrier to trade, EU legal order, fundamental rights, public health and external relations.

Surveying the wine jurisprudence of the Court of Justice of European Union resembles a wine testing. One can sense the savours rich bouquet that the case law express, on strong cultural choices, policies, lifestyle or identity at national and European level.

Keywords: *wine, Court of Justice of European Union, intellectual property, international agreement, taxation.*

1. Introduction

The European Union is the world leading producer of wine[1]. Almost half of the world's vineyards are in the European Union (EU) and the EU produces and consumes around 60% of the world's wine[2].

Therefore, wine is a complex and vivid area of EU law. A simple search of word `wine` on EUR-Lex shows 19066 results. When refined, EUR-Lex displays 2466 results on Legislation and wine subject, of which 2120 regulations and 12 directives. If the search is refined by author (Council of the European Union) and regarding only regulations the result is 547[3]. When search for the subject matter `wine` in the EU case law, in the form of Judgments, the number of results is 120. This paper is, accordingly, only a survey of the case law, based on an ample specialized literature.

The present paper will consider only some of the most relevant judgements of the Court of Justice of European Union regarding wine. Coincidentally or not many of this cases are also landmark decisions, shaping the EU law. What we find remarkable is the relevance and impact of the wine cases over different fields of EU law.

The purpose of this paper is to present this variety of EU law areas enriched through the Court wine judgments: intellectual property (Capitol 2), fundamental rights (Capitol 3), EU legal order (Capitol 4), external relations (Capitol 5), fiscal barrier to trade (Capitol 6) and public health (Capitol 7).

2. Intellectual property

2.1. Protection of protected designations of origin

The EU legislation for quality wine consists of two types of classification: Protected Denomination of Origin (PDO) regarding "quality wines produced in a specified region" and Protected Geographical Indication (PGI) regarding "quality wines with geographical indication". In the specific case of the wine industry, protection by origin plays an imperative role, since it is not only a 'labeling' issue, as wine quality is strongly linked to the place where the grape is harvested in terms of the terroir of the vineyard[4].

The Court had occasion to define the concepts related to protected **designations of origin in many cases.**

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[1] Judgment of the Court of 16 May 2000, *Kingdom of Belgium v Kingdom of Spain (Rioja wine)*, Case C-388/95, ECLI:EU:C:2000:244, p.57.

[1] According to European Commision, it accounts for 45% of world wine-growing areas, 65% of production, 57% of global consumption and 70% of exports in global terms, https://ec.europa.eu/agriculture/wine_en.

[2] Meloni, Giulia and Swinnen, Johan F. M., *The Political Economy of European Wine Regulations* (October 17, 2012). Available at SSRN: https://ssrn.com/abstract=2279338 or http://dx.doi.org/10.2139/ssrn.2279338.

[3] The basic two regulations are: Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December, establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (CMO Regulation) : and Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008.

[4] Jazmín Muñoz and Sofía Boza, *Protection by origin in Chile and the European markets: the case of the wine sector, SECO/WTI Academic Cooperation Project*, Working Paper No. 14/2017, https://www.wti.org/media/filer_public/8d/23/8d234fa5-d456-483f-8def-79ea8009392d/munozbozasecowp.pdf.

In a recent judgement of 20th December 2017, *Champagner Sorbet*[5], the Court held that a sorbet may be sold under the name 'Champagner Sorbet' if it has, as one of its essential characteristics, a taste attributable primarily to champagne. If that is the case, that product name does not take undue advantage of the protected designation of origin 'Champagne'.

At the end of 2012, Aldi, a company distributing, inter alia, foodstuffs, began to sell a frozen product, distributed under the name 'Champagner Sorbet' and contained, among its ingredients, 12% champagne. Taking the view that the distribution of that product under that name constituted an infringement of the PDO 'Champagne', the Comité Interprofessionnel du Vin de Champagne, an association of champagne producers, brought proceedings before the Landgericht München.

In this respect, the CJEU, first of all, rejected the position of the Comité that the protection granted under these provisions was absolute. The Court stated that the use of a protected designation of origin as part of the name under which is sold a foodstuff that does not correspond to the product specifications for that designation but contains an ingredient which does correspond to those specifications cannot be regarded, in itself, as an unfair use and, therefore, as a use against which protected designations of origin are protected in all circumstances by virtue of the applicable provisions of EU law[6]. It is true that the use of the name 'Champagner Sorbet' to refer to a sorbet containing champagne is liable to extend to that product the reputation of the PDO 'Champagne', which conveys an image of quality and prestige, and therefore to take advantage of that reputation. However, such use of the name 'Champagner Sorbet' does not take undue advantage (and therefore does not exploit the reputation) of the PDO 'Champagne' if the product concerned has, as one of its essential characteristics, a taste that is primarily attributable to champagne.

The decision ***Port Charlotte*[7],** in Case C-56/16 P, provides guidance in situations which give rise to exploitation of the reputation regarding a protected designation of origin. The Scottish company Bruichladdich Distillery Co. Ltd. Filed, a trade mark application for "Port Charlotte, for whisky. Instituto dos Vinhos e do Porto filed an application with the European Union Intellectual Property Office (EUIPO) for a declaration that the mark was invalid.

The Court held that national law on PGIs cannot be used to provide supplementary protection above and beyond that provided under EU law. It was also settle that a PGI for "port" cannot be used to prevent registration of other trademarks containing the word "port", if the use is legitimate and without confusion with the PGI.

The Court has turned its attention to the labelling of wine in many cases, interpreting the use of terms 'méthode champenoise', `cremant` and `chateu[8]`.

The case ***Méthode champenoise***[9] concerns a dispute between SMW Winzersekt GmbH ('Winzersekt') and the Land Rheinland-Pfalz on the use after 31 August 1994 of the term 'Flaschengärung im Champagnerverfahren' ('bottle-fermented by the champagne method') to describe certain quality sparkling wines produced in a specified region ('quality sparkling wines PSR'). Winzersekt is an association of wine-growers who produce sparkling wine from wines of the Mosel-Saar-Ruwer region using a process referred to as 'méthode champenoise', which means in particular that fermentation takes place in the bottle and the cuvée is separated from the lees by disgorging.

The Court held that a wine producer cannot be authorized to use, in descriptions relating to the method of production of his products, geographical indications which do not correspond to the actual provenance of the wine.

In Case C-309/89, ***Codorníu***[10] successfully challenged the validity of a regulation which allowed the use of the word "Crémant" only in respect of sparkling wines from France or Luxembourg and thus forbad its use in respect of wines emanating from Spain.

The Court held in *Codorníu* that the reservation of the term "crémant" to wines produced in two Member States cannot validly be justified either on the basis of traditional use, since it disregards the traditional use of that mark in the third State for wines of the same kind, or by the indication of origin associated with the mark in question, since it is in essence attributed on the basis of the method of manufacture of the product and not its origin. It follows that the different treatment has not been objectively justified and the said provision must therefore be declared void.

On the other hand, the Court clearly ruled out in case ***Tocai friulano*[11]** that the Italian name Tocai friulano' and its synonym Tocai italico are not a protected geographical indication within the meaning of the EC-Hungary Agreement.

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[5] Judgment of 20 December 2017**,** Vin de Champagne v Aldi Süd, Case C-393/16, ECLI:EU:C:2017:991.

[66] https://www.bardehle.com/ip-news-knowledge/ip-news/news-detail/court-of-justice-of-the-european-union-champagne-sorbet-does-not-infringe-champagne-if-the-sorb.html.

[7] Judgment of the Court of 14 September 2017, European Union Intellectual Property Office (EUIPO) v Instituto dos Vinhos do Douro e do Porto, IP (Port Charlotte), Case C-56/16 P, ECLI:EU:C:2017:693.

[8] Judgment of the Court of 29 June 1994, Claire Lafforgue, née Baux and François Baux v Château de Calce SCI and Coopérative de Calce (*Château de Calce*), Case C-403/92, ECLI:EU:C:1994:269.

[9] Judgment of the Court of 13 December 1994, *SMW Winzersekt GmbH v Land Rheinland-Pfalz*, Case C-306/93, ECLI:EU:C:1994:407,

[10] Judgment of the Court of 18 May 1994, Codorníu SA v Council of the European Union, Case C-309/89, ECLI:EU:C:1994:197.

[11] Judgment of the Court of 12 May 2005, Regione autonoma Friuli-Venezia Giulia and Agenzia regionale per lo sviluppo rurale (ERSA) v Ministero delle Politiche Agricole e Forestali (Tocai friulano) Case C-347/03, ECLI:EU:C:2005:285.

'Tocai friulano' or 'Tocai italico' is a vine variety traditionally grown in the region of Friuli-Venezia Giulia (Italy) and used in the production of white wines marketed inter alia under geographical indications such as 'Collio' or 'Collio goriziano'. In 1993, the European Community and the Republic of Hungary concluded an agreement on the reciprocal protection and control of wine names. In order to protect the Hungarian geographical indication 'Tokaj', the agreement prohibited the use of the term 'Tocai' to describe the abovementioned Italian wines at the end of a transitional period expiring on 31 March 2007. In 2002, the autonomous region of Friuli-Venezia Giulia and the regional agency for rural development asked the Tribunal amministrativo regionale del Lazio to annul the national legislation implementing the prohibition provided for by the agreement. In that context, the Italian court made a reference to the CJEU.

The Court clearly ruled out that as the Italian name Tocai friulano' and Tocai italico' are not a protected geographical indication and the Hungarian name Tokaj' is, the EC-Hungary Agreement do not apply.

In case ***Kingdom of Belgium v Kingdom of Spain (Rioja wine)***[12] the Court turned its attention to the Spanish rules govern the bottling of wines bearing the designation of origin "Rioja".

Belgium considered that those rules which, in particular, require the wine to be bottled in cellars in the region of production in order to qualify for the "controlled designation of origin" (denominación de origen calificada) were detrimental to the free movement of goods.

The Court finds that national rules applicable to wines bearing a designation of origin which make the use of the name of the production region conditional upon bottling in that region constitute a measure having an effect equivalent to quantitative restrictions on exports.

However, the requirement of bottling in the region of production, whose aim is to preserve the considerable reputation of the wine bearing the designation of origin by strengthening control over its particular characteristics and its quality, is justified as a measure protecting the designation of origin which may be used by all the wine producers in that region and is of decisive importance to them, and it must be regarded as being in conformity with Community law despite its restrictive effects on trade, since it constitutes a necessary and proportionate means of attaining the objective pursued in that there are no less restrictive alternative measures capable of attaining it[13].

In the case ***Abadía Retuerta- Cuvée Palomar***[14], the applicant, Abadía Retuerta SA, filed a Community trade mark application at the Office for Harmonisation in the Internal Market (OHIM), pursuant to Regulation No 40/94. The trade mark for which registration was sought is the word sign *Cuvée Palomar* for wines.

OHIM takes the view that the mark applied for was inadmissible. The reason was an obligation to interpret the Community trade-mark legislation, as far as possible, in the light of the wording and purpose of TRIPs Agreement, which lays down a specific prohibition on registration of geographical indications identifying wines and spirits.

Under Spanish law the area of production protected by the registered designation of origin 'Valencia' consists of, inter alia, the sub-region Clariano, which includes, inter alia, a local administrative area with the name *el Palomar*. The name *el Palomar* thus constitutes a geographical indication for a quality wine produced in specified regions (psr). Under Spanish law and, accordingly, under Article 52 of Regulation No 1493/1999 on the common organisation of the market in wine, which provides that, if a Member State uses the name of a specified region, including the name of a local administrative area, to designate a quality wine psr, that name may not be used to designate products of the wine sector not produced in that region and/or products not designated by the name in accordance with the provisions of the relevant Community and national rules[15].

2.2. Distinctive character of trademarks

In case ***Freixenet***[16], the Spanish sparkling wine producing company seeks to set aside the judgments of the General Court of the European Union concerning applications for registration of signs representing a frosted white bottle and a frosted black matt bottle as Community trademarks. Freixenet's trademark application for the both bottles provided the following disclaimer: "The applicant states that through the mark now being applied for he does not want to obtain restrictive and exclusive protection for the shape of the packaging but for the specific appearance of its surface",

It rarely happens that the Court of Justice annuls a decision of the General Court, and, thus, the decision is per se remarkable. It becomes even more remarkable when considering that the decision appears to broaden the scope of signs that are protectable under the category of "other" marks[17]. The Court held that when assessing protectability of the surface of a product as a

[12] Judgment of the Court of 16 May 2000, *Kingdom of Belgium v Kingdom of Spain (Rioja wine)*, Case C-388/95, ECLI:EU:C:2000:244

[13] Judgment of the Court of 16 May 2000, *Rioja wine*, Case C-388/95.

[14] Judgment of the General Court of 11 May 2010, Abadía Retuerta, SA v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (Abadía Retuerta), Case T-237/08, ECLI:EU:T:2010:185.

[15] Judgment of the General Court of 11 May 2010, *Abadía Retuerta*, Case T-237/08, , P. 82, 86-88, 110-112.

[16] Judgment of the Court of 20 October 2011, Freixenet, SA v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)(Freixenet). Joined cases C-344/10 P and C-345/10 P., ECLI:EU:C:2011:680.

[17] Philipe Kutschke, *Court of Justice of the European Union on the protectability of the shading of a bottle as a trademark* (decision of October 20, 2011 Joined Cases C-344/10 P and C-345/10 P – Freixenet v OHIM), BARDEHLE PAGENBERG IP Report 2011/V.

trademark, a significant departure from the norm or customs in the sector concerned is sufficient to confer distinctiveness on the mark.

It was commented[18] that as well as the visual aspect, the matt finish bottle could be regarded as a tactile sign.

3. Fundamental rights

It would appear useful to mention a series of judgments ***Liselotte Hauer***, ***Méthode champenoise* (*Winzersekt)***, ***Tokai firuliano***, in which the Court, while affirming its concern to fundamental right protection, noted the limits imposed to the right to property or to the freedom to pursue a trade or profession

3.1. Right to property

***Liselotte Hauer*[19]** was the owner of a plot of land forming part of the administrative district of Bad Dürkheim. Mrs. Hauer applied for authorization to undertake the new planting of vines on the land which she owns. The Land Rheinland-Pfalz refused to grant her that authorization. While the application was pending, the European Commission issued an order prohibiting the planting of that type of vine for three years.

The Court declare that fundamental rights form an integral part of the general principles of the law, the observance of which is ensured by the court. In safeguarding those rights, the latter is bound to draw inspiration from constitutional traditions common to the member states, so that measures which are incompatible with the fundamental rights recognized by the constitutions of those states are unacceptable in the Community. International treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can also supply guidelines which should be followed within the framework of community law.

The scope of that right should be measured in relation to its social function; the substance and enjoyment of property rights are subject to restrictions which must be accepted by each owner on the basis of the superior general interest and the general good.

The Court clearly ruled out that the measure in question does not adversely affect the "substance" of the right to property: it does not restrict the owner's power to make use of his land except in one of the numerous imaginable ways and is of limited duration.

In the case ***Méthode champenoise* (*Winzersekt)***[20] the designation 'méthode champenoise' is a term which, prior to the adoption of the regulation, all producers of sparkling wines were entitled to use. The prohibition of the use of that designation cannot be regarded as an infringement of an alleged property right vested in Winzersekt. The use of terms relating to a production method may refer to the name of a geographical unit only where the wine in question is entitled to use that geographical indication.

In ***Tocai friulano***[21] the Court holds that, since it does not exclude any reasonable method of marketing the Italian wines concerned, *the prohibition does not constitute deprivation of possessions* for the purposes of the European Convention on Human Rights (ECHR).

Consequently, the lack of compensation for the winegrowers concerned is not in itself a circumstance demonstrating incompatibility between the prohibition and the right to property. In addition, even if that prohibition constitutes control of the use of property as referred to in the ECHR, the interference which it involves may be justified.

In that regard, the Court observes that the objective of the prohibition is to reconcile the need to provide consumers with clear and accurate information on products with the need to protect producers on their territory against distortions of competition. The prohibition therefore pursues **a** *legitimate aim of general interest.*

The Court rules that the prohibition is also proportionate to that aim, given, inter alia, that a transitional period of thirteen years was provided for and that alternative terms are available to replace the names 'Tocai friulano' and 'Tocai italico'[22].

3.2. Freedom to pursue a trade or profession

In the same way as the right to property, in **Liselotte Hauer*[23]*,** the right of freedom to pursue trade or professional activities, far from constituting an unfettered prerogative, must be viewed in the light of the social function of the activities protected thereunder.

To the extent to which it affects the second aspect, the prohibition on planting in question does not constitute an unacceptable interference with the fundamental right freely to pursue economic activity; *the latter is not an absolute individual right, excluding any restriction; it must be seen in a social context.*

So far as concerns the impairment of the freedom to pursue a trade or profession, the Court held in ***Méthode champenoise* (*Winzersekt)*[24]*,** that the EU legislation do not impair the very substance of the right freely to exercise a trade or profession relied on by Winzersekt since those provisions affect only the arrangements governing the exercise of that right and

[18] Graeme B. Dinwoodie, Mark D. Janis, *Trademark Law and Theory: A Handbook of Contemporary Research*, Edward Elgar Publishing, 2008, p. 521.

[19] Judgment of the Court of 13 December 1979, *Liselotte Hauer v Land Rheinland-Pfalz*, Case 44/79, ECLI:EU:C:1979:290.

[20] Judgment of the Court of 13 December 1994, *Méthode champenoise* (*Winzersekt)*, Case C-306/93.

[21] Judgment of the Court of 12 May 2005, *Tocai friulano*, Case C-347/03.

[22] CJE/05/42 12 May 2005, Press Release No 42/05, 12 May 2005.

[23] Judgment of the Court of 13 December 1979, *Liselotte Hauer*, Case 44/79.

[24] Judgment of the Court of 13 December 1994, *Méthode champenoise* (*Winzersekt)*, Case C-306/93.

do not jeopardize its very existence. It is for that reason necessary to determine whether those provisions pursue objectives of general interest, do not affect the position of producers such as Winzersekt in a disproportionate manner and, consequently, whether the Council exceeded the limits of its

4. EU legal order

4.1. Supremacy

Liselotte Hauer[25] addresses the question of supremacy of EU law regarding constitutional law of member states. The Court declare that: `the question of a possible infringement of fundamental rights by a measure of the community institutions can only be judged in the light of community law itself. The introduction of special criteria for assessment stemming from the legislation or *constitutional law* of a particular member state would, by damaging the substantive unity and efficacy of community law, lead inevitably to the destruction of the unity of the common market and the jeopardizing of the cohesion of the community`[26].

4.2. Direct application of a regulation

The Court had the occasion to rule on the direct application of a regulation in **Bureau national interprofessionnel du Cognac**[27]**.** In that regard, the Court affirms that in order to ensure observance of the principles of legal certainty and the protection of legitimate expectations, the substantive rules of EU law must be interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, objectives or general scheme that such effect must be given to them[28].

In that connection, it should be recalled that the direct application of a regulation means that its entry into force and its application in favour of or against those subject to it are independent of any measure of reception into national law, strict compliance with that obligation being an indispensable condition for the simultaneous and uniform application of regulations throughout the European Union.

4.3. The notion of 'individual concern'

Codorniu[29] sought to challenge a Regulation reserving the word "cremant" for high-quality sparkling wines from specific regions in France and Luxembourg.

Codorniu is a Spanish company manufacturing and marketing quality sparkling wines psr. It is the holder of the Spanish graphic trade mark "Gran Cremant de Codorniu", which it has been using since 1924 to designate one of its quality sparkling wines. Codorniu is the main Community producer of quality sparkling wines, the designation of which includes the term "crémant". Other producers established in Spain also use the term "Gran Cremant" to designate their quality sparkling wines.

The Court held, departing from the previous case law[30], that the applicant was *individually concerned* because the reservation to producers in France and Luxembourg interfered with Codorniu's intellectual property rights[31].

Although it is true that according to the criteria in the second paragraph of Article 263 of TFUE the contested provision is, by nature and by virtue of its sphere of application, of a legislative nature in that it applies to the traders concerned in general, that does not prevent it from being of individual concern to some of them[32].

Natural or legal persons may claim that a contested provision is of individual concern to them only if it affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons. By reserving the right to use the term "crémant" to French and Luxembourg producers, the contested provision prevents Codorniu from using its graphic trade mark. It follows that Codorniu has established the existence of a situation which from the point of view of the contested provision differentiates it from all other traders[33].

4.4. Non-contractual liability of the Community

The case ***Cantina sociale di Dolianova***[34] involved wine cooperatives which were producers of wine in Sardinia (Italy). Following a series of disputes concerning the payment of Community subsidies between wine producing cooperatives, the distiller and the Italian authorities responsible for the management of such subsidies, those cooperatives – since there were unable to obtain the full amount of the payments required before the national courts after the distiller went bankrupt – had brought an action before the Court of First Instance for a declaration that the Commission

[25] Judgment of the Court of 13 December 1979, *Liselotte Hauer*, Case 44/79.
[26] Ibid..
[27] Judgment of the Court of 14 July 2011, *Bureau national interprofessionnel du Cognac*, Joined cases C-4/10 and C-27/10, ECLI:EU:C:2011:484.
[28] Ibid., p.26.
[29] Judgment of the Court of 18 May 1994, *Codorníu*, Case C-309/89, ECLI:EU:C:1994:197.
[30] Paul Craig, Gráinne de Búrca, *EU Law, Text, Cases, and Materials*, Oxford University Press, 2015, p. 497.
[31] http://www.eulaws.eu/?p=171.
[32] Judgment of the Court of 18 May 1994, *Codorníu*, p.19.
[33] Ibid., p.22.
[34] Judgment of the Court (Fourth Chamber) of 17 July 2008., Commission of the European Communities v Cantina sociale di Dolianova Soc. coop. arl and Others, (*Cantina sociale di Dolianova*) Case C-51/05 P, ECLI:EU:C:2008:409.

was non-contractually liable and for the Commission therefore to pay for the damage which they had suffered[35].

In the case ***Cantina sociale di Dolianova*** the Court of Justice set aside the Court of First Instance`s ruling which had taken a subjective approach according to which the damage caused by an unlawful legislative act could not be regarded as certain as long as the allegedly injured party did not perceive it as such[36].

The court underline that the rules on limitation periods which govern actions for damages must be based only on strictly objectives criteria. If it were otherwise, there would be a risk of undermine the principle of legal certainty on which the rules on limitations periods specifically rely and the point in time at which those proceedings become time-barred varies according to the individual perception[37].

4.5. Preliminary ruling

The court declined jurisdiction

Foglia v. Novello[38] is the only case to date where the court declined jurisdiction in a preliminary ruling case on account of the spurious nature of the main proceedings[39]. The questions concerned the legality under Union law of an import duty imposed by the French on the import of wine from Italy[40].

Mr. Foglia, having his place of business at Santa Vittoria D ' Alba, in the province of Cuneo, Piedmont, Italy, made a contract to sell Italian liqueur wines to the defendant, Mrs. Novello. The contract provided that the parties would not be liable for any taxes levied by French or Italian authorities which were contrary to EC law. The parties to the contract were, in fact, concerned to obtain a ruling that a tax system in one Member State was invalid by expedient the proceedings before a court in another member state. The court decline its jurisdiction.

The Court states that it does not have jurisdiction to reply to questions of interpretation which are submitted to it within the framework of procedural devices arranged by the parties in order to induce the Court to give its views on certain problems of Community law which do not correspond to an objective requirement inherent in the resolution of a dispute. The duty assigned to the Court by is not that of delivering advisory opinions on general or hypothetical questions but of assisting in the administration of justice in the Member States.

Consequences of an earlier judgment giving a preliminary ruling

In case ***Kingdom of Belgium v Kingdom of Spain (Rioja wine)***[41], the most interesting issue however arises not from the interpretation of the Treaty free movement provisions but from the unclear relationship between the *Delhaize ruling*[42] and the case at issue; from a first reading it seems that the Court, without saying it, overruled itself: however a more careful reading of the two judgments does not seem to support this view[43].

Both in the *Delhaize case* and in the *Rioja* one, the Court found the Spanish legislation to constitute a measure having equivalent effect to a restriction on exports. As far as the issue of justification is concerned, in the Delhaize case the Court clearly stated that it had not been *shown* that the Spanish legislation was justified. The Court points out that in the *Rioja* proceedings, the Spanish, Italian and Portuguese Governments and the Commission have produced new information to demonstrate that the reasons underlying the contested requirement are capable of justifying it. It is necessary to examine this case in the light of that information[44].

Use of art. 259 TFEU: State vs. State

The ***Rioja case*** is also interesting for the use of art. 259 TFEU which enables a Member State to bring an action against another Member State.

In the history of European integration only six times a Member State has directly brought an action for failure to fulfil the obligations before the CJEU against another State[45]. Of the sixth cases, only four proceeded to judgment, the other two were settled amicably[46].

5. External relations

5.1. Principles of international law relating to treaties

The Court held in ***Tocai friulano***[47] that the European Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, is not the legal basis of Decision 93/724

[35] European Commision, Summary of important judgements, http://ec.europa.eu/dgs/legal_service/arrets/05c051_en.pdf
[36] Koen Lenaerts, Ignace Maselis, Kathleen Gutman, *EU Procedural Law*, OUP Oxford, 2014, p.546.
[37] Judgment of the Court of 17 July 2008., *Cantina sociale di Dolianova*, Case C-51/05 P, p 59-60.
[38] Judgment of the Court of 11 March 1980, *Pasquale Foglia v Mariella Novello*, Case 104/79, ECLI:EU:C:1980:73.
[39] Koen Lenaerts, Ignace Maselis, Kathleen Gutman, *EU Procedural Law*, OUP Oxford, 2014, p. 93.
[40] Lorna Woods, Philippa Watson, *Steiner & Woods EU Law*, Oxford University Press, 2014, p. 231.
[41] Judgment of the Court of 16 May 2000, *Kingdom of Belgium v Kingdom of Spain (Rioja wine)*, Case C-388/95, ECLI:EU:C:2000:244
[42] Judgment of the Court of 9 June 1992. Établissements Delhaize frères and Compagnie Le Lion SA v Promalvin SA and AGE Bodegas Unidas SA (*Delhaize*), Case C-47/90, ECLI:EU:C:1992:250.
[43] Eleanor Spaventa, *'Case C-388/95, Belgium v. Spain'*, 38 Common Market Law Review, Issue 1, 2001, pp. 211–219.
[44] Judgment of the Court of 16 May 2000, *Rioja wine*, Case C-388/95, p.52.
[45] Case 141/78, France v United Kingdom, Case C-388/95, Belgium v Spain, Case C-145/04, Spain v United Kingdom, Case C-364/10, Hungary v Slovakia, Case 58/77, Ireland v France, Case C-349/92, Spain v United Kingdom.
[46] Dimitriu, Ioana Mihaela , *State versus state: who applies better EU law?*, Challenges of the Knowledge Society, Volume 5, Number 1, 2015, pp. 404-410(7).
[47] Judgment of the Court of 12 May 2005, *Tocai friulano*, Case C-347/03.

concerning the conclusion of the Agreement between the European Community and the Republic of Hungary on the reciprocal protection and control of wine names.

The appropriate legal basis for the conclusion by the Community alone of the latter agreement is Article 133 EC, an article which confers on the Community competence in the field of the common commercial policy. That agreement is part on the common organisation of the market in wine and its principal objective is to promote trade between the Contracting Parties

The Court then points out that in the case of homonymity between a geographical indication of a third country and a name incorporating the name of a vine variety used for the description and presentation of certain Community wines, the provisions on homonyms contained in the Agreement on Trade-Related Aspects of Intellectual Property (the TRIPs Agreement) do not require that the name of a vine variety used for the description of Community wines be allowed to continue to be used in the future[48].

5.2. Direct effect of TRIPS Agreement

The Court upholds in ***Abadía Retuerta***[49] that although the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) do not have direct effect, it is nevertheless true that the trade−mark legislation, must, as far as possible, be interpreted in the light of the wording and purpose of that agreement.[50]

5.3. International agreement to which the European Union is not a party

The case ***International Organisation for Vine and Wine (OIV)***[51] is notable from several perspectives: the emergence and proliferation of informal means of co-operation challenging the monopoly of traditional forms of international law-making and, secondly, the competence of EU to act externally.

In *OIV* case the Court was confronted with the question of the legal character and effects of an informal act issued by an international organisation to which the EU is not a member.

The OIV is an intergovernmental organisation of technical and scientific nature. It allows for discussions and eventually adopts non-binding recommendations on vine, wine marketing and wine production standards. The EU is not a member of the OIV, and only 21 of its Member States are. Issues dealt with in the OIV fall within the area of agriculture, a shared competence. The Member Statesand the Commission initially coordinated OIV positions informally prior to OIV meetings. Later, the procedure was formalised and the Council started adopting common positions on recommendations by the Commission through art. 218(9) TFEU, a Treaty provision concerning procedures on international agreements.49 In other words, EU institutions and Member States found ways to cooperate to assure unity of representation in the OIV, thereby fulfilling the duty of art. 4(3) TEU.

Germany, challenged this practice by arguing that the legal basis of art. 218(9) TFEU could not be used when the international organisation does adopt legally binding acts and the EU is not a member[52].

The case the discussion focuses on the scope and interpretation of the sole Article 218(9) TFEU because, as Germany points out, no other substantive legal basis was indicated in the contested decision. This case raises crucial issues not only for the European Union (EU) and its Member States, but also for the proper functioning of the international organisations in which they operate[53].

First, this case may be seen as one of the exponents of the vivid academic debate over norm creation that occurs outside the classic international law framework[54].

Overall, the declining importance of form and formalities, treaty-fatigue, and the proliferation of new actors, outputs and processes have accentuated the phenomenon of informal international law-making, and thus, the problem of distinguishing between law and non-law. Also, recent years have also witnessed the proliferation of informal instruments issued by private actors. The trend towards privatisation manifests itself through the increased engagement of private actors with autonomous self-regulation, the emergence of mixed public-private acts (coregulation) and the proliferation of standard-setting instruments[55]

The *OIV* case is also relevant for the debates on the autonomy[56] of EU law.

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[48] CJE/05/42 12 May 2005, Press Release No 42/05, 12 May 2005.

[49] Judgment of the General Court of 11 May 2010, *Abadía Retuerta*, , Case T-237/08,.

[50] Ibid., p 67-72.

[51] Judgment of the Court (Grand Chamber), 7 October 2014, Federal Republic of Germany v Council of the European Union (OIV), Case C 399/12, ECLI:EU:C:2014:2258.

[52] Johan Bjerkem, *Member States as 'Trustees' of the Union? The European Union and the Arctic Council*, College of Europe, EU Diplomacy Papers, 12/2017, (http://aei.pitt.edu/92758/1/edp-12-2017_bjerkem.pdf).

[53] Govaere, Inge. 2014. "*Novel Issues Pertaining to EU Member States Membership of Other International Organisations: The OIV Case*." In The European Union in the World : Essays in Honour of M. Maresceau, ed. Inge Govaere, Erwoan Lannon, Peter Van Elsuwege, and Stanislas Adam, 225–243. Leiden, The Netherlands: Martinus Nijhoff Publishers.

[54] Eva Kassoti, *The EU and the Challenge of Informal International Law-Making: The CJEU's Contribution to the Doctrine of International Law-Making*, Geneva Jean Monnet Working Paper 06/2017, https://www.ceje.ch/files/3615/1748/7746/kassoti_6-2017.pdf .

[55] Ibid.

[56] R.A. Wessel and S. Blockmans (Eds.), Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations, The Hague: T.M.C. Asser Press/Springer, 2013, pp. 1-9; Konstadinides, Theodore, In the Union of Wine: Loose Ends in the Relationship between the European Union and the Member States in the Field of External Representation (2015). 21 (4) European Public Law (Forthcoming). Available at SSRN: https://ssrn.com/abstract=2584995.

Also, the Court made it plain that a clear distinction must be drawn between the existence (and qualification) of a competence on the one hand, and its exercise on the other. The fact that, given these circumstances, the Union cannot exercise its competence on the international forum through its own external actors[57], in particular the Commission or the High Representative, has no implications whatsoever for the issue of the existence of a competence (or even its qualification as being exclusive or not), which the Court had no difficulty accepting in this case. As the Court recalls: `in such circumstances the Union must act via its Member States, members of that organization, acting jointly in the interest of the Union`.

6. Taxation

The CJEU decisions on duties and taxation made a significant contribution to the realization of a single market. The Court interpreted the relevant Treaty articles in the manner best designed to ensure the Treaty objectives are achieved. In relation to taxation the issues are more complex. The original Rome Treaty left a considerable degree of autonomy to Member States in the fiscal field, albeit subject to constraints imposed by Articles 30 and 110 TFEU[58].

In this area, as in many others, there is a link between judicial doctrine and legislative initiatives. The very fact that a challenged national tax policy will, according to Court decision in ***French Sweet Wines case***[59], be upheld if the court deems it to be compatible with the Treaty can lead to paradoxical results. The absence of harmonization has led to the ironic result that the Commission, abetted by the CJEU, has managed to wield perhaps more influence over Member States` tax policies, and their economic and social policies, than would be the case if the Council had agreed a uniform tax regime.

`Article 110 TFEU purpose is to prevent Member States to introduce new taxes which had the purpose or effect of discouraging the sale of imported products in favour of the sale of similar products available on the domestic market and, in this way, to circumvent the prohibitions in Articles 28 TFEU, 30 TFEU and 34 TFEU`[60].

The prohibition laid down in article 110(1) applies if two cumulative conditions are met: first, relevant imported product and the relevant domestic product must be *similar* and, secondly, there must be *discrimination*[61].

Article 110(2) TFEU applies if two cumulative conditions are met: first, the imported product and the domestic product must be in *competition*, and, secondly, the tax must *protect* the domestic product[62].

In some cases, the **Spirits cases**[63], the Court follows a `holistic` approach[64], which does not distinguish between the two paragraphs of article 110 TFEU.

6.1. Similar products - Art. 110 (1) TFEU

The Court has turned its attention to the concept of similarity between wine and other alcoholic beverages in several cases. It was underline[65] that in terms of production conditions and characteristics, whilst wine is an agricultural product, with an elevated cost of production and subject to climate vicissitudes, beer is an industrial product.

The Court endorsed a broad interpretation of the concept of similarity in its judgment of 27 February 1980, in Case 168/78[66], ***Commission v French Republic***.

The Court stated that `it is therefore necessary to interpret the concept of "similar products" with sufficient flexibility. It is necessary to consider as similar products which have similar characteristics and meet the same needs from the point of view of consumers. It is therefore necessary to determine the scope of the first paragraph of Article 110 on the basis not of the criterion of the strictly identical nature of the products but on that of their similar and comparable use`.

The court interpreted the meaning of similar products in case ***Johnny Walker*** [67], where it was able to assess the compatibility with the provision of a system of differential taxation applied under Danish tax legislation to Scotch whisky and fruit wine of the liqueur type. Consequently, the Court held that in order to determine whether products are similar `it is necessary first to consider certain objective characteristics of both categories of beverages, such as their origin, the method of manufacture and their

[57] Roxana-Mariana Popescu, Place of international agreements to which the European Union is part within the EU legal order, Challenges of the Knowledge Society, Volume 5, Number 1, 2015, pp. 489-494(6).
[58] Paul Craig, Gráinne de Búrca, *EU Law, Text, Cases, and Materials*, Oxford University Press, 2015, p. 636.
[59] Judgment of the Court of 7 April 1987, *Commission v French Republic (French sweet wines)*, Case 196/85, ECLI:EU:C:1987:182.
[60] Judgment of the Court of 7 April 2011, *Ioan Tatu v Statul român prin Ministerul Finanţelor şi Economiei* and Others, Case C-402/09, p.53.
[61] Catherine Barnard and Steve Peers, European Union Law , Oxford, Oxford University Press, 2014,p. 348.
[62] Ibid.,p. 350.
[63] Judgment of the Court of 27 February 1980, *Commission v French Republic*, Case 168/78, ECLI:EU:C:1980:51; Judgment of the Court of 27 February 1980, *Commission v Ireland*, Case 55/79, ECLI:EU:C:1980:56; Judgment of the Court of 12 July 1983, Case 170/78, ECLI:EU:C:1983:202; Judgment of the Court of 27 February 1980, *Commission v Kingdom of Denmark*, Case 171/78, ECLI:EU:C:1980:54; Judgment of the Court of 27 February 1980, *Commission v Italian Republic*, Case 169/78, ECLI:EU:C:1980:52.
[64] Catherine Barnard and Steve Peers, *European Union Law* , Oxford, Oxford University Press, 2014,p. 348.
[65] Theodore Georgopoulos, *Taxation of alcohol and consumer attitude is the ECJ sober?*, American Association of Wine Economists Working Paper, No. 37, June 2009, http://www.wine-economics.org/aawe/wp-content/uploads/2012/10/AAWE_WP37.pdf.
[66] Judgment of the Court of 27 February 1980, *Commission v French Republic*, Case 168/78, ECLI:EU:C:1980:51.
[67] Judgment of the Court of 4 March 1986, *John Walker & Sons Ltd v Ministeriet for Skatter og Afgifter*, Case 243/84. ECLI:EU:C:1986:100

organoleptic properties, in particular taste and alcohol content, and secondly to consider whether or not both categories of beverages are capable of meeting the same needs from the point of view of consumers`[68].

In case ***Commission v Kingdom of Denmark (Fruit wine)*** the court asses weather Denmark infringe the treaty imposing a higher rate of duty on wine made from grapes than on wine made from other fruit.

`As the concept of similarity must be given a broad interpretation, the similarity of products must be assessed not according to whether they are strictly identical but according to whether their use is similar and comparable`[69].

The court takes a dynamic interpretation concluded that the point of view of consumers must be assessed on the basis not of existing consumer habits but of the prospective development of those habits.

The concept of *indirect discrimination* was applied by the Court in ***Marsala*** case[70], without mentioning it expressly[71]. In the context of identical rates applied to manufacture of nationally and foreign produced wine alcohol, a reduction was granted by the Italian legislation to alcohol distilled from wine and used in the production of liqueur wines which qualify for the designation `Marsala`, a beverage made in western Sicily. The Court observed that no imported liqueur wine can ever qualify for the preferential treatment accorded to Marsala and that imported liqueur wines accordingly suffer discrimination.

6.2. Goods not similar but in competition – Art. 110(2) TFEU

In the case ***Commission v French Republic***, Case 168/78, the court held `that the function of the second paragraph of Article 110 TFEU is to cover all forms of indirect tax protection in the case of products which, *without being similar* within the meaning of the first paragraph, *are nevertheless in competition*, even partial, indirect or potential, with certain products of the importing country. For the purposes of the application of that provision it is sufficient for the imported product to be in competition with the protected domestic production by reason of one or several economic uses to which it may be put, even though the condition of similarity for the purposes of the first paragraph of Article 95 is not fulfilled[72]`.

The case ***Wine and Beer[73]*** concerns the great difference between the rate of excise duty on still light wine produced in other Member States and the rate of excise duty on beer produced in the United Kingdom that, according to the Commission, afforded indirect protection to beer and was contrary to the second paragraph of Article 110 of the Treaty.

The Court emphasized that `the second paragraph of Article 110 applied to the treatment for, tax purposes of products which, without fulfilling the criterion of similarity, were nevertheless in competition, either partially or potentially, with certain products of the importing country`.

As regards the question of competition between wine and beer, the Court considered that, to a certain extent at least, the two beverages in question were capable of meeting identical needs, so that it had to be acknowledged that there was a degree of substitution for one another[74]. In view of the substantial differences in the quality and, therefore, in the price of wines, the decisive competitive relationship between beer, a popular and widely consumed beverage, and wine must be established by reference to those wines which are the most accessible to the public at large, that is to say, generally speaking, the lightest and cheapest varieties[75].

The Court concluded that the United Kingdom's tax system has the effect of subjecting wine imported from other Member States to an additional tax burden so as to afford protection to domestic beer production. Since such protection is most marked in the case of the most popular wines, the effect of the United Kingdom tax system is to stamp wine with the hallmarks of a luxury product which, in view of the tax burden which it bears, can scarcely constitute in the eyes of the consumer a genuine alternative to the typical domestically produced beverage[76]. So, the emphasis is on the considerably higher tax burden applied to the wines.

In a more recent case, ***Commission v Kingdom of Sweden***[77], the Court was once again called to give answers to the question of taxation of wine and beer in the light of Article 110 TFEU. The Court took a different view, considering that the Swedish measure was compatible with EU law. This can reflect the accent on the possibility of the measure to have protectionist effect[78].

In this case the major issue was the consumer's attitude towards selling prices of alcoholic beverages.

The Court applied the method of relationship of final selling prices between a litter of strong beer and a litter of wine in competition and compared this

[68] Ibid., p.11.
[69] Judgment of the Court of 4 March 1986, *Commission v Kingdom of Denmark (Fruit wine)*, Case 106/84, ECLI:EU:C:1986:99.
[70] Judgment of the Court of 3 July 1985, *Commission v Italian Republic (Marsala)*, Case 277/83, ECLI:EU:C:1985:285.
[71] Christa Tobler, *Indirect Discrimination: A Case Study Into the Development of the Legal Concept of Indirect Discrimination Under EC Law*, Intersentia nv, 2005, p. 127.
[72] Judgment of the Court of 27 February 1980, *Commission v French Republic*, Case 168/78, ECLI:EU:C:1980:51.
[73] Judgment of the Court of 12 July 1983, Commission v United Kingdom of Great Britain and Northern Ireland (Wine and Beer), Case 170/78, ECLI:EU:C:1983:202.
[74] Ibid., p.8.
[75] Judgment of the Court of 12 July 1983, Wine and Beer, Case 170/78, ECLI:EU:C:1983:202, p.12.
[76] ibid, p.27.
[77] Judgment of the Court (Grand Chamber) of 8 April 2008, *Commission v Kingdom of Sweden*, Case C-167/05, ECLI:EU:C:2008:202
[78] Friedl Weiss, Clemens Kaupa, *European Union Internal Market Law*, Cambridge University Press, 2014, p.91.

relationship with the one that would apply if tax rates of beer were applied to wine. Thus, the Court found that the relationship between final selling prices of beer and wine would be 1: 2.1 instead of the actual 1: 2 .3. In this sense, the CJEU considered that the impact of higher taxation on wine would be "virtually the same". According to the Court's reasoning, given the important difference of the final selling prices the fluctuation of the ratio is not likely to change the consumer's attitude[79].

6.3. Exceptions

In ***French sweet wines*** **case**[80], the Court accepted France was not in violation of the community law treating sweet wine production more favourably under the domestic taxation regime on account of being a need to sustain the production in areas of country where growing conditions were poor and unpredictable[81].

The Court held that Community law does not restrict the freedom of each Member State to lay down tax arrangements which differentiate between certain products, even products which are similar on the basis of *objective criteria*, such as the *nature of the raw materials* used or the production processes employed. `Such differentiation is compatible with Community law if it pursues objectives of economic policy which are themselves compatible with the requirements of the Treaty and its secondary legislation, and if the detailed rules are such as to avoid any form of discrimination, direct or indirect, in regard to imports from other Member States or any form of protection of competing domestic products`.

The aim of offsetting the more *severe conditions under which certain products are produced*, in order to sustain the output of quality products which are of particular economic importance for certain regions of the Community must be regarded as compatible with the requirements of Community law[82]

The ***Joustra***[83] case offers the Court the occasion to rule on interpretation of Directive 92/12/EEC on the general arrangements for products subject to excise duty.

Mr. Joustra is a Dutch national and together with some 70 other private individuals formed a group called the 'Circle des Amis du Vin'.

Each year, on behalf of the circle, Mr. Joustra orders wine in France for his own use and that of the other members of the group. On his instructions, that wine is then collected by a Netherlands transport company which transports it to the Netherlands and delivers it to Mr. Joustra's home. The wine is stored there for a few days before being delivered to the other members of the circle on the basis of their respective shares of the quantity purchased. Mr. Joustra pays for the wine and the transport and each member of the group then reimburses him for the cost of the quantity of wine delivered to that member and a share of the transport costs calculated in proportion to that quantity. It is common ground that Mr. Joustra does not engage in that activity on a commercial basis or with a view to making a profit[84].

The Dutch tax authorities nevertheless charged excise duty on the wine and Mr. Joustra submitted an appeal against this decision.

In the course of the ensuing proceedings, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) raised questions concerning the interpretation of Directive 92/12/EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products.

Joustra is interesting for the literal interpretation method applied by the Court. The court held that only products acquired on a person's own behalf fall within the application of Article 8, while those purchased for other individuals do not. Furthermore, transportation must be effected personally by the purchaser.

The Court expressly mention that it is for the Community legislature to remedy the legal lacuna, if necessary, by adopting the measures required in order to amend that provision[85].

7. Public health

The EU's main competencies are in creating a single European market rather than making health policy. We may therefore expect that alcohol policy has seen the dominance of economic over health interests. However this might be a simplistic picture[86].

The case ***Commission v French Republic***[87] regarded a French law which interdict the advertising of grain-based spirits (mainly foreign) while allowing advertising of wine based spirits (mainly French).

National legislation restricting the advertising of some alcoholic drinks it constitutes arbitrary discrimination in trade between Member States where it authorises advertising in respect of certain national products whilst advertising in respect of products bearing comparable characteristics but originating in other Member States is restricted. Legislation restricting advertising in respect of alcoholic drinks

[79] Theodore Georgopoulos, *Taxation of Alcohol and Consumer Attitude: Is The ECJ Sober?, AAWE WORKING PAPER, no.37, 2009., p.2-6.*
[80] Judgment of the Court of 7 April 1987, Commission v French Republic (French sweet wines), Case 196/85, ECLI:EU:C:1987:182.
[81] Dermot Cahill, Vincent Power, Niamh Connery, *European Law*, OUP Oxford, 2011, p. 64.
[82] Robert Schütze, *An Introduction to European Law*, Cambridge University Press, 2015,p.230.
[83] Judgment of the Court of 23 November 2006, Staatssecretaris van Financiën v B. F. Joustra (Joustra), Case C-5/05, ECLI:EU:C:2006:733
[84] Ibid., p.17.
[85] Judgment of the Court of 23 November 2006, *Joustra*, Case C-5/05, ECLI:EU:C:2006:733, 46.
[86] Ben Baumberg, Peter Anderson, *Health, alcohol and EU law: understanding the impact of European single market law on alcohol policies*, Oxford University Press, European Journal of Public Health, Vol. 18, No. 4, 392–398.
[87] Judgment of the Court of 10 July 1980, Commission v French Republic, Case 152/78, ECLI:EU:C:1980:187.

complies with the requirements of Article 30 EEC only if it applies in identical manner to all the relevant drinks whatever their origin.

The Court held that by subjecting advertising in respect of alcoholic beverages to discriminatory rules and thereby maintaining obstacles to the freedom of intra-Community trade, the French Republic had failed to fulfil its obligations under Article 30 EEC. The Court recognize in ***Commission v French Republic***[88] that national legislation restricting the advertising of some alcoholic drinks may in principle be justified by concern relating to the protection of public health.

In case ***Deutsches Weintor***[89] the court examined the definition of *health claims*. In this case 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 specifies that 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[90]. 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[91].

8. Conclusion

Defending wines shaped landmark decisions of EU law.

The Court declare, in *Liselotte Hauer,* that *`fundamental rights form an integral part of the general principles of the law*, the observance of which is ensured by the court`. Furthermore, the Court affirms the supremacy of EU law vis-à-vis *constitutional law* of Member states.

In the field of EU procedural law, in *Codorníu*, the Court recognize, for the first time, the *individual concern* of the applicant in the action for annulment of *a legislative act.* `

Foglia v. Novello is the only case to date where the Court declined jurisdiction in a preliminary ruling case on account of the spurious nature of the main proceedings[92].

The *Rioja Wine case* is one of the six cases in the history of European integration when a state use the art. 259 TFEU and directly brought an action for failure to fulfil the obligations before the CJEU against another State.

In the case of an informal act issued by an international organisation to which the EU is not a member, *the Union must act via its Member States*, members of that organization, *acting jointly in the interest of the Union (International Organisation for Vine and Wine).*

A long series of decisions, such as *Spirits cases, Wine and Beer, Johnny Walker or French Sweet Wines case, on* duties and taxation made a substantial contribution to the realization of the single market

We may say wine is one of the key ingredients that creates law and, thus, defines who the EU is. Indeed, no efforts were saved or vigilance rest in protecting the Europe`s wine cellar.

In any case… *in vino veritas.*

References

- Barnard, Catherine and Steve Peers, European Union Law , Oxford, Oxford University Press, 2014
- Baumberg, Ben, Peter Anderson, Health, alcohol and EU law: understanding the impact of European single market law on alcohol policies, Oxford University Press, European Journal of Public Health, Vol. 18, No. 4, 392–398
- Berlottier , Luc, Laurent Mercier, Protected Designations of Origin and Protected Geographical Indications,
- Bjerkem, Johan, Member States as 'Trustees' of the Union? The European Union and the Arctic Council, College of Europe, EU Diplomacy Papers, 12/2017, http://aei.pitt.edu/92758/1/edp-12-2017_bjerkem.pdf
- Blakeney, Michael, The Protection of Geographical Indications: Law and Practice, Edward Elgar Publishing, 2014
- Cahill, Dermot , Vincent Power, Niamh Connery, European Law, OUP Oxford, 2011

[88] Ibid.
[89] Judgment of 6 September 2012, Deutsches Weintor, Case C–544/10, ECLI:EU:C:2012:526.
[90] Ibid., para. 36.
[91] Ibid, para. 35.
[92] Koen Lenaerts, Ignace Maselis, Kathleen Gutman, *EU Procedural Law*, OUP Oxford, 2014, p. 93.

- Cini, Michelle, and Nieves Pérez-Solórzano Borragán. 2016. European Union Politics. Oxford University Press
- CJE/05/42 12 May 2005, Press Release No 42/05, 12 May 2005
- Craig, Paul, Gráinne de Búrca, EU Law, Text, Cases, and Materials, Oxford University Press, 2015
- Dimitriu, Ioana Mihaela , State versus state: who applies better EU law?, Challenges of the Knowledge Society, Volume 5, Number 1, 2015, pp. 404-410(7)
- Dinwoodie, Graeme B., Mark D. Janis, Trademark Law and Theory: A Handbook of Contemporary Research, Edward Elgar Publishing, 2008
- Erlbacher, Friedrich, Recent Case Law on External Competences of the European Union: How Member States Can Embrace Their Own Treaty (2017). CLEER Paper Series, 2017/2, T.M.C. Asser Institute for International & European Law 2017-2. Available at SSRN: https://ssrn.com/abstract=3120550
- Fuerea, Augustin, Dreptul Uniunii Europene. Principii, actiuni, libertati- Universul Juridic, Bucuresti, 2016
- Georgopoulos, Theodore, Taxation of Alcohol and Consumer Attitude: Is The ECJ Sober?, AAWE WORKING PAPER, no.37, 2009
- Georgopoulos, Theodore, Taxation of alcohol and consumer attitude is the ECJ sober?, American Association of Wine Economists Working Paper, No. 37, June 2009, http://www.wine-economics.org/aawe/wp-content/uploads/2012/10/AAWE_WP37.pdf
- Govaere, Inge. 2014. "Novel Issues Pertaining to EU Member States Membership of Other International Organisations: The OIV Case." In The European Union in the World : Essays in Honour of M. Maresceau, ed. Inge Govaere, Erwoan Lannon, Peter Van Elsuwege, and Stanislas Adam, 225–243. Leiden, The Netherlands: Martinus Nijhoff Publishers
- Kassoti, Eva, The EU and the Challenge of Informal International Law-Making: The CJEU's Contribution to the Doctrine of International Law-Making, Geneva Jean Monnet Working Paper 06/2017, https://www.ceje.ch/files/3615/1748/7746/kassoti_6-2017.pdf
- Konstadinides, Theodore, In the Union of Wine: Loose Ends in the Relationship between the European Union and the Member States in the Field of External Representation (2015). 21 (4) European Public Law (Forthcoming). Available at SSRN: https://ssrn.com/abstract=2584995
- Kutschke, Philipe, Court of Justice of the European Union on the protectability of the shading of a bottle as a trademark (decision of October 20, 2011 – Joined Cases C-344/10 P and C-345/10 P – Freixenet v OHIM), Bardehle Pagenberg IP Report 2011/V
- Lenaerts, Koen, Ignace Maselis, Kathleen Gutman, EU Procedural Law, OUP Oxford, 2014
- Meloni, Giulia and Swinnen, Johan F. M., The Political Economy of European Wine Regulations (October 17, 2012). Available at SSRN: https://ssrn.com/abstract=2279338 or http://dx.doi.org/10.2139/ssrn.2279338
- Muñoz, Jazmín and Sofía Boza, Protection by origin in Chile and the European markets: the case of the wine sector, SECO/WTI Academic Cooperation Project , Working Paper No. 14/2017, https://www.wti.org/media/filer_public/8d/23/8d234fa5-d456-483f-8def-79ea8009392d/munozbozasecowp.pdf
- O'Connor , Bernard, The Law of Geographical Indications, Cameron May, London, 2004
- Ortino, Federico , Basic Legal Instruments for the Liberalisation of Trade Comparative Analysis of EC and WTO Law Bloomsbury Publishing, 30 ian. 2004
- Popescu, Roxana-Mariana, Place of international agreements to which the European Union is part within the EU legal order, Challenges of the Knowledge Society, Volume 5, Number 1, 2015, pp. 489-494(6)
- Rodriguez Iglesias, Gil Carlos, Drinks in Luxembourg: Alcoholic Beverages and the Case Law of the European Court of Justice (22 March 1999); in Judicial Review in European Union Law: Essays in Honour of Lord Slynn, Kluwer Law International, 2000
- Schütze, Robert , An Introduction to European Law, Cambridge University Press, 2015
- Spaventa, Eleanor, 'Case C-388/95, Belgium v. Spain', 38 Common Market Law Review, Issue 1, 2001, pp. 211–219
- Steier, Gabriela, Kiran K. Patel, International Food Law and Policy, Springer, 2017
- Tobler, Christa, Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law, Intersentia nv, 2005
- Weatherill, Stephen, Cases & Materials on EU Law, Oxford University Press, 2016
- Weiss, Friedl, Clemens Kaupa, European Union Internal Market Law, Cambridge University Press, 2014
- Wessel, R.A. and S. Blockmans (Eds.), Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations, The Hague: T.M.C. Asser Press/Springer, 2013, pp. 1-9
- Woods, Lorna, Philippa Watson, Steiner & Woods EU Law, Oxford University Press, 2014
- Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December, establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (CMO Regulation)
- Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008
- *Judgment of 20* December *2017, Vin de Champagne v Aldi Süd, Case C-393/16*, ECLI:EU:C:2017:991

- Judgment of the Court of 14 July 2011, Bureau national interprofessionnel du Cognac, Joined cases C-4/10 and C-27/10, ECLI:EU:C:2011:484
- Judgment of the Court of 14 September 2017, European Union Intellectual Property Office (EUIPO) v Instituto dos Vinhos do Douro e do Porto, IP (Port Charlotte), Case C-56/16 P, ECLI:EU:C:2017:693
- Judgment of the Court of 13 December 1994, SMW Winzersekt GmbH v Land Rheinland-Pfalz, Case C-306/93, ECLI:EU:C:1994:407
- Judgment of the Court of 13 December 1979, Liselotte Hauer v Land Rheinland-Pfalz, Case 44/79, ECLI:EU:C:1979:290
- Judgment of the Court of 18 May 1994, Codorníu SA v Council of the European Union, Case C-309/89, ECLI:EU:C:1994:197
- Judgment of the Court of 24 February 1987, Deutz und Geldermann, Sektkellerei Breisach (Baden) GmbH v Council of the European Communities, Case 26/86 ECLI:EU:C:1987:102
- Judgment of the Court of 12 May 2005, Regione autonoma Friuli-Venezia Giulia and Agenzia regionale per lo sviluppo rurale (ERSA) v Ministero delle Politiche Agricole e Forestali, Case C-347/03, ECLI:EU:C:2005:285
- Judgment of the Court of 7 April 2011, Ioan Tatu v Statul român prin Ministerul Finanţelor şi Economiei and Others, Case C-402/09
- Judgment of the Court of 4 March 1986, John Walker & Sons Ltd v Ministeriet for Skatter og Afgifter, Case 243/84. ECLI:EU:C:1986:100
- Judgment of the Court of 27 February 1980, Commission v French Republic, Case 168/78, ECLI:EU:C:1980:51
- Judgment of the Court of 10 July 1980, Commission v French Republic, Case 152/78, ECLI:EU:C:1980:187
- Judgment of the Court of 25 July 1991, Aragonesa v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña (Aragonesa), Joined cases C-1/90 and C-176/90, ECLI:EU:C:1991:327
- Judgment of the Court of 8 March 2001, Konsumentombudsmannen (KO) v Gourmet International Products AB (GIP) (Gourmet), Case C-405/98, ECLI:EU:C:2001:135
- Judgment of the Court of 12 July 1983, Commission v United Kingdom of Great Britain and Northern Ireland (Wine and Beer), Case 170/78, ECLI:EU:C:1983:202
- Judgment of the Court (Grand Chamber) of 8 April 2008, Commission v Kingdom of Sweden, Case C-167/05, ECLI:EU:C:2008:202
- Judgment of the Court of 27 February 1980, Commission v Ireland, Case 55/79, ECLI:EU:C:1980:56
- Judgment of the Court of 27 February 1980, Commission v Kingdom of Denmark, Case 171/78, ECLI:EU:C:1980:54
- Judgment of the Court of 27 February 1980, Commission v Italian Republic, Case 169/78, ECLI:EU:C:1980:52
- Judgment of the Court of 3 July 1985, Commission v Italian Republic (Marsala), Case 277/83, ECLI:EU:C:1985:285
- Judgment of the Court of 7 April 1987, Commission v French Republic (French sweet wines), Case 196/85, ECLI:EU:C:1987:182
- Judgment of the Court of 4 March 1986, Commission v Kingdom of Denmark (Fruit wine), Case 106/84, ECLI:EU:C:1986:99
- Judgment of the Court of 11 March 1980, Pasquale Foglia v Mariella Novello, Case 104/79, ECLI:EU:C:1980:73
- Judgment of the Court of 16 December 1981, Pasquale Foglia v Mariella Novello, Case 244/80, ECLI:EU:C:1981:302
- Judgment of the Court of 23 November 2006, Staatssecretaris van Financiën v B. F. Joustra (Joustra), Case C-5/05, ECLI:EU:C:2006:733
- Judgment of the General Court (Third Chamber) of 11 May 2010, Abadía Retuerta, SA v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (Abadía Retuerta), Case T-237/08, ECLI:EU:T:2010:185
- Judgment of the Court (Grand Chamber), 7 October 2014, Federal Republic of Germany v Council of the European Union, Case C 399/12, ECLI:EU:C:2014:2258
- Judgment of the Court of 16 May 2000, Kingdom of Belgium v Kingdom of Spain (Rioja wine), Case C-388/95, ECLI:EU:C:2000:244
- Judgment of the Court of 9 June 1992. Établissements Delhaize frères and Compagnie Le Lion SA v Promalvin SA and AGE Bodegas Unidas SA (Delhaize), Case C-47/90, ECLI:EU:C:1992:250
- Judgment of 6 September 2012, Deutsches Weintor, Case C–544/10, ECLI:EU:C:2012:526
- Judgment of the Court (Fourth Chamber) of 17 July 2008., Commission of the European Communities v Cantina sociale di Dolianova Soc. coop. arl and Others, (Cantina sociale di Dolianova) Case C-51/05 P, ECLI:EU:C:2008:409
- Judgment of the Court of 20 October 2011, Freixenet, SA v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)(Freixenet). Joined cases C-344/10 P and C-345/10 P., ECLI:EU:C:2011:680
- Judgment of the Court of 29 June 1994, Claire Lafforgue, née Baux and François Baux v Château de Calce SCI and Coopérative de Calce (Château de Calce), Case C-403/92, ECLI:EU:C:1994:269

PERSPECTIVES ON THE RULE OF LAW IN A MODERN DEMOCRACY

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Abstract

The nurturing presence of law within a state is, in a modern society, not open for debate. In fact, the absence of law or the lack of its enforcement has been considered as the main symptom of failed states. But the concept of "rule of law" has evolved along with society, along with the principles that drive it. Thus, this concept hasn't always been the same and will not be the same in the future. Whilst in the time before the French Revolution, the "rule of law" meant the rule of an absolute head of state anointed by the divine, the people simply abiding by his will, after the French Revolution the concept changed, the state remained powerful, but under a collective rule. The road had been opened for the modern democracies. As the 19th century grew to a close, the modern state had been born in the Western democracies, a modern state which still held a tight grip on the individual. After the devastating effects of the First and the Second World Wars, the state was once again reformed, in a more subtle manner: its strength was reduced in favor of the individual who considered the collective interests of society to be inferior to his personal interests and needs: post-modernism was born, a thought-current which has had influence on all fields of human life, including the concept of "rule of law".

Keywords: *rule of law, democracy, separation of powers, French Revolution, post-modernism.*

1. The dawn of "law"

First of all, we need to define "*law*" as being mandatory guidelines within society set forth by a ruling body.

Secondly, the ruling body that mandates these laws can take many forms in accordance with the development of each society. Thus, looking in our distant or not too distant past, we can identify many ways in which a society and the leaders of that society impose their will on the majority of the population.

Most of history, the ruling classes, governments, leaders have not been elected by the majority, but have either been hereditary (absolute monarchy etc.), theocratic (any form of rule in which the domineering classes are considered to be instated by divinity), dictatorial etc.

In any case, most of human history has seen a manner of leadership or rule that has been absolute, totalitarian. We must not come to the conclusion that single rulers have imposed their will with iron fists and the rest of society was more or less composed of slaves, but we must acknowledge that be it one ruler, a council of rulers or a body of leaders, the ruling minority imposed its will upon the subservient minority.

This subservient minority along with its unopposed ruling elites (be it the supreme leader, or some form of intermediate aristocrats, nobles, businessmen etc.) generally formed society, formed proto-states or, later, states.

The gradual evolution of human thought, human desires, and human needs brought forth, through the ages, gradual changes in the perception of people of their own society and brought into question the legitimacy of those in power.

The power of these people was called into question and, through violent revolutions, these systems came crumbling down along with the political edifices which brought them to power.

This paper does not and cannot make a summary of human political and social history, but it does want to shine a light on certain events that have permitted the rise of democracy, the rise of the rule of law and the possibility of the current layout of society.

Thus we consider essential to mention the 18th century simply because it is the century in which a great event unfolded which even today has repercussions and will have for centuries to come: the French Revolution.

2. The birth of the modern state and of modern democracy: The French Revolution

Through the Middle Ages humanity has seen a slow evolution, both in terms of technology, as well as in terms of social and political thought.

Of course, the reader will have realized by now, that we are referring, in general, to European society, and in a lesser degree to African or Asian cultures. In that respect, we can assert that in 16-18th centuries Europe has dominated the entire world with its empires, mainly, through the use of its weapons and political intrigue.

In European society political discussion was frozen as whole nations were being controlled by authoritarian hereditary rulers who imposed their will, along with the church, upon the vast majority of the population.

Law, in this effect, was imposed by the ruling elite, which had little incentive to change anything of the *status-quo* which greatly favored their own interests. And the people, in general, having only basic

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knowledge of life, was not inclined to bring forth any type of meaningful changes, preferring stability.

Through the centuries, however, through western philosophy and thought, the certain aberrations and major disadvantages of such a system became more and more evident[1].

The harsh and unequal enforcement of law, undemocratically elected kings or parliaments meant that all social reform or all new ideas were stifled by a rigid and unwavering class system.

For this reason western thinkers became all too aware of these factors which held back the huge potential of mankind, the creativity of most members of society being channeled only towards the benefit of a few individuals.

Thus philosophers like Voltaire[2] proposed through their writings that this system must be destroyed and a new form of human governance must come into effect.

His writings along with the writing of many others created the premise which was necessary for a sudden and much needed revolution.

This revolution came to be in 1789-1799 A.D., the entire French populations revolting against the aristocratic rule (which was viewed as corrupt, unwilling to listen to the needs of the people and unwilling to change), Church rule (which was also seen to be serving its own interest) and, in general, against the make up the system.

Of course, the majority of the members of this revolution had no idea what to put in place of the current system, had no idea of the concepts of rule of law or of democracy, but, as history sometimes creates, certain elements coalesced to produce the sudden spark of revolution.

We cannot place this spark on the usual perpetrators, as people usually do: the extravagance of the court of Marie Antoinette, the high cost of the royal court, the oppressive general regime of land owners.

The spark came from a certain buildup of tension, of ideas, of needs and from the unwavering evolution of humanity.

The revolution is well known for its violence. Indeed many tens of thousands of people found their death in the first years of the revolution.

The revolution is also known for its initial tyranny, bringing forth the Reign of Terror (later used again with "great" results by Lenin) in which thousands of people were put to death without a trial[3].

The revolution is also known to have sparked the ascension of power-hungry individuals such as Napoleon, causing further suffering upon all of Europe.

But, as has been the case often in human history, the revolutions, through 20 years of struggle, produced a new concept of state: one in which the ruling class is not imposed by the will of few, but by the desires of the many.

The revolution also produced equality not between all members of society, but between all ages and both sexes (the revolutions being the instance in which women fought for equal rights) [4].

Moreover, and concerning our topic, the French Revolution produced, after years of intense struggle, the modern concept of "separation of powers", a state in which the rule of law prevailed, law which has been decreed by of the will of the people through a democratically elected legislative body and in which the executive branch is kept in check by a judiciary branch which is also under the control of law.

Like all brilliant ideas, this notion spread throughout Europe and the world, and today most of European society is dominated by the notion of "the rule of law" and "the separation of powers within the state".

3. Democracy and the rule of law

The concept of "rule of law" is vague and is hard to grasp fully even by the most notable scholars.

This vague ideal, thus has been hard to achieve and the road towards it can be fraught with many perils.

This is exactly what we must extract from the 20th century, a century "*of the self*", in which the individual awoke, giving birth to modernity, in which the individual said "no" to the rule of elites, in which the individual said no to the overbearing force of the state, he himself becoming the "center of the universe", and thus creating the premises for post-modernism.

The 20th century represented a century of human suffering as well as human liberation, a century fraught by two world wars in which hundreds of millions of people suffered or died and in which the classical state knew many reforms.

In its stride for democracy, in its stride to achieve equilibrium, humanity more than once slipped into the clutches of dictatorship only to come out reinvigorated, able to restart in a better position and, more or less, with lessons learned.

The rule of law, thus, particularly after the fall of the Soviet Union, became a goal for most countries in the world, realizing that only through the separation of powers within the state, can the individual come to flourish.

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[1] See also for more references : S. Bullen, "A Critical Examination of the Role of Political Thought in the French Revolution", http://www.e-ir.info/2011/10/12/a-critical-examination-of-the-role-of-political-thought-in-the-french-revolution/

[2] For more ideas on the influence of Voltaire see also I. Birchall, "1989: Voltaire and the French Revolution", http://grimanddim.org/historical-writings/1989-voltaire-and-the-french-revolution/

[3] See also M. Carey, "Violence and terror in the Russian Revolution" , https://www.bl.uk/russian-revolution/articles/violence-and-terror-in-the-russian-revolution

[4] For more on this topic, J. Abray, "Feminism in the French Revolution" available at https://www.jstor.org/stable/1859051 ?seq=1#page_scan_tab_contents

But, as we mentioned, there are many perspectives of the concept of "rule of law", "separation of powers" and "democracy".

First, we must note that the "rule of law" system entails that the state has legitimacy in the eyes of the majority, thus the state ensures the rule of law and the rule of law ensures its legitimacy – interdependency of the two concepts.

Secondly, the law becomes a vector of state power, the modern state being formed along the following principles: the ruling body is subservient to the law of the land, free and guaranteed access to a court of law against any administrative, legislative or judiciary abuses, the prevalence of the rule of law against the state itself, means for the state to impose the rule of law and the rule of law to impose itself against the state.[5]

Thirdly, we must define democracy as a system of state organization in which the rule of law is ensured by specific means and in which all aspects of political and social life are dictated by the rule of the majority, through legal institutions.

Finally, fourthly, the concept of "separation of powers" must the defined as the system in which three state powers : the legislative, the executive and the judiciary are in a balance dictated by law and enforced through legal means, in which each branch of the state has the duty and right to oversee the enforcement of the law.

We must emphasize that, as can clearly be seen, the rule of law is as the core of the modern democratic system, in which none of the powers of the state has the upper hand and in which each of the powers balances the "weight" of the other.

Also, it would seem that all the power of the state is under the rule and guidance of society which expresses itself through the direct elective processes, in which the majority of the population dictates the direction of society.

This is the crux of the issue, as some events have shown, the democratic electoral systems having its major inconveniences.

First of all, having the majority of people dictate the direction of society by electing members to establish law has some drawbacks.

Recent events such as *Brexit* and the election of far-right of far-left governments even within well-established democracies proved that, under certain conditions, the general population is inclined to choose paths which are not necessarily the best from a "rule of law" perspective. Sometimes choices appeared to be wholly unreasonable and against the concept of democracy itself. The classical example of this is the coming to power of the Nazi Party in the 1930s in Germany. The Nazis, an extreme right worker's party came to power through democratic means because of the dire economic situation in Germany between the two World Wars, a situation in which the population's savings were wiped out by galloping inflation and in which war reparations brought financial despair to most households.

Because of this situation we conclude that the population, willingly voted democracy out of the state, voted for a centralized, authoritarian regime which ended by bringing destruction upon Germany and Europe.

This is not by far the only example of democracy which, through the careful manipulation of politicians in certain periods of despair, has renounced its self, and the people, in a struggle to achieve security and stability, lost not only democracy, but the security and stability which they sought.

Another more recent example would the *Brexit*: a situation in which, by creating fear and in the context of economic downturn, certain politicians have managed to convince the majority of the British people that parting from the European Union is the only method in which they can regain their economic prowess. After a stormy referendum, the majority of the population now, polls show, regrets this decision.

But, as was the case of Germany in the 1930s, the rule of law dictates that the effects of the popular referendum be respected by all the branches of the state, being the direct will of the people.

Thus we move further in our analyses: can the democratic system outvote itself? Can democracy make choices that are undemocratic? Can any of the branches of the state dismiss certain popular choices of the people?

First of all, the checks and balances inherent in a democratic system, theoretically do not permit the people to vote out democracy, as there are certain core values which cannot be changed even by direct vote of all of the members of society. For example, in our own national Constitution it states that Romania is a sovereign Republic, in which the rule of law is of constitutional value and in which all people are equal.

These are values which cannot be altered by any popular vote.

The "forefathers of the Constitution" enshrined these values so that future generations cannot alter them in any way.

However, as history has shown, even withholding these values, a society can slip into an authoritarian system.

Second of all, all laws that can have harmful effects on society must be passed through a legislative process in which politicians who have been elected vote the respective laws into effect. The executive branch is held responsible for enforcing the laws. The judicial branch, which in most states is the only branch of the state who is not elected directly, must overview the way in which the laws are passed and in which the executive branch enforces them.

[5] M. Voicu, „*Accesul liber la Justiție*", Revista Dreptul nr. 4/1997, Bucharest, pg. 2.

4. Rule of law in the classical view, modernism and post-modernism

Now we arrive at the crux of the issue: can the judicial branch rescind popular laws passed by the legislative branch or enforcements by the executive branch.

As an example of a situation in which this has occurred, we present the following.

During the 1970s a big debate over abortion was held in the United States, the significant majority of the population being against abortion (except for certain medical reasons) and thus was in favor of passing legislation which banned all abortions (with certain limited exceptions)[6].

The congress of the United States passed the bill and declared abortions illegal.

Following this, this Supreme Court of the United States was petitioned in regard to the Constitutionality and legality of the respective bill, which had been highly appreciated by the general public.

The Supreme Court of the United States, in a historical decision established that the bill was unconstitutional as it was against the rights of the mother enshrined in the Constitution of the United States. The Supreme Court considered that by limiting abortions in such a major way, the legislative branch breached its Constitutional prerogatives.

In hindsight, we can easily observe that the "rule of law" and "separation of powers" within the American state is the so called "*classical*" one, in which the rule of law is imposed upon all walks of life, **the judicial branch having the power to enforce even the most unpopular of rulings**.

Also, it must also be noted that the American people accepted willingly this ruling, even though it was unpopular, as a consequence of its democratic system and a consequence of the independence of the judiciary.

Thus certain observers have stated that this type of "rule of law" that overrules even the majority will is a type of "*dictatorship of the rule of law*" in which the separation of the branches in the state is so absolute, that the judiciary can rescind a popular law passed lawfully by the legislative body.

This dictatorship of the rule of law has been the approach of the classic democracies of the 19th and early 20th century when the state, though democratically elected governments, was dominated by certain fundamental principals who were applied in practice in accordance with the view of the judicial branch (in general, Supreme Courts). Since the judges of the Supreme Courts were few in number and not democratically elected, **it thus became evident that certain decisions by the majority would be rescinded by a small group of individuals who were not elected.**

This system, however imperfect it may seem, was seen as acceptable as the ruling elites still had significant power and acted paternalistic in their belief that society, as a whole, is incapable of addressing important matters and thus a ruling body, the judiciary, should be able to "press the brake pedal" when democracy is threatened even by democratic actions.

However this classic approach towards democracy could not be long lived as the 20th century rolled on, with its many wars and with its many social and political upheavals.

As the two World Wars concluded and as the Cold War ended, the western world no longer trusted the institutions that were put in place to limit the aspirations of the individual.

The old paradigm which asserted the rational man, which asserted that the elites had to rule in a benevolent, but paternalistic manner over the ruled was put into question and eventually abandoned. A new social and political reality was put in its place, postmodernism, in which the individual was supreme, in which the desires of the majority would be passed into law that could not be rescinded by any branch of the state. Indeed, the will of the people would rule supreme in this new form of "rule of law".

Francis Fukuyama, a great historian and thinker of the 20th century concluded in discussing the future of the state that "the state that emerges at the end of history is liberal insofar as it recognizes and protects through a system of law man's universal right to freedom, and democratic insofar as it exists only with the consent of the governed"[7].

Thus the future state envisaged by Fukuyama insured that the liberal state of tomorrow would be democratic insofar as the consent of the governed would be offered. In other worlds, no branch of the state would be able to contradict the direct will of the people, thus the modern (or post-modern) concept of the state, the concept of "rule of law" comes into being.

Although this short essay cannot begin to analyze the complex meanings of such concepts as modernism or post-modernism, the critical difference between human (especially western civilization) society of the early 20th century and of the early 21st century is that the latter is more individually-driven and centered. The individual in the 21st century is centered not on fulfilling his role in society but he sees society and indeed the state and the rule of law only as a prerequisite for his own personal fulfillment. The individual now reigns supreme and does not accept other entities to openly defy his will.

Thus the state has become subservient to the individual and not the other way round.

This has, of course, had dire consequences upon the concept of rule of law and upon the separation of the powers of the state.

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[6] For details on the case, see also Pew Research Center; http://www.pewforum.org/2013/01/16/a-history-of-key-abortion-rulings-of-the-us-supreme-court/

[7] F. Fukuyama, „*The End of History?*", 1989, https://www.embl.de/aboutus/science_society/discu ssion/discussion_2006/ref1-22june06.pdf

None of the branches of state, in the post-modernist mentality, can rescind the decision of the majority however in disregard to the wellbeing of the state, of society in general, it really is.

Thus, the situation of *Brexit* can be explained in terms of a majority which has dictated the course of action which is clearly detrimental to the wellbeing of the nation, but cannot be contested through the judicial system, as it was passed through a direct referendum.

This can have serious repercussions, especially concerning decisions whose consequences shall be felt not in the near future, but in the distant one.

For example, the struggle to implement legislation on a global level for the protection of the environment and, of course, the long term protection of the entire world. In recent years, very little has been done in limiting the extensive damage which has befallen the environment because of emissions, deforestations etc., exactly because popular opinion is not for curtailing this phenomenon, and the population of the world, in general, is indifferent to the destruction of the environment as long as its needs are met in the short term.

5. Conclusion

Living in our post-modern world, in which the notion of "rule of law" has been redefined to better suit the needs of the individual and less the needs of the state and the general society, has produced several imbalances which will have to dealt with in the coming future.

The new "rule of law" concept gives new force to the individual which can dictate the policy of the state, in disregard of the general interest of society.

A balance between the needs of the individual and the needs of the many must always be the goal, but if the balance is extremely difficult, if not impossible to achieve, then we would prefer the needs of the many to prevail over the individual. Otherwise, our whole civilization would be in jeopardy in light of the egotistical desires of the individual.

References

- J. Abray, "Feminism in the French Revolution"
- https://www.jstor.org/stable/1859051?seq=1#page_scan_tab_contents
- I. Birchall, "1989: Voltaire and the French Revolution"
- http://grimanddim.org/historical-writings/1989-voltaire-and-the-french-revolution
- S. Bullen, „A Critical Examination of the Role of Political Thought in the French Revolution", http://www.e-ir.info/2011/10/12/a-critical-examination-of-the-role-of-political-thought-in-the-french-revolution
- M. Carey, "Violence and terror in the Russian Revolution"
- https://www.bl.uk/russian-revolution/articles/violence-and-terror-in-the-russian-revolution
- F. Fukuyama, „The End of History?", 1989
- https://www.embl.de/aboutus/science_society/discu ssion/discussion_2006/ref1-22june06.pdf
- M. Voicu, „Accesul liber la Justitie", Revista Dreptul nr. 4/1997, Bucharest, pg. 2
- Pew Research Center
- http://www.pewforum.org/2013/01/16/a-history-of-key-abortion-rulings-of-the-us-supreme-court/

PROCEDURES FOR THE PROCUREMENT OF PUBLIC PROPERTY RIGHTS. THE LEGAL NATURE OF PUBLIC WORKS CONTRACTS

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Abstract

Public property belongs to the state or to an administrative-territorial unit and is made up of goods for public use or public interest declared as such either by their nature or by law. The goods constituting the public domain are defined on the one hand by the Constitution of Romania (Article 136, paragraph 3), on the other hand, by the Annex to Law 213 of November 17, 1998 on public property and its legal status, and last but not least by the Civil Code (Article 554). Procurement of the right to public property is performed in several ways provided by law, as we shall see below, and we shall pay particular attention to the public procurement contract. From the analysis of the procurement methods of the right of public ownership, we find that the legislation is not harmonized and does not clarify all the aspects related to the legal status applicable to the public domain, thus reaching complicated and controversial situations.

Keywords: *public property, public goods, contract, public works,, settling appeals.*

1. Public Property

Public goods and services in our country appear in the Organic Regulations, these being considered the first legal acts.

An important moment in the development of the public domain is the adoption in 1864 under the reign of Alexandru Ioan Cuza of the Law for the Establishment of the County Councils, the Law for the Regulation of Rural Property and the Law for Expropriation for the Public Purpose.

Along with them, the notion of public domain is certified and at the same time "the goods belonging to the county public domain, apart from those belonging to the township public domain, as well as the juridical regime of the expropriation for public purpose[1]".

According to the republished Constitution of Romania, Article 136, paragraph 3, " The mineral resources of public interest, the air, the waters with energy potential that can be used for national interests, the beaches, the territorial sea, the natural resources of the economic zone and the continental shelf, as well as other possessions established by the organic law, shall be public property exclusively".

Article 136, paragraph 2 defines the holders of public property rights. Thus, public property "can only belong to the state (public property of national interest) or administrative-territorial units (the public property of county, municipal, town or locality interest) [2]".

According to the new Civil Code[3], Titlul VI, Capitolul I, articolul 858 " Public property is ownership that belongs to the state law or an administrative - territorial unit over the goods which, by their nature or by the declaration of law, are of public interest or use, provided that they acquired by one of the ways stipulated by law".

Law No. 213 of November 17, 1998 in Article 9 regulates the way in which a good is transferred from the public domain of the state to the public domain of an administrative-territorial unit and vice versa from the public domain of the county to the public domain of an administrative-territorial unit within the jurisdiction of the respective county and vice versa, from the public domain of an administrative-territorial unit in the public domain of another administrative-territorial unit within the juridiction of the respective county and from the public domain of a county to the public domain of another county at the request of the county council, the latter considering only the pursuit of investment objectives, following the closing of the property to return to its original owner.

Acquisition of the right to public property is governed by the New Civil Code by Article 863, which partly restates the content of Article 7 of Law 213 of November 17, 1998 on public property and its legal status.

2. Acquisition of Public Property Rights

Article 7 of Law 213 of November 17, 1998 indicates the following ways of acquiring the right to public ownership: naturally "(subsoil, deposits, inland, coastal and seaside waterways, etc., subjected to a dynamic natural development processes which makes possible the extension and restriction of the initial surface)", through public procurement in compliance with (at present Law 98 / 19.05.2016), by the expropriation for public utility purposes (for public

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[1] Verginia Vedinaș, Drept administrativ, Ediția a X – a, revăzută și actualizată, editura Universul Juridic, București, 2017, p. 473

[2] Antonie Iorgovan, Tratat de drept administrativ, volumul II, ediția 4, Editura All Beck, București, 2005, p. 166

[3] Law No. 287 of July 17, 2009 as republished and subsequently amended on the Civil Code published in the Official Gazette no. 505 of July 15, 2011.

utility purposes, for works of national interest or local interest), by the donation or related acts accepted by the Government, the county council or the local council, as the case may be (provided that the property becomes of public use or interest) through the passage of property from the private domain of state or administrative-territorial units in their public domain, based on public utility reasons and by any other ways provided by the law.

After the repeal of Article 7 of Law 213/1998 by Law No 71 of June 3, 2011, Article 89, paragraph 2, and in accordance with the new Civil Code, Title VI, Chapter I, Article 863, the right to property is acquired in one of the following ways:

- by *public procurement*, in compliance with the law and here "it is only referred to the goods of public use or of public interest"[4];
- by *expropriation* for reasons of public utility reasons, in compliance with the law. The current laws governing expropriation for public utility purposes are Law No 33 of May 27, 1994 on expropriation for public utility purposes and Law no. 255 of December 14, 2010 on the expropriation for public utility purposes necessary for the achievement of objectives of national, county and local interest. As a consequence of the multiple disputes which might arise regarding the implementation of Law 33/1994, Law 255/2010 was adopted in order to reduce the time dedicated to the expropriation procedure and at the same time to simplify it. By way of illustration, if Law 33/1994 provides that under the final and irrevocable judgement and decree on the expropriation (once the obligations imposed by it have been fulfilled), the property becomes the unencumbered property of the expropriator, Law 255/2010 provides that the property is trasnferred to the property of the expropriator at the date of the issuance of the Expropriation Decision, this being an enforceable title. Another comparable situation would be that Law 33/1994 provides that the payment of claims in the absence of an agreement between the parties, it shall be determined by court both in regard to the amount and the term (which shall be no more than 30 days from the date the final court decision), Law 255/2010 provides that the payment of claims in case of disputes shall be recorded on the name of the holder and shall be issued only at his written request (and the payment term shall be no more than 90 days from the date issue of the expropriator's decision);
- by *donation or bequest*, if accepted (for those made in the name of the state with the approval of the Government and for those made in the name of the administrative-territorial units according to Law 215 of April 13, 2001, Article 121, paragraph 3 with the approval of the local / county councils) under the condition to become of public use or of interest, by its nature or by the will of the possessor;
- by *onerous agreement*, provided that it is of public use or of interest, by its nature or by the will of the acquirer. This paragraph comes to complement the previously existing gap and opens new perspectives;
- through *the transfer of a good from the private domain of the state into its public domain or from the private domain of an administrative-territorial unit to its public domain*, in compliance with the conditions of the law. The transfer of the property from the private domain to the public domain can be performed with a governmental, county council or local council decision, as the case may be;
- through other ways established by law.

3. Public Procurement Contract

3.1. Definitions

The way the public procurement process, the organization of public procurement award procedures and the organization of solutions contests are carried out, the use of specific tools and techniques to be implemented for the award of public procurement contracts, and various specific aspects related to the execution of public procurement contracts are governed by Law No 98[5] of May 19, 2016 on public procurement.

These are based on principles such as: non-discrimination; equal treatment; mutual recognition; transparency; proportionality and accountability.

The public procurement contract is defined in Chapter I, Section 2, Article 3, paragraph 1, point 1, as "the onerous contract, assimilated by law to the administrative act, concluded in writing between one or more economic operators and one or more awarding entities, having as object the execution of works, the supply of goods or the provision of services".

Awaring entities within as described in this law are central or local public authorities and institutions, including their subordinate structures acting as credit release authorities and public procurement officers, bodies governed by public law and / or associations formed by one or more awarding entities of the foregoing.

3.2. Award procedures and value thresholds

"Award procedures are the steps to be taken by the awarding entitity and by the tenderers / candidates

[4] Ibidem, p. 289

[5] Law No. 98 of May 19, 2016 on public works Published in the Official Gazette no. 390 of May 23, 2016, amended and supplemented by: Emergency Ordinance no. 80 of November 16, 2016 for the establishment of measures in the field of central public administration for the extension of the term stipulated in art. 136 of the Law no. 304/2004 on judicial organization and for the amendment and supplementation of some normative acts, Law no. 80 of April 27, 2017 regarding the approval of Government Emergency Ordinance no. 80/2016 for the establishment of measures in the field of central public administration, for the extension of the term stipulated in art. 136 of the Law no. 304/2004 on judicial organization and for the amendment and supplementation of some normative acts and the Emergency Ordinance No. 107 of 20 December 2017 for the amendment and supplementation of some normative acts with impact in the field of public works.

in order for the agreement of the parties to engage in the public contract to be considered valid"[6].

The procedures for the award of a public procurement contract are:

1. Direct purchase, in the case of the purchase of goods or services if the estimated value of the purchase, excluding VAT, is less than 132.519 lei, ie works, if the estimated value of the acqusition, excluding VAT, is inferior to 441.730 lei;
2. Simplified procedure where the thresholds estimated value, exluding VAT of the public procurement contract is inferior to:

a) 23.227.215 lei, for public procurement contracts / framework agreements for works;
b) 600.129 lei, for public procurement contracts / framework agreements for products and services;
b^1[7]. 929.089 lei, for public contracts / framework agreements for products and services awarded by local awarding entities;
c) 3.334.050 lei, for public service contracts / framework agreements for services which have as their object social services and other specific services.

3. The tender may be open, restricted, for competitive negotiation or competitive dialogue, negotiation without prior publication and solution contest, the award procedure applicable to social services and other specific services in the case of the award of public procurement / framework agreements with an estimated value, exluding VAT, of equal or higher than the thresholds specified above.

These thresholds are set and reviewed by the European Commission in accordance with the appropriate rules and procedures set out in Art. 6 of Directive 2014/24 / EU of the European Parliament and of the Council of February 26, 2014 on public procurement and repealing Directive 2004/18 / EC[8] and are published by the National Agency for Public Procurement on its website

Estimates for purchases are considered to be:

- For the contest of solutions in a procedure for the award of a public service contract, the estimated value excluding VAT of the public service contract, including the value of the prizes or other payments made to the participants;
- For solution contests treated as a distinct procedure, including prizes or payments to participants, this value is calculated by reference to the total amount of prizes or payments made to the participants and shall include the estimated value net of VAT of the public service contract which may be concluded in accordance with the provisions of Article 104 (7)[9], if the awarding entity expresses its intention to award that contract in the contest notice;
- For the framework agreement or for the dynamic purchasing system, the estimated acquisition value shall include the estimated maximum value, net of VAT, reflecting all the subsequent public procurement contracts expected to be awarded under the framework agreement or using the dynamic purchasing system;
- For the innovation partnership, the estimated acquisition value, net of VAT, shall be the estimated maximum value, including all research and development activities to be achieved during the partnership stages, the products, services or works to be performed and purchased at the end of the partnership;
- For public works contracts, this shall include, on the one hand, the cost of the works and, on the other, the estimated total value of the goods and services that the awarding entity shall make available to the contractor for the execution of the works;
- For public procurement contracts on separate lots, this shall include the total value resulting from the summing of all lots, net of VAT, and if the total amount of the lots is equal to or greater than the corresponding value thresholds, the award procedures shall apply to the award of each lot, indifferent of its estimated value (except where the estimated value net of VAT of the respective lot is below the threshold of 355,632 lei for the purchase of goods or services or is below the threshold of 4,445,400 lei for the purchase of works and the total amount of lots which are or have been assigned is registered below 20% of the total value of all lots, procurement of similar products or services and where the contracting authority may use the simplified procedure or direct purchase);
- For the procurement of similar products attributed to separate lots, the estimated value shall include the estimated total value of all lots and the public procurement procedures for the value threshold shall be applied.
- For the procurement of regular products or services, this is the actual total amount of all the contracts awarded within the last 12 months (or within the previous budget year) or the estimated cumulative amount of all successive contracts awarded over a 12-month period;
- For the procurement of products by payment (in installments), rental or leasing (with or without a purchase option), the estimate is based on the duration of the contract;
- For the procurement of insurance services, the estimated acquisition value shall include insurance

[6] Vasilica Negruț, Dreptul administrativ al bunurilor, Editura Universitară Danubius, 2017, Galați, p. 27

[7] Paragraph 1 of Article 7 (a) Section 4, Chapter I was supplemented by Point 4, Article I of Emergency Ordinance No 107 of December 20, 2017, published in the Official Gazette No 1022 of December 22, 2017.

[8] Directive 2004/18 / EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

[9] The awarding entity has the right to apply the negotiated procedure without prior publication of a contract notice for the award of public service contracts where, following a solution bid, the public service contract is to be awarded according to the rules established for the respective solution bid, to the winning competitor or to one of the winning competitors of the respective bid; in the latter case, the awarding entity has the obligation to send invitations to negotiation to all winning competitors.

premiums and any other forms of payment related to these services;

- For the procurement of banking services, the value shall be estimated based on the fees, commissions, interests and any other forms of remuneration related to these services;
- For the procurement of design services, the value shall be estimated based on the fees, commissions and any other forms of remuneration related to these services;
- For the procurement of services for which a total price is not provided, the estimated value of the purchase is based on the duration of the contract (for contracts concluded for a fixed period of less than or equal to 48 months, the value is the whole contract expressed for the entire period of time and for contracts concluded for a determined period of more than 48 months the value shall be given by the monthly value multiplied by 48).

3.3. Framework agreement

The framework agreement has a duration of up to 4 years (except in duly justified cases) and may be concluded between the awarding entity and one or more economic operators established by applying criteria such as qualification, selection, award and evaluation, provided in the procurement documentation.

For the framework agreement that shall only be concluded with an operator, its content must include the minimum obligations of the economic operator (assumed within the bid) and the unit price of the offer included in the bid (based on which the price of each subsequent contract is be determined).

For the framework agreement with several economic operators, it is executed:

a) Without resuming the competition, if the framework agreement defines, on the one hand, all the terms and conditions governing the subject of the contract (the execution of works, the provision of services and the supply of products) and, on the other, the objective conditions based on which the economic operator is established in the framework agreement) that shall execute the contract (by performing the works, provisioning of services or supplying of products;
b) With resumption of competition where the framework agreement does not cover all the terms and conditions attached to it (execution of works, provision of services and supply of products);
c) partially without resumption and partly with restarting the competition only if during the procedure for awarding the framework agreement were forseen both the terms and conditions governing its subject matter (execution of works, provision of services and supply of products).

4. Settling appeals

In accordance with Law 101[10] of May 19, 2016, Article 2, paragraph 1, "Any person who considers himself or herself aggrieved regarding to a right or interest consequently to an act of the awarding entity or to the failure to resolve within the legal term a request, may seek the annulment of the act, may oblige on the awarding entity to issue an act or to take remedial action, to recognize the alleged right or legitimate interest, by administrative or administrative means within the jurisdiction or judicial means ".

In this respect, the aggrieved party can address the National Council for Solving Complaints by administrative proceedings within the jurisdiction or the court by judicial means.

The National Council for Solving Complaints is an independent body with administrative-judicial activity, with legal personality, which operates under Law 101 of May 19, 2016 and is not subordinated to any public authority or institution.

Following the examination the lawfulness and merits of the contested act, the National Council for Solving Complaints may:

a) issue a resolution annulling in whole or in part the contested act [11];
b) oblige the contractor (the awarding entity) to issue a document in order to remedy the situation;[12]
c) dispose of other measures (with the exception of those set out above) in order to remedy the acts that affected the award procedure [13].

If the awarding entity cannot take remedial action, it is bound to cancel the award procedure.

If during the settlement of the complaint the National Council for Solving Complaints identifies other violations (compared to those brought before by the appellant) of the legal provisions the National Agency for Public Procurement, the Romanian Audit Office, the awarding entity and in this respect shall transmit all the data and / or documents relevant in support of the complaint.

The awarding entity and / or the aggrieved party may appeal the decisions of the National Council for

[10] Law No. 101 of May 19, 2016 on the remedies and means of appeal in connection with the award of public works contracts, sectoral contracts and with works and services concession contracts, as well as on the organization and functioning of the National Council for Solving Complaints published in the Official Gazette no. 393 of May 23, 2016.

[11] Decision No. 290/C8/191, 194, 197 of 07.02.2017 of the National Council for Solving Complaints regarding the annulment of the minutes 2220/09.01.2017 and the subsequent acts, regarding the rejection of the claimants.

[12] Decision no. 2876/C2/3428, 3436, 3454 of 01.11.2017 of the National Council for Solving Complaints regarding the obligation of the contracting authority within 15 days from receiving the decision to reanalyze the offers submitted by: DIALFA SECURITY SRL for lots 2, 3, 4, 6.7; ROMOLD SRL for lots 2, 4, 5, 6; INTEGRA PROFESIONAL SECURITY SRL for lots 3, 5, observing the legal provisions and those mentioned in the motivation.

[13] Decision No. 395/C11/353 of the 22.02.2017 of the National Council for Solving Complaints regarding the Council's motion to dismiss for lack of jurisdiction, invoked ex officio and declines the competence to settle the appeal filed by ALFARO SECURITY SRL, in favor of the Galati Country Court - Contentious Administrative and Tax Matters.

Solving Complaints with a complaint to the competent court according to Law No. 554 of December 2, 2004, both on grounds of its unfounded and ellegal character, within 10 days from the communication of the decision.

The court may, on the one hand, reject the substantive complaint or admit a defence used in litigation and, on the other, grant the complaint.

If the complaint is admitted, the court shall order the partial or total annulment of the act of the awarding entity or shall oblige the awarding entity to issue the act, shall oblige the awarding entity to fulfill an obligation until the elimination of any specifications (technical, economic or financial) that are considered discriminatory both from the contract notice and the awarding documentation, as well as from any other issued documents related to the award procedure. At the same time, the court may order any other measures considered necessary to remedy the violation of the legal procurement provisions (public, sectoral or regarding the concession).

5. The Legal Status of the Administrative Contract

The legal status of the administrative contract is becoming more and more precise. In French law, "it was the jurisprudence that had to do everything in its power to solve the problem of determining the administrative or private law character of a contract and to define the criteria of administrative contracts by their nature"[14]

Thus, three elements were identified: "the parts of the contract, the subject of the contract and the terms of the contract".

"The following main features of the administrative contract can currently be identified[15]":

- it represents an agreement between the parties, one of which is the authority of the administration;
- its object is the performance of works or the provision of services;
- its clauses are of regulatory nature;
- the public administration can only transfer the rights, obligations or interests to another authority;
- the public authority may modify or terminate the contract unilaterally;
- the contract is governed by public law;
- disputes may be settled in administrative courts.

Thus, "the administrative contract represents an agreeement between a public authority in a position of legal superiority on the one hand and other subjects of law on the other (natural persons, legal persons or other state bodies subordinated to the other party) pursuing the satisfaction of a general interest by the provision of a public service, the performance of a public works or the use of public goods, mainly, to a public power regime[16]"

6. Conclusions

Analyzing procurement methods of public domain by comparing the new Civil Code and Law 213 of November 17, 1998 on public property, we identify a major difference already since the first method of acquiring the right of public ownership, namely the attrition.

In the new Civil Code this form of acquisition no longer exists, although the Civil Code "always makes reference to the fact that it is related to goods" [17] that are of public use or interest

In the case of expropriations, Article 7 included in the new Civil Code was enriched with "under the law" which becomes "expropriation for a public utility purpose, under the law".

Considering that, it is the only form of expropriation, in order to ensure uniformity between the specific legislation and the new Civil Code, Article 863 (b) also includes the principle that expropriation is performed after the payment of compensation.

The introduction of a new method of acquiring public property by onerous agreement, thus opening up the way to civil contracts, is beneficial.

As regards to the public procurement, it is found to be an active body, in continuous movement and transformation. In 2016, the Ordinance No. 34[18] of April 19, 2006 on the award of public procurement contracts, public works concession contracts and services concession contracts was repealed by Law 98/2016. Since the issuance of the Law 98, a number of modifications and completions have been made by various acts which are expected to continue also in the future.

References

- Antonie Iorgovan, Tratat de drept administrativ, volumul II, ediția 4, Editura All Beck, București, 2005
- Dana Apostol Tofan, Drept administrativ, Volumul II, ediția 4, editura C. H. Beck, București, 2017
- Oliviu Puie, Contractele administrative în contextul noului Cod Civil și al noului Cod de procedură civilă, editura Universul Juridic, București, 2014
- Vasilica Negruț, Dreptul administrativ al bunurilor, Editura Universitară Danubius, 2017, Galați

[14] Oliviu Puie, Contractele administrative în contextul noului Cod Civil și al noului Cod de procedură civilă, editura Universul Juridic, București, 2014, p. 10

[15] Dana Apostol Tofan, Drept administrativ, Volumul II, ediția 4, editura C. H. Beck, București, 2017, p. 104.

[16] Verginia Vedinaș, Drept administrativ,Ediția a X – a, revăzută și actualizată, editura Universul Juridic, București, 2017, p. 374.

[17] Dana Apostol Tofan, Drept administrativ, Volumul II, ediția 4, editura C. H. Beck, București, 2017, p.492

[18] Repealed by Article 238 of Law No 98 of May 19, 2016 on public procurement.

- Verginia Vedinaș, Drept administrativ,Ediția a X – a, revăzută și actualizată, editura Universul Juridic, București, 2017
- Law No. 287 of July 17, 2009 as republished and subsequently amended on the Civil Code published in the Official Gazette no. 505 of July 15, 2011
- Law No. 71 of June 3, 2011, published in the Official Gazette no. 409 of June, 10 2011
- Law No. 98 of May 19, 2016 on public works Published in the Official Gazette no. 390 of May 23, 2016, amended and supplemented by: Emergency Ordinance no. 80 of November 16, 2016 for the establishment of measures in the field of central public administration for the extension of the term stipulated in art. 136 of the Law no. 304/2004 on judicial organization and for the amendment and supplementation of some normative acts, Law no. 80 of April 27, 2017 regarding the approval of Government Emergency Ordinance no. 80/2016 for the establishment of measures in the field of central public administration, for the extension of the term stipulated in art. 136 of the Law no. 304/2004 on judicial organization and for the amendment and supplementation of some normative acts and the Emergency Ordinance No. 107 of 20 December 2017 for the amendment and supplementation of some normative acts with impact in the field of public works
- Law No. 101 of May 19, 2016 on the remedies and means of appeal in connection with the award of public works contracts, sectoral contracts and with works and services concession contracts, as well as on the organization and functioning of the National Council for Solving Complaints published in the Official Gazette no. 393 of May 23, 2016
- Law No. 554 of December 2, 2004 of the administrative contentious published in the Official Gazette no. 1154 of December 7, 2004
- Emergency Ordinance No. 107 of 20 December 2017, published in the Official Gazette, issue 1022 of December 22, 2017
- Directive 2004/18 / EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts
- Decision No. 290/C8/191, 194, 197 of 07.02.2017 of the National Council for Solving Complaints regarding the annulment of the minutes 2220/09.01.2017 and the subsequent acts, regarding the rejection of the claimants
- Decision no. 2876/C2/3428, 3436, 3454 of 01.11.2017 of the National Council for Solving Complaints regarding the obligation of the contracting authority within 15 days from receiving the decision to reanalyze the offers submitted by: DIALFA SECURITY SRL for lots 2, 3, 4, 6.7; ROMOLD SRL for lots 2, 4, 5, 6; INTEGRA PROFESIONAL SECURITY SRL for lots 3, 5, observing the legal provisions and those mentioned in the motivation
- Decision No. 395/C11/353 of the 22.02.2017 of the National Council for Solving Complaints regarding the Council's motion to dismiss for lack of jurisdiction, invoked ex officio and declines the competence to settle the appeal filed by ALFARO SECURITY SRL, in favor of the Galati Country Court - Contentious Administrative and Tax Matters

MULTILINGUALISM IN THE EUROPEAN UNION: UNITY (AND CHALLENGE) IN DIVERSITY

Mihaela Augustina DUMITRAȘCU*

Abstract

While being part of the European Union's commitment to preserve its linguistic and cultural diversity, the multilingualism of this supranational organization also poses some challenges due to the unprecedented number of the official languages recognized.

After a quick historical overview on the evolution from 4 to 24 languages today, and a short comparison with other international organizations' approach regarding the languages, we will present the current relevant legal provisions, after the Treaty of Lisbon, regulating the linguistic regime of the EU, followed by an overview of the way the EU institutions (for example, the Council, the European Parliament, the Commission, the European Court of Justice) use language in their activities.

The purpose of this paper is to identify the right, pragmatic balance between, on one side, the need to give equal legal status to all the Member States' official languages, as a manifestation of a general principle of equality between the EU citizens, and, on the other side, the 'costs' of this linguistic pluralism, in terms of accuracy and uniformity of interpretation of legal texts and case law, efficiency, time frame, transparency, financial costs, inevitable complications and difficulties.

We will also see how language could be seen and used as a bridge to unity within the EU, through communication between individuals, between the EU institutions and EU citizens, within the EU institutions, rather than a barrier, while at the same time aiming to also preserve an important element, namely the practical efficiency of the functioning of the European process in its entire complexity.

Keywords: *language, diversity, multilingualism, EU institutions, EU law, equality principle.*

1. Introduction

Motto: "The harmonious co-existence of many languages in Europe is a powerful symbol of the EU's aspiration to be united in diversity, one of the cornerstones of the European project".[1]

The multilingualism which is present in and chosen by the European Union is a horizontal aspect of its functioning, having tremendous consequences on a variety of activities, domains, interactions and approaches within this international organization. The commitment to the language diversity is one of the main values of the European Union, and it has influences on many directions: from legislation's adoption to institutional activity, from interaction with the EU citizens to their participation in EU's life, from the need for uniform legal interpretation across the Union to the freedom of movement of products and persons.

These are all reasons for which studying the impact of the multilingualism on EU's complex functioning is not only really important, but also very interesting. We cannot ignore the importance and the consequences of the multilingualism on the efficiency of this integration organization, with its very ambitious goals, and at the same time trying hard to blend the idealistic values with the practicalities of the daily duties and the urge for efficiency in terms of legislation response and ever evolving and challenging economy.

So, our objective is, on one hand, to identify the status quo of the EU legislation on this matter and, more importantly, the reality and practice of using multiple languages in EU institutions and in relation with the citizens, and, on the other hand, the realistic balance between this idealistic value of multilingualism and the costs, the difficulties, the practical approaches and the compromises that can be observed through the Union's activity and legislation.

The paper will start by presenting the history and general aspects of EU's linguistic diversity, and continue by analyzing its regulation on the matter: the treaties, the secondary legislation and some of the most important case law. A very important hint about the reality of putting into practice the multilinguistic approach is by studying how the institutions use different languages in their activities.

After analyzing all the above-mentioned aspects, we will conclude as to the concrete compromise the EU is making towards this very costly and most of the time delaying process of applying the multilinguistic principle, and also market oriented approach the EU uses as means to deal with this linguistic diversity within its borders.

As the references prove, this theme is of much interest for many researchers, and their perspectives on the matter are rather diverse, from technical to ideological. There are many studies, books, articles, working papers, study guides aiming at catching the theory, but also the reality of how a multilinguistic

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[1] European Commission's website: http://ec.europa.eu/education/policy/multilingualism/linguistic-diversity_en, accessed 01.03.2018.

international organization succeeds to put together in a functional manner such complex aspects and consequences of a complicated, bold and beautiful, yet challenging choice - language diversity.

'Languages define personal identities, but are also part of a shared inheritance. They can serve as a bridge to other people and open access to other countries and cultures, promoting mutual understanding. A successful multilingualism policy can strengthen the life chances of citizens: it may increase their employability, facilitate access to services and rights, and contribute to solidarity through enhanced intercultural dialogue and social cohesion[2].'

According, to EU official website, 'every year on the European Day of Languages, 26 September, the EU joins forces with the Council of Europe, the European Centre for Modern Languages, language institutions and citizens around Europe to promote linguistic diversity and language learning through events and happenings'.[3]

'Increasingly, it has become important to the EU to promote and protect those many diverse cultures and encourage its citizens to expand their linguistic knowledge. Travelling across state borders would become easier; businesses would flourish; people would develop a better understanding of the many diverse cultures that surround them in the EU. Multilingualism has the potential to enhance integration within the EU through this heightened appreciation.'[4]

2. Short history of multilingualism in the European Union

The motto of this integration international organization, the European Union, is: "united in diversity". Diversity is celebrated, it is where EU's strength is coming from, according to its officials, and it is also its challenge. This motto was adopted in 2000 'to express the common goal of the European project, which is to "achieve unity of purpose through peace and prosperity in Europe, while acknowledging and fostering the wealth of its different cultures, traditions, and languages"; (...) Languages occupy a central element in Europe's diversity[5]'.

As Richard L. Creech says in his book, "In no way is the EU more diverse than in terms of language"[6] - 28 member states, 500 million citizens, 3 alphabets, and 24 official languages. According to Richard L. Creech, the Union's approach to language must be seen from two perspectives: "the EU's territorial growth, with the concomitant rise in the level of its linguistic and cultural diversity (the so-called *'widening'* of the EU), and its evolution from something that was little more than an engine of economic integration into an organization that embodies a serious commitment to human rights principles (the so-called *'deepening'*)'[7].

In their search to find ways to prevent a new World War to happen, and to 'overcome the destructive potential of their differences, linguistic or otherwise'[8], the Europeans created the European Coal and Steel Community (ECSC), in 1951, and, in 1957, the Atomic Energy Community (Euratom) and the European Economic Community (EEC), with the clear intent to make the member states so deeply interlinked and interdependent economically, to a such extent that war would no longer be an option for them, as Schuman Declaration proclaims.

The initial founding member states were six, namely: France, Germany, Italy, Belgium, Luxembourg and Netherlands. Consequently, the first 4 official languages (meaning 'equally authentic') of the organizations were: French, German, Italian and Dutch.

With the first enlargement, the United Kingdom, Ireland and Denmark joined in 1973, so English and Danish became too official languages. According to Richard L. Creech, adding English, which was also the language of the USA, the 'superpower', 'was to have profound consequences'[9]. Irish, on the other hand, had a semi-official status, becoming only a Treaty language, but not a secondary legislation language.

In 1981, Greece became part of the Communities, bringing along Greek as an official language (with a difficult alphabet, because it was different from the Roman script).

Then, Portuguese and Spanish were added in 1986; after that, Finnish (the first non-Indo-European language in EU) and Swedish joined the list (for Austria, German was already there) in 1995. In 2004, nine new languages were brought in EU, along with 10 new member states from Eastern Europe and Mediterranean Islands[10]. For Cyprus, Greek was already provided from the time Greece joined the EC. Romanian and Bulgarian were also introduced in 2007, and Croatian in 2013.

We can see the great linguistic diversity, and, as author Richard L. Creech states, 'the EU has not defined

[2] http://ec.europa.eu/education/policy/multilingualism/linguistic-diversity_en

[3] http://ec.europa.eu/education/policy/multilingualism/linguistic-diversity_en

[4] Shannon Hall, *Protection and Promotion of Multilingualism in the EU*, May 15 2013, available at http://www.e-ir.info/2013/05/15/protection-and-promotion-of-multilingualism-in-the-eu/, accessed 26.01.2018, p.1.

[5] Vicent Climent - Ferrando, Linguistic neoliberalism in the European Union. Politics and policies of the EU's approach to multilingualism, Journal of Language and Law, no. 66, 2016, p. 3.

[6] Richard L. Creech, Law and Language in the European Union. The Paradox of a Babel 'United in Diversity', Europa Law Publishing, Groningen, 2005, p. 3.

[7] Richard L. Creech, *op. cit*, p. 5.

[8] Richard L. Creech, *op. cit*, p. 12.

[9] Richard L. Creech, *op. cit*, p. 16.

[10] Czech, Estonian, Hungarian, Latvian, Lithuanian, Maltese, Polish, Slovak, Slovenian.

any geographical limit on enlargement - beyond the vague requirement that members must be 'European States' - and the room for linguistic expansion is therefore also open-ended'[11]. There is indeed a large number, but, as author Theo van Els, says, 'it is exceeded considerably by the number of languages which have no place in the institutions of the EU'[12], meaning the (around 60-80)[13] minority or regional languages within the member states (spoken by approx. 40 million people, according to EU's official website).

3. Quick comparison with other international organizations' approach of the matter

The multilingualism of the EU is unprecedented comparing to other major international organizations, such as United Nations, NATO or the Council of Europe. As Athanassiou Phoebus puts it, 'the concept of multilingualism stands out as one of the most prominent symbols of European historical, political, and cultural diversity and has gradually assumed, in addition to its inherently symbolic dimension, the mandatory nature of a legal imperative and the significance of a political necessity'[14].

An analysis regarding the use of language in international courts is made by Olga Lachacz & Rafal Manko, in their study[15]. Thus, after the Latin of the Roman Empire dominated the diplomatic relations, it was replaced by French during the 18th century, followed in the 19th century by English, being recognized as second language of the League of Nations and of the Permanent Court of International Justice. The principle of equality and the right to a fair trial were very important in adopting the multilingualism principle in international organizations and their courts.

For example, the International Court of Justice and International Tribunal for the Law of the Sea operate in two working languages (English and French). On the other hand, according to the above-mentioned authors, 'in international criminal courts broader linguistic solutions have been adopted', offering the defendants the choice to receive the documents in their native language, that could be other than the official language of the respective court (International Military Tribunal, International Criminal Court). Finally, according to the authors, the European Court of Human Rights has the rule that the applicants have the right to communicate in their own language, respecting at the same time the rule providing that English and French are the official languages of the Court.

As we notice, the European Union and its institutions, including the European Court of Justice, are not at all unique in the choice of the linguistic diversity.

However, according to Athanassiou Phoebus[16], 'a key feature that differentiates the EU from an ordinary international organization and justifies its consistent adherence to multilingualism is its distinct legal nature, and in particular, the direct effect of primary and secondary Community legislation. (...) Absent a fully multilingual legal regime, neither the principle of direct effect nor the doctrine of the supremacy of Community law could effectively operate'. So, we agree with the author Athanassiou Phoebus when he says that 'multilingualism is a necessary corollary to the principle of direct effect and, ultimately, to the doctrine of supremacy (...).'

We shall therefore analyze further how the EU regulates multilingualism and then how it deals with its challenges.

4. How the language diversity is regulated within the European Union

The legal base for the multilingualism is represented by the following texts (primary law): art. 2, art. 3(3), 55 TEU; 20, 24, 342, 165 (1) of TFUE; art. 22 and 21 of the Charter of fundamental rights of the EU; Declaration no.16 annexed to the Treaties (which is not obligatory text, but has political value).

There is also secondary law, namely: Regulation no. 1 determining the languages to be used by the European Economic Community[17], as amended with each new accession to the EU.

Articles 2 and 3 TEU set the general context for the multilingualism to exist in the EU. We will render their content below.

Article 2 TEU says that 'The Union is founded on the values of respect for human dignity, freedom, democracy, *equality*, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which *pluralism*, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

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[11] Richard L. Creech, *op. cit*, p. 23.

[12] Theo van Els, *Multilingualism in the European Union*, International Journal of Applied Linguistic, vol. 15, no.3, Blackwell Publishing Ltd., 2005, p. 269.

[13] Vicent Climent - Ferrando, *op. cit*., p.3.

[14] Cf. Wagner, Ema, Bech, Svend and Martinez M. Jesus, 2002, *Translating for the European Union Institutions*, St. Jerome Publishing, pp.1 to 7, cited by Phoebus Athanassiou, *Working paper: The application of multilingualism in the EU context*, ECB Legal Working Paper series, no.2, 2006, available at http://hdl.handle.net/10419/154656 (www.econstor.eu), accessed 26.01.2018, p.1.

[15] Olga Lachacz, Rafal Manko, *Multilingualism at the Court of Justice of the European Union: theoretical and practical aspects*, Studies in logic, grammar and rhetoric 34 (47), Versita, 2013, p. 76-78.

[16] Athanassiou Phoebus, *op. cit*., p. 6.

[17] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:01958R0001-20130701&from=EN

Furthermore, article 3 TEU para. 3 provides that 'The Union shall establish an *internal market*. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.'

Article 55 TEU talks about the official languages of the EU, as follows:

1. This Treaty, drawn up in a single original in the Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages, the texts in each of these languages being equally authentic, shall be deposited in the archives of the Government of the Italian Republic, which will transmit a certified copy to each of the governments of the other signatory States.
2. This Treaty may also be translated into any other languages as determined by Member States among those which, in accordance with their constitutional order, enjoy official status in all or part of their territory. A certified copy of such translations shall be provided by the Member States concerned to be deposited in the archives of the Council.'

Important relevant provisions we can also find in the Charter, namely article 21 - Non-discrimination:

1. Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, *language*, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.', and article 22 - Cultural, religious and linguistic diversity: 'The Union shall respect cultural, religious and linguistic diversity.'

Regarding the use of languages by the European citizens, article 20 TFEU provides: '(d) the right to petition the European Parliament, to apply to the European Ombudsman, and 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.'; article 24 TFEU: 'Every citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 13 of the Treaty on European Union in one of the languages mentioned in Article 55(1) of the Treaty on European Union and have an answer in the same language.'

An important provision regarding the linguistic diversity is to be found in article 165 TFEU, which states that: '1. The Union shall contribute to the development of *quality education* by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their *cultural and linguistic diversity* (...). 2. Union action shall be aimed at:

developing the European dimension in education, particularly through the teaching and dissemination of the *languages* of the Member States (...)'.

Article 342 TFEU provides that 'The *rules governing the languages of the institutions* of the Union shall, without prejudice to the provisions contained in the Statute of the Court of Justice of the European Union, be determined by the Council, acting unanimously by means of regulations.' This provision is the basis for the Council Regulation on languages, updated after the last EU enlargement in 2013, saying that:

Article 1

The official languages and the working languages of the institutions of the Union shall be Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish.

Article 2

Documents which a Member State or a person subject to the jurisdiction of a Member State sends to institutions of the Community may be drafted in any one of the official languages selected by the sender. The reply shall be drafted in the same language.

Article 3

Documents which an institution of the Community sends to a Member State or to a person subject to the jurisdiction of a Member State shall be drafted in the language of such State.

Article 4

Regulations and other documents of general application shall be drafted in the official languages.

Article 5

The Official Journal of the European Union shall be published in the official languages.

Article 6

The institutions of the Community may stipulate in their rules of procedure which of the languages are to be used in specific cases.

Article 7

The languages to be used in the proceedings of the Court of Justice shall be laid down in its rules of procedure.

Article 8

If a Member State has more than one official language, the language to be used shall, at the request of such State, be governed by the general rules of its law.

This Regulation shall be binding in its entirety and directly applicable in all Member States.'

The last of the relevant acts on the use of languages in the EU we are going to mention is Declaration no. 16 on Article 55(2) of the Treaty on European Union, a political act, annexed to the Treaties. The Declaration says:

'The Conference considers that the possibility of producing translations of the Treaties in the languages mentioned in Article 55(2) contributes to fulfilling the objective of respecting the Union's *rich cultural and linguistic diversity* as set forth in the fourth subparagraph of Article 3(3). In this context, the Conference confirms the attachment of the Union to the *cultural diversity* of Europe and the special attention it will continue to pay to these and other *languages.* (...)'

If we are to synthesize the above-mentioned provisions, we could say that, basically[18], 'the EU's multilingualism policy has two facets:

- striving to protect Europe's rich linguistic diversity, and
- promoting language learning.'

There are currently 24 official languages: Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish and Swedish.

As EU citizens, we have the right to use any of these languages in correspondence with the EU institutions, which have to reply in the same language. EU regulations and other legislative texts are published in all official languages except Irish (only regulations adopted by both the EU Council and the European Parliament are currently translated into Irish).

One of the EU's multilingualism goals is for every European to speak 2 languages in addition to their mother tongue. The best way to achieve this would be to introduce children to 2 foreign languages from an early age. Evidence suggests this may speed up language learning - and boost mother tongue skills too.'

The EU supports language learning, according to Commission's website, because[19]:

- better language skills enable more people to study and/or work abroad, and improve their job prospects;
- speaking other languages helps people from different cultures understand one another - essential in a multilingual, multicultural Europe;
- to trade effectively across Europe, businesses need multilingual staff;
- the language industry – translation and interpretation, language teaching, language technologies, etc. – is among the fastest growing areas of the economy.

Also, as the Commission says, EU citizens should be able to get information about what the EU is doing, have access to EU law in a language they can understand, be able to participate in the law-making process of the EU, because Europeans have a right to know what is being done in their name. They must also be able to play an active part without having to learn other languages. Using as many national languages as possible makes the EU and its institutions more open and effective.

If we were to comment on the Regulation of languages in the EU, we could cite author Athanassiou Phoebus[20] with whom we agree, and who mentions the acknowledgement by the Regulation of *national* languages only, thereby excluding form its scope of application *regional* languages, and also not clearly distinguishing between *official* languages, and the *working* ones. At the same time, the author notices the fact that only the *written* form of the use of the languages are considered (*translation*), and there is no mention about their utilization in *verbal* communication, in *interpreting*.

5. The EU institutional practice regarding the multilingualism (official vs. working language; equal vs. ranked)

First, we have to mention that the above-mentioned Regulation allows the institutions a certain degree of freedom in selecting their language regime (working languages), provided that it is explained in their internal rules regulation.

The non-discrimination rule on the basis of language (enshrined in the Charter, art. 21) was considered in the *Kik v. OHIM* case (T-120/99, C-361/01 P) by the ECJ as not being a general principle to which no limitation is allowed; consequently, there is no absolute principle of equality of languages, so the institutions are free to establish which official languages they use as they see fit, in specific cases. Nevertheless, the limitations must be objective, appropriate and proportionate, limited and justified, with no unjustified differences of treatment, and not undermining the essence of linguistic diversity (for these concepts, the Opinion of Advocated General Maduro, in case C-160/03, *Spain v. Eurojust*, is relevant).

Therefore, for practical reasons, the institutions choose not to adapt the full multilingualism, but to use instead some working languages. We also notice there is also ranking as regards which official languages are used as working one within the institutions, which may in fact contradict the principle of equality. The preoccupation arises as to find the right balance between linguistic diversity and efficiency.

We are going to present below the choice of some institutions for the use of languages in their activities and in relation with the EU citizens.

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[18] https://europa.eu/european-union/topics/multilingualism_en, accessed 28 February 2018.

[19] https://ec.europa.eu/info/about-european-commission/service-standards-and-principles/use-languages_en, accessed 28 February 2018.

[20] Athanassiou Phoebus, *op. cit*., p.10.

5.1. Multilingualism in the European Parliament[21]

In the European Parliament, all official languages are equally important: all parliamentary documents are published in all the official languages of the European Union (EU) and all Members of the European Parliament (MEP) have the right to speak in the official language of their choice. It also ensures everyone is able to follow and access the Parliament's work.

The European Parliament differs from the other EU institutions in its obligation to ensure the highest possible degree of multilingualism. Every European citizen has the right to stand for election to the European Parliament. It would be unreasonable to require MEPs to have a perfect command of one of the more frequently used languages, such as French or English. The right of each Member to read and write parliamentary documents, follow debates and speak in his or her own language is expressly recognized in Parliament's Rules of Procedure.

All EU citizens must be able to read legislation affecting them in the language of their own country. As a co-legislator, the European Parliament also has a duty to ensure that the linguistic quality of all laws it adopts is flawless in all official languages.

Europeans are entitled to follow the Parliament's work, ask questions and receive replies in their own language, under European legislation[22].

The 24 official languages make a total of 552 possible combinations, since each language can be translated into 23 others. In order to meet this challenge, the European Parliament has set up highly efficient interpreting, translation and legal text verification services. Very strict rules have been put in place to ensure that these services function smoothly and that the costs remain reasonable.

The legislation adopted by the European Parliament affects over 500 million people in 28 countries and 24 official languages: it must be identical and as clear as possible in all the languages. Verifying the linguistic and legislative quality of the texts is the job of Parliament's lawyer-linguists.

As a conclusion, we can surely notice the strong commitment of the Parliament for multilingualism, as a *sine qua non* condition for legitimacy and democracy, as the European Parliament is the only EU institution with democratic legitimacy, being elected directly by the European citizens.

5.2. Multilingualism in the Council

First we must say that in the Council the members represent the interests of the member states (and not the general interest of the EU, as the Commission must do). After the Treaty of Lisbon, the Council is part of the decision making, together with the Parliament adopting the EU legislation on equal footing.

In this context, it is normal that the full multilingualism principle is adopted by this institution. So the draft legislation must be translated in all the official languages of the EU.

5.3. Multilingualism in the Commission

Studying the way the activities of the Commission are carried, it is obvious that this institution uses, *de facto*, only three working languages: English, French, and sometimes German, too. The reason for this situation is the imperatives for speed and efficiency[23].

5.4. Multilingualism in European Court of Justice (ECJ)

In order to provide an equal and real access to justice, the ECJ respects the principle of linguistic equality, in order to ensure the effective protection of the rights of citizens under the EU law. Therefore, the *language of the case* may be any of the 24 official languages, fact usually decided by the applicant.

At the same time, internally, the ECJ deliberates in French, and also the draft judgment is in French, and then translated into the other official languages. The choice for French has also historical reasons, but also provides for the crucial aspect of legal certainty when deliberating and drafting the judgment, given the paramount importance of uniformity of interpretation and then application of EU law by all its addresses within this integration and supranational organization.

6. The delicate balance between different factors of multilingualism

Studying the EU treaties, the legislation, the case law and also the institutional practical approach regarding multilingualism, we cannot help noticing the different factors that must be taken into consideration while acknowledging the EU's commitment towards the linguistic diversity as a political value: the equality principle applied to EU official languages vs. ranking of the working languages, the market/economic oriented approach to multilingualism, and the various types of costs of a multilingual European Union.

Translation and interpretation within this organization are a 'mammoth task', each institution having its own translation department, besides a unique organism for all the institutions - the Joint Interpreting and Conference Center[24].

According to European Commission, multilingualism costs each European citizen only two euros per year, comparing this price with that of a cup

[21] Source for this subtitle: http://www.europarl.europa.eu/aboutparliament/en/20150201PVL00013/Multilingualism, accessed on 27.02.2018.

[22] Rules of Procedure of the EP: Rule 158 relating to multilingualism; The EP Code of Conduct on Multilingualism.

[23] Athanassiou Phoebus, *op. cit*., p.20.

[24] Richard L. Creech, *op. cit.*, p.26.

of coffee. At the same time, in order to cut the costs, a lot of materials remained un-translated or only summarized. Also, the institutions use only a limited number of working languages to make the process more speedy and efficient, trading off the equality principle to the need of productivity.

Although the financial costs do not seem high, there is another type of 'costs' that are pretty important in regard to translation of written texts: the institutional inefficiencies, the delays, the translation errors, the lost productivity, the differences between the translated texts which are hard to avoid, time pressure, inconsistencies, the risks for uniform interpretation of EU legislation across the member states. At the same time, in order to have really accurate translations, according to author Richard L. Creech, 'a good legal translator must therefore also be an expert in comparative law'. Actually, in order to find out the real intent and aim of the legislator it is necessary to read the text in at least 2-3 other official languages; even the ECJ recommends to the national judges to do this compared reading before considering addressing a preliminary question to the Court, in order to get more clarification on the text[25].

As regards the interpreting, the situation is even more complicated, as, besides meeting lasting a long time and becoming tiring, a lot of the information and the sometimes crucial non-verbal message are lost, including the jokes, for example, which are at times skipped, or heard later by the persons who listen to the interpreter and not the speaker. So the listener is not only disconnected by the speaker, but also cannot fully grasp the message in its complexity, verbal and non-verbal.

According to Richard L. Creech, 'the EU's programs do not acknowledge the economic and political integration is in fact inherently antagonistic to linguistic diversity'.[26] Actually, the working languages are 2 + 1, and it is easy to notice that out of these three, English has become a true lingua franca[27]. As Bruno de Witte says[28], ' form the point of view of market integration, linguistic diversity is not so much a cultural asset, as an obstacle to efficient communication.' Richard L. Creech concludes, consequently, that 'the EU's approach to language use has up to now been largely an economic affair[29].

As Vicent Climent - Ferrando[30] puts it, 'while the idea of promotion, protection and respect of linguistic diversity remains in the current EU *political rhetoric* on languages, the *actual policies* adopt a market-oriented approach, which considers languages as mere commodities for economic growth, mobility and jobs'. Indeed, as the above-mentioned author proves in his paper, we can also see 'the functional importance of language skills to increase competitiveness, reinvigorate the economy and to boost people's employability and mobility through (majority) language learning[31].

It results a kind of utilitarian and market-oriented approach to multilingualism in the European Union, which puts in a different perspective the idealistic political principles of linguistic diversity and equality of the EU's official languages, which represents the 'sentimental' dimension, associated, as Vicent Climent - Ferrando says, with 'notions of *culture, identity, respect, intercultural dialogue and EU values*, but does not translate into concrete policy intiatives'[32].

7. Conclusions

'The European Union has always seen its great diversity of cultures and languages as an asset. Firmly rooted in the European treaties, multilingualism is the reflection of this cultural and linguistic diversity. It also makes the European institutions more accessible and transparent for all citizens of the Union, which is essential for the success of the EU's democratic system[33].

'The European Union's aspiration to be united in diversity underpins the whole European project. The harmonious co-existence of many languages in Europe embodies this. Languages can build bridges between people, giving us access to other countries and cultures, and enabling us to understand each other better. Foreign language skills play an increasingly important role in making young people more employable and equipping them for working abroad. They are also a factor in competitiveness; poor language skills cause many companies to lose contracts and hamper workers

[25] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2016:439:FULL

[26] Richard L. Creech, *op. cit.*, p. 51.

[27] Lingua franca = any language that is used by different speakers to communicate when they do not share a common language/whose native languages are different - www.oxforddictionaries.com. In the past we had Latin and Greek, and now English. Other linguas francas are: Arabic, Chinese, French, Portuguese, Russian, Spanish, in different continents and regions of the world.

"I speak Spanish with God, Italian with women, French to men, and German to my horse" (Emperor Charles V), cited by Ineta Dabasinskiene, Laura Cubajevaite, Multilingualism in Europe - Study Guide. A resource Book for Students, Kaunas, Vytautas Magnus University, Faculty of Humanities, Department of Lithuanian Languages, 2013, pg. 12.

[28] Bruno de Witte, *Surviving in Babel? Language rights and European integration*, in 'The protection of minorities and human rights', Y. Dinstein & M. Tabory eds., 1992, p. 277, 295, cited by Richard L. Creech., *op. cit.*, p.103.

[29] Richard L. Creech., *op. cit.*, p.157.

[30] Vicent Climent - Ferrando, *op. cit*., p.1.

[31] Vicent Climent - Ferrando, *op. cit*., p.6.

[32] Vicent Climent - Ferrando, *op. cit*., p.10.

[33] Source for this subtitle: http://www.europarl.europa.eu/aboutparliament/en/20150201PVL00013/Multilingualism, accessed on 27.02.2018.

who might want to seek employment in countries other than their own[34].

The objective set up in Lisbon 2000 was for the EU to become the most dynamic knowledge-based economy in the world, with good growth, employment and social cohesion. Of course, language, meaning effective communication, plays an important role with regard to internal market, professional mobility, skills improvement etc. Languages, therefore, is a fundamental asset in free movement of goods, labour, capitals, services, facilitating, at the same time, opportunities and fostering competitiveness.

'The EU's remarkable linguistic pluralism and its respect for linguistic diversity are intimately related to its unique nature as a sui generis, treaty - based organization bringing together [28] European countries with distinct, yet closely linked cultural and historical traditions'. As the author affirms, examining the language regime reveals that multilingualism is not an absolute imperative, but rather a value that may need to be balanced against other equally important considerations, like speed, efficiency, which are objective and operational needs[35].

Indeed, the multilingualism, the linguistic diversity, the equality of all official languages, all these are important, idealistic values, with which the EU resonates deeply as concepts. At the same time, we cannot ignore or forget that this is an economic integration organization, with ambitious goals, an internal market to manage, in a nutshell, a very complex and demanding project that needs to be successful for everyone involved. That is why concepts as efficiency, speediness, practicality must also me considered and addressed. There is also the issue of the EU legislation, with its special characteristics: direct effect and applicability, primacy, which makes it even more complicated in terms of uniform interpretation and application of EU law by the member state, uniformity being an essential component of integration.

The success on all levels of this unique integration organization will eventually depend on the way it manages to balance all these factors, most of them even contradictory, in a way that is smart and ingenious, similar in approach with Jean Monnet's courageous and ingenious idea in 1950.

The languages, as expression of national identity and cultural diversity, can therefore be used as a link or bridge between people, rather than an obstacle to the market integration. Let's not forget that the EU was, is and should be first of all about its peoples, and not mere economics, and let's not forget the words of this *primus inter pares* among Europe's founding fathers, this man of great beginnings, Jean Monnet, who said: 'Nous ne coalisons pas des États, nous unissons des hommes.' So, we consider that it is in our mission today, as inheritance, to try to continuously re-connect with this initial spirit, which ignited the European Communities and keep it alive, even in the multilingualism approach, through all difficulties, ambitious economic objectives and competitiveness at all levels.

References

- Richard L. Creech, Law and Language in the European Union. The Paradox of a Babel 'United in Diversity', Europa Law Publishing, Groningen, 2005
- Nikos Vogiatzis, The linguistic policy of the EU institutions and political participation post-Lisbon, European Law Review, 2016
- Theo van Els, Multilingualism in the European Union, International Journal of Applied Linguistic, vol. 15, no.3, Blackwell Publishing Ltd., 2005
- Olga Lachacz, Rafal Manko, Multilingualism at the Court of Justice of the European Union: theoretical and practical aspects, Studies in logic, grammar and rhetoric 34 (47), Versita, 2013
- Mattias Derlen, Multilingual interpretation of CJEU case law: rule and reality; European Law Review, 2014
- Vicent Climent - Ferrando, Linguistic neoliberalism in the European Union. Politics and policies of the EU's approach to multilingualism, Journal of Language and Law, no. 66, 2016
- Ineta Dabasinskiene, Laura Cubajevaite, Multilingualism in Europe - Study Guide. A resource Book for Students, Kaunas, Vytautas Magnus University, Faculty of Humanities, Department of Lithuanian Languages, 2013
- European Union's official websites: http://ec.europa.eu/education/policy/multilingualism_en, https://europa.eu/european-union/topics/multilingualism_en, http://ec.europa.eu/education/policy/ multilingualism/ linguistic-diversity_en, http://www.europarl.europa.eu/aboutparliament/en/2015020 1PVL00013/Multilingualism, accessed 26.01.2018
- Shannon Hall, Protection and Promotion of Multilingualism in the EU, May 15 2013, available at http://www.e-ir.info/2013/05/15/protection-and-promotion-of-multilingualism-in-the-eu/, accessed 26.01.2018
- Phoebus Athanassiou, Working paper: The application of multilingualism in the EU context, ECB Legal Working Paper series, no.2, 2006, available at http://hdl.handle.net/10419/154656 (www.econstor.eu), accessed 26.01.2018
- European Commission's website: http://ec.europa.eu/education/policy/multilingualism/linguistic-diversity_en, accessed 01.03.2018
- Treaty on European Union, Treaty on the Functioning of the European Union, the Charter of Fundamental Right of the European Union (in English, French, and Romanian)

[34] http://ec.europa.eu/education/policy/multilingualism_en

[35] Athanassiou Phoebus, *op. cit.*, p.23.

THE LEGAL REGIME FOR CUSTOMS DUTIES AND TAXES HAVING EQUIVALENT EFFECT IN THE EUROPEAN UNION

Augustin FUEREA*

Abstract

One of the consequences that generates direct, short, medium and long-term effects, determined by the accession of the states to the European Union, is that of valorizing also the free movement of goods. More precisely, it is about the correct knowledge (in a society of knowledge), understanding and application of the principles and rules that govern the goods, but also the appropriation, respectively the engagement in a series of complex mechanisms, which can determine the activation of exceptions, limitations, restrictions or exemptions from the freedoms concerned. For these reasons precisely, the emphasis on freedom has to fall on the norm, rule, knowledge, understanding, and above all on compliance, application. Why? Because, in the European space too, the freedom is regarded as representing what philosophers call "understood necessity", not chaos, not hazard, not disorder. Freedom is for all, not only for some, under conditions of equal chances, but also of engaging in valorization through the assimilation of a large amount of information, in a time, why not admit, relatively brief and last but not least, in terms of competence, professionalism and competition, specific conditions of a market economy, an economy in which we already find ourselves. The free movement of goods is the legal regime under which goods are not confronted at frontiers with any restrictions regulated by a State, both in the case of imports and exports. Therefore, the freedom results equally in the prohibition between the EU Member States of customs duties and charges having equivalent effect to customs duties, plus the prohibition imposed on the Member States of the Union to establish quantitative restrictions or to adopt measures having equivalent effect.

Keywords: *legal regime; customs duties; charges having equivalent effect to customs duties; the European Union; institutional treaties; amending treaties; case law of the CJEU).*

1. Historical and conceptual references

The choice of the wording of this introductory part for the analysis to which we shall proceed is based in particular, on the paradox of each of the three notions, namely: "references," "history," and "concepts". As a consequence, the choice was not a random one, but rather the opposite. Each above-mentioned notion presents the paradox of cumulation of two dimensions. On the one hand, we are talking about the precision given to us by the "references" to which we relate our existence, temporally speaking, and on the other hand, about the flexibility given by the relative character of their stability (the continuous movement of the universe, the existential space we find ourselves in, and so on). The same goes for "history" (seen and rendered subjectively, obviously in a different manner from one person to another), and also in the case of "concepts" understood, defined and accepted differently. Each concept (to which we also refer) revolves around invariable constants that are difficult or even impossible to challenge. At such constants, we shall try to refer in this approach, since the objective view is now more necessary than ever, given the extent, complexity and implications of the information that is covered by such an area of concern.

Our research starts from the time factor. When exactly do we encounter preoccupations incident to common rules referring to a uniform conduct? Who highlights such concerns? Where do they manifest and through what are they materialized, consecrated from the point of view of the headquarters of the matter? These are questions to which we shall try to find answers.

By concentrating our interest on the European Union, the undeniable temptation would be to artificially overlap the concerns in matter, as origins, over the origins of the idea of unity at European level. Nor would we mistake much in terms of the time position of these origins. With the arguments that both historians and jurists have identified, we might end up either in antiquity or in different stages of the evolution of the European continent, or in the first half of the twentieth century, essentially marked by the two world wars.

Why are we going so far in history? It is simple. Because "for a long time, Europe's idea of union was confused with the organization of the world; it is thus related to Europe, if not the known world, at least the useful world"[1], a world that harmoniously has proposed to bring equally together both dimensions: the political one (peace, security) and the economical one, from the legal point of view.

Economists confirm such assumptions, appreciating that "the history of the union of territories (including for economic reasons), and later of European states, is found in remote periods, with reference to the expansion of the Roman Empire, to Great Carol's empire and to the Napoleonic conquests, to the

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[1] Charles Zorgbibe, *Construcția europeană. Trecut, prezent, viitor*, Trei Publishing House, Bucharest, 1998, p. 5.

establishment of the League of Nations in the interwar period"[2].

Everything is done in the context of the globalization trend of international relations, including from an economical and financial perspective, because "globalization is the process of internationally interdependent expansion of international economic flows. Current globalization is a new way of life for the international community (...). Globalization is not new. It has been observed from the beginning of the 16th century, recognized until the end of the 19th century and characteristic of the 20th century"[3]. Among the entities identified as being involved in this process, the World Trade Organization, for example, occupies an important place. Europe has assumed, through a process of integration very well thought and followed, a special role as an actor with global responsibilities, including from an economic perspective. The Common Market is an enlightening example for the above finding.

"The Community objective of the founding members of the [European Economic Community] was (...) **a Community market**, which subsequently became **an internal market**, namely **an economic and monetary Union**"[4].

Briefly, the historical references to such developments point to the following institutional and amending Treaties: the Treaty establishing the European Economic Community; the Treaty establishing the Atomic Energy (as institutional treaties), namely the Single European Act, the Maastricht Treaty, the Treaty of Nice and the Treaty of Lisbon (as amending Treaties).

In art. 3 par. (1) of the Treaty establishing the European Community (ECT), in its consolidated form of 1992[5], it is stated that "in order to achieve the objectives set out in art. 2[6], the activities of the Community shall include, subject to and in accordance with the deadlines laid down in (...) the Treaty: (a) the prohibition between Member States of customs duties and quantitative restrictions on imports and exports of goods and all other measures having equivalent effect; (b) a common commercial policy; (c) an internal market characterized by the elimination, between Member States, of obstacles to the free movement of goods, persons, services and capital".

The provisions of art. 14 par. (2) TEC, the consolidated version of 1997, according to which "The internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured", are edifying.

Impressive is the speech by former British Prime Minister Margaret Thatcher (The Bruges Speech[7]), which, in its debut, shows: "You have invited me to talk about the UK and Europe. I should congratulate you for your courage. If you believe certain things that are being told or written about my view of Europe, it's almost like inviting Genghis Khan to talk about the virtues of peaceful coexistence!". However, the same person, within the framework of the Third Idea-Force ("A Europe open to entrepreneurship") insists on appreciating that "the goal of a Europe open to the entrepreneurial spirit was the driving force behind the creation of the Single European Market until 1992. By deploying barriers and enabling businesses to operate on a European scale, we shall be able to better compete with the United States, Japan and other economic powers that are emerging in Asia or elsewhere". This is the essence of Britain's concerns, including now under the Brexit conditions. Worthy to add, it is also the statement made by the same British Prime Minister on the occasion of her speech, namely: "The UK has provided an example by opening its markets to the others. The city of London has for a long time been home to financial institutions around the world. This is why, it is the biggest financial centre in Europe and the one that has prospered the best". There are assertions that currently stimulate the deepest reflections in the context of an important stage of the EU-UK negotiations that the Brexit has generated.

Article 131 TEC has a particular consistency in terms of building the common commercial policy, stating that "by establishing a customs union among themselves, the Member States understand to contribute, for the common interest, to the harmonious development of world trade, to the progressive elimination of restrictions on international trade and to the reduction of customs barriers. The common commercial policy (being within the exclusive competence of the European Community / EU) takes into account the favourable effect that the elimination of duties between Member States can entail in increasing the competitive power of enterprises in these States". This is the reason why, gradually, a genuine customs duty of the European Community / European Union has emerged and developed. Next, following the

[2] Maria Bârsan, Integrarea economică europeană, vol. I – Introducere în teorie și practică, Carpatica Publishing House, Cluj-Napoca, 1995, p. 7.

[3] Petre Tănăsie, *România, globalizarea și cerințele regândirii guvernării globale. Oportunități și vulnerabilitate*, in *Studii Juridices*, "N. Titulescu" University of Bucharest, Economic Publishing House, Bucharest, 2001, p. 155.

[4] Andrei Popescu, *Reglementări ale relațiilor de muncă – practică europeană*, under the aegis of the Legislative Council, Tribuna Economică Publishing House, Bucharest, 1998, p. 104.

[5] The Treaty was signed in Rome on 25 March 1957 and entered into force on 1 January 1958. Subsequently, the Treaty has been amended several times.

[6] Article 2 TEC, consolidated form of 1992: "The Community's task is to establish a common market and economic and monetary union and to implement the common policies and actions referred to in Art. 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of convergence of economic performance, a high level of protection and improvement of the quality of the environment, raising the standard of living and quality of life, economic and social cohesion and solidarity between Member States".

[7] Charles Zorgbibe, *op. cit.*, pp. 336-342.

same logical thread, art. 135 TEC states that "within the scope of [the Treaty], the Council (...) shall take steps to intensify customs cooperation between the Member States and between them and the Commission".

Even though sometimes the regulations subsequent to the Maastricht Treaty have helped not directly, but only implicitly, to enshrine the principle of the free movement of goods, including through the prohibition of customs duties and charges having equivalent effect between Member States. The Treaties of Amsterdam and Nice have maintained a constant evolutionary nature of the matter, however, emphasized by the Treaty of Lisbon.

2. Grounds for the appearance of the Common Market)

The common market "is essentially a customs union which, in addition to the freedom of trade in goods and services, also implies the freedom of movement of the main factors of production (capital and labour force) among the member countries"[8]. Customs Union "is an even closer form of economic integration. In such a union, [the Member States] are obliged to use common tariffs and rules on imports [and exports] from [to] non-member States"[9]. Moreover, the same authors add that the economic union "involves all the features of a common market"[10].

Our concern is precisely the first component, namely that of import and export customs duties and charges having equivalent effect, at the level of Member States of the European Community, respectively of the European Union, later.

From the point of view of stages crossed, within the framework of the economic integration, "the European Economic Community started with a customs union"[11]. This is because the ECSC [similar CEEA] is a special case of sectoral integration for coal and steel" as it is the "1965 US-Canada Automobile Agreement"[12]. Because "for developed countries [as in the case above], these sectoral initiatives require a so-called removal of obligations, i.e. a derogation from the General Agreement on Tariffs and Trade"[13].

"Like the World Trade Organization, the European Union apparently seeks to establish free trade among nations. As in the case of the World Trade Organization, this requires not only the elimination of taxes, but also the criticism of any attempt by a government or national authority[14] to place its own producers unfairly to those in other states"[15]. In other words, what it is not allowed to be practiced in the relations between the Member States in terms of customs duties and charges having equivalent effect, that should also be the case in the relations between these States and third States, with reference to the Lisbon Agenda 2000, according to which the EU wanted to become the most dynamic and performing knowledge-based economy in the world by 2010, an objective which has subsequently been carried forward.

From a conceptual point of view, there are substantial differences between the "internal market" and the "common market", as stated in the doctrine, as follows: "the transition from the "common market" to "the internal market" is not a mere terminological change. As it also results from the Commission White Paper of 1985, it was an ambitious objective, the completion of which involved the adoption of 310 directives to approximate the laws of [the Member States]"[16]. Regulatory developments have been so conspicuous that, over time, a genuine European Union customs law has emerged, which is based on the 1993 Community Customs Code, which has produced legal effects, in terms of rights and obligations, from January 1st, 1994 as a generally accepted rule for the entire customs territory of the European Union.

3. Current grounds for the prohibition of customs duties and charges having equivalent effect, between Member States

The primary and fundamental element of the matter is art. 28-37 of the Treaty on the Functioning of the European Union (TFEU)[17].

From the very beginning, art. 28 par. (1) TFEU states that the Union, this time as subject of international law, on the basis of the legal personality acquired under Art. 47 of the Treaty on European Union (TEU), "is made up of a customs union which regulates the entire trade of goods and which involves a prohibition between Member States of customs duties on imports and exports and any charges having equivalent effect, such as the adoption of a common customs tariff in relations with third countries".

Par. (2) of the same art. 28 TFEU states that "the provisions (...) shall apply to products originating in the Member States as well as to products coming from third countries which are in free circulation in the Member States".

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[8] Dan Drosu Şaguna, Mihail Romeo Nicolescu, *Societăţi Comerciale Europene*, Oscar Print Publishing House, Bucharest, 1995, p. 15.
[9] Idem.
[10] Idem.
[11] Jacques Pelkmars, *Integrare europeană. Metode şi analiză economică*, second edition, IER, R.A. Official Gazette, Bucharest, 2003, p. 7.
[12] Idem.
[13] Idem.
[14] Concerning the concept of public authority into national law, see Elena-Emilia Ştefan, *Disputed matters on the concept of public authority*, LESIJ no.1/2015, pp. 132-139.
[15] Steven P. McGiffen, *Uniunea Europeană. Ghid critic*, New Edition, R.A. Monitorul Oficial Publishing House, Bucharest, 2007, p. 76-77.
[16] Sergiu Deleanu, *Drept comunitar al afacerilor*, Servo-Sat Publishing House, Arad, 2002, p. 9.
[17] For more information on the legal basis, see Mihaela-Augustina Dumitraşcu (coord.), *Legislaţia privind libertăţile de circulaţie în Uniunea Europeană*, C.H. Beck Publishing House, Bucharest, 2015, in particular *Fişă sintetică*, pag. 1-8.

With value of interpreting the provisions of art. 28 par. (2) of the TFEU, the following article (Article 29 TFEU) is added: "Products originating in third countries for which import formalities have been completed are considered to be in free circulation in a Member State and for which the customs duties and charges having equivalent effect which were due and which did not benefit from a full or partial refund of those taxes and charges were levied in that Member State".

The European Union legislature expresses unequivocally, in Art. 30 TFEU which provides that "customs duties on imports and exports or charges having equivalent effect shall be prohibited between Member States". The article invoked "concerns any kind of customs duties or charges having equivalent effect, irrespective of whether they relate to imports or exports, without making any distinction according to the time when those taxes are levied"[18]. According to the doctrine[19], the prohibition referring to customs duties on imports and exports or on charges having equivalent effect "also applies to customs duties of fiscal nature".

By analyzing, conceptually, from the fund perspective, we find the fact that customs duties and charges having equivalent effect are "the most often used ways to obstruct the free movement of goods. These forms of protectionism are reflected in the increase in prices of imported goods compared to domestic similar products, thus favouring domestic products. The removal of such taxes is particularly important for the idea of a customs union and the single market, as the European Commission emphasizes in its policy on customs strategy[20]: the Customs Union is at the heart of the European Union and is an essential element in the functioning of the Single Market, a market which can only function normally when properly applying common rules at its external borders. This implies that the 28 customs administrations of the European Union must act[21] as if they were one"[22].

For a proper understanding, we distinguish in our research, between customs duties, charges which do not involve too much documentation, unlike charges having equivalent effect, which make it necessary to resort to the case-law of the Court of Justice of the European Union[23] (CJEU). Thus, customs duties, in the strict sense of the word, "are one of the oldest forms of protection of national trade, until it has had a deterrent effect on trade. It was estimated that around the 18th century there were about 1,800 customs frontiers on the territory of today's Germany. Merchants who wanted to transport goods along the Rhine, from Strasbourg to the Dutch border, had to pay 30 charges"[24].

The legislator of the European Economic Community directly banned customs duties by sanctioning the violation of such permissive conduct for the development of trade by banning barriers to it, tax barriers[25] and not only. From a conceptual point of view, customs duties are indirect taxes which the State levies on goods when they cross the frontier of a country for import, export or transit[26]. In other words, customs duties are financial burdens affecting goods crossing a border. At European Union level, this type of tax applies to goods coming from third countries and not to exports or imports between Member States of the Union.

"The concept of charges having equivalent effect comprises all pecuniary taxes other than customs duties in the strict sense, imposed on goods which are in free circulation in the Community, by crossing borders between States and which are not permitted under the specific rules of the Treaty"[27]. This is the definition established in the doctrine of the field, with references to the jurisprudence of the matter[28], in the 1962s. Later in 1976, another case, *Bauhuis*[29], is likely to complete the above definition of charges having equivalent effect. In this case, "the Court has held that any monetary charge, whatever the destination and manner of its application, unilaterally imposed on goods on the ground that they cross a border (but not crossing the border) and which are not customs duties, strictly speaking, constitutes a charge having equivalent effect in the case where it is not linked to a general system of systematic internal taxation applied according to the same criteria and the same stages in the marketing of

[18] Paul Craig, Grainne de Búrca, *Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină*, 6th edition, Hamangiu Publishing House, Bucharest, 2017, p. 715.

[19] Idem.

[20] http://ec.europa.eu/taxation_customs/customs/policy_issues/customs_strategy/index_fr.htm.

[21] *Idem*.

[22] Roxana-Mariana Popescu, Influența jurisprudenței Curții de Justiție de la Luxemburg asupra dreptului Uniunii Europene – studiu de caz: noțiunea de „taxă cu efect echivalent taxelor vamale, Public Law Review, no. 4/2013, Universul Juridic Publishing House, Bucharest, p. 73.

[23] 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-Negura, *Dreptul Uniunii Europene – o nouă tipologie juridic,* Hamangiu Publishing House, Bucharest, 2016, pp. 156-165; Roxana-Mariana Popescu, *Introducere în dreptul Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2011, pp. 96-98.

[24] Walter Cains, *Introducere în legislația Uniunii Europene*, Universal Dalsi Publishing House, Bucharest, 2001, p. 163.

[25] "In tax matters, the unanimity rule of decision-making prevented the harmonisation of the laws inthe Member States of the European Union, the States not being willing to cede their sovereignty in this matter" –Viorel Roș, *Drept financiar și fiscal*, Universul Juridic Publishing House, Bucharest, 2016, p. 57.

[26] Aurel Teodor Moldovan, *Drept vamal*, C.H. Beck, Bucharest, 2006, p. 118.

[27] Walter Cairs, *op.cit.*, p. 166.

[28] Judgment Commission of the European Economic Community v. the Grand Duchy of Luxembourg and the Kingdom of Belgium, Joined cases 2-3 / 62, ECLI:EU:C:1962:45.

[29] Judgment in W.J.G. Bauhuis v. The Netherlands, 46/76, ECLI:EU:C:1977:6.

similar domestic products"[30]. There has been a very rich jurisprudence in the field, according to the doctrine of the field[31], even since the 1990s[32].

Of particular importance are also the problems concerning the avoidance of confusion between taxes with equivalent effect (forbidden) and other (permitted) taxes, such as the following types of taxes: internal taxes; the fees charged for services rendered to economic agents and the fees charged under provisions of European Union law.

What happens if these fees have been collected in breach of the provisions of the Treaty on the Functioning of the European Union? Naturally, there is a sanction that, in terms of finality, leads to their recovery and return to those from whom they have been unlawfully received, including through the initiation and conduct of an infringement proceeding against States that are guilty of breaches of the European Union law, in the light of their obligations.

4. Conclusions

Concluding, we appreciate that the regime of customs duties and charges having equivalent effect in the European Union is of particular interest, recording significant developments that are likely to strengthen relations between Member States as subjects of international law, but also between individuals (individuals and legal entities) as genuine beneficiaries of all the freedoms of movement, taken as a whole.

References

- Bârsan, Maria, Integrarea economică europeană, vol. I – Introducere în teorie și practică, Carpatica Publishing House, Cluj-Napoca, 1995
- Cains, Walter, Introducere în legislația Uniunii Europene, Universal Dalsi Publishing House, Bucharest, 2001
- Craig, Paul; de Búrca, Grainne, Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină, 6th edition, Hamangiu Publishing House, Bucharest, 2017
- Deleanu, Sergiu, Drept comunitar al afacerilor, Servo-Sat Publishing House, Arad, 2002
- Dumitrașcu, Mihaela-Augustina, Dreptul Uniunii Europene și specificitatea acestuia, second edition, revised and enlarged, Universul Juridic Publishing House, Bucharest, 2015
- Dumitrașcu, Mihaela-Augustina (coord.), Legislația privind libertățile de circulație în Uniunea Europeană, C.H. Beck Publishing House, Bucharest, 2015
- Fuerea, Augustin, Dreptul Uniunii Europene – principii, acțiuni, libertăți, Universul Juridic Publishing House, Bucharest, 2016
- Jacques Pelkmars, Integrare europeană. Metode și analiză economică, second edition, IER, R.A. Official Gazette, Bucharest, 2003
- McGiffen, Steven P., Uniunea Europeană. Ghid critic, New Edition, R.A. Monitorul Oficial Publishing House, Bucharest, 2007
- Moldovan, Aurel Teodor, Drept vamal, C.H. Beck, Bucharest, 2006
- Popescu, Andrei, Reglementări ale relațiilor de muncă – practică europeană, under the aegis of the Legislative Council, Tribuna Economică Publishing House, Bucharest, 1998
- Popescu, Roxana-Mariana, Influența jurisprudenței Curții de Justiție de la Luxemburg asupra dreptului Uniunii Europene – studiu de caz: noțiunea de „taxă cu efect echivalent taxelor vamale, Public Law Review, no. 4/2013, Universul Juridic Publishing House, Bucharest
- Popescu, Roxana-Mariana, Introducere în dreptul Uniunii Europene, Universul Juridic Publishing House, Bucharest, 2011
- Roș, Viorel, Drept financiar și fiscal, Universul Juridic Publishing House, Bucharest, 2016
- Spătaru-Negură, Laura-Cristiana, Dreptul Uniunii Europene – o nouă tipologie juridic, Hamangiu Publishing House, Bucharest, 2016
- Șaguna, Dan Drosu; Nicolescu, Mihail Romeo, Societăți Comerciale Europene, Oscar Print Publishing House, Bucharest, 1995
- Ștefan, Elena-Emilia, Disputed matters on the concept of public authority, LESIJ no.1/2015
- Tănăsie, Petre, România, globalizarea și cerințele regândirii guvernării globale. Oportunități și vulnerabilitate, in Studii Juridices, "N. Titulescu" University of Bucharest, Economic Publishing House, Bucharest, 2001;
- Zorgbibe, Charles, Construcția europeană. Trecut, prezent, viitor, Trei Publishing House, Bucharest, 1998;
- Judgement Kapniki Michaïlidis AE v. Idryma Koinonikon Asfaliseon (IKA), Joined Cases C-441 and 442/98, ECLI:EU:C:2000:479
- Judgment in W.J.G. Bauhuis v. The Netherlands, 46/76, ECLI:EU:C:1977:6
- Judgment of the Commission of the European Economic Community against the Grand Duchy of Luxembourg and the Kingdom of Belgium, Joined cases 2-3/62, ECLI:EU:C:1962:45
- http://ec.europa.eu/taxation_customs/customs/policy_issues/customs_strategy/index_fr.htm

[30] Walter Cairs, op.cit., p. 166.
[31] Augustin Fuerea, Dreptul Uniunii Europene – principii, acțiuni, libertăți, Universul Juridic Publishing House, Bucharest, 2016, pp. 161-170.
[32] Judgement Kapniki Michaïlidis AE v. Idryma Koinonikon Asfaliseon (IKA), Joined Cases C-441 and 442/98, ECLI:EU:C:2000:479.

THE LEGAL, SOCIAL AND RELIGIOUS DIMENSION OF THE CONCEPT OF EUTHANASIA

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Abstract

If the right to life of the human being is consecrated, guaranteed, promoted and unanimously recognized as a subjective right of a general nature, the right to assisted death can be understood by reference to the individual seeking support for the application of certain euthanasia procedures, resulting in his physics disappearance. Considering the legal challenge to the regulation of euthanasia and its social and, above all, religious implications, we consider it relevant to analyze the arguments specific to each direction of approach in order to converge the adopted solutions. Taking into account the definition of euthanasia accepted unanimously and covering the relevant cases, we consider necessary the distinction between euthanasia and the like, in order to determine the limits of the euthanasia cases, a criterion for their identification and the correctness of the use of such criterion. The supporters of euthanasia invoke Cicero's argument that a good death is the ideal way to respect the law of nature, leaving the world in peace and dignity, and the opponents base their argumentation on religious and ethical principles regarding the sacredness of life, and find that the legalization of euthanasia contributes to hurry the deaths of some people, sometimes even against their will.

Keywords: *euthanasia, right to life, dignity, the right to assisted death.*

1. The historical evolution of the concept of euthanasia

In the ancient Greek language, „*eu*" means „good, harmonious", and „*thanatos*" means „death", so, as shown by Francis Bacon, the word „euthanasia" signifies „a good, peaceful, happy death".

In ancient Rome, the Law of the XII Tables[1] regulated the killing of children born with malformations right after their birth, and in Sparta, according to the notes of the Greek historian Plutarch in his work „Parallel Lives", „children that were not healthy and vigorous, crooked children" were thrown off a cliff of Taiget mountain.

Euthanasia was also used by the Roman emperor Publius Aelius Hadrianus (76-138 A.D.), who asked the physician Hermogenes to end his suffering by quickening his death, but the doctor „found the way to remain true to his professional oath, without refusing him"[2].

Although determined by the religious influences and by the limited medical knowledge of the time, ancient medicine, by its representatives, tried to defeat the disease, but the ill person in terminal stage was left to die, adopting an attitude of resignation before death and of recognition of the higher force of destiny. Hippocrates himself (460-377 B.C.), believed to be the greatest doctor of the Antiquity, mentioned, in his book called „About Art", that medicine „means to relieve the pain of the ill person, reduce the violence of his disease and refuse to care for those enslaved by their disease, understanding that, in such cases, medicine is powerless", but his oath forbade to terminate a life by the wording „I will not give poison to anyone, even if he asks for it, and I will not encourage him to take such substances".

The Middle Ages bring a new approach to life, and, implicitly, to the concept of euthanasia. The sacredness of life, claimed by the Christian, Judaic and Islamic religions, which believe that human life has divine origins, condemned euthanasia of any kind, although death received a new symbolic significance, representing the transition to a new world.

Attempts of legal regulation of euthanasia appear in the beginning of the XX century, when the first great controversies related to this subject appear in Germany, England and USA; but euthanasia practiced in the Nazi Germany has been and still is condemned throughout the world and under all aspects, respectively moral, legal, medical, theological and philosophical.

In the Declaration on Euthanasia of the Congregation for the Doctrine of Faith of 1980, there was a firm and categorical insistence on the fact that „nothing and no one may authorize the killing of an innocent human being, be it a fetus, embryo, child or adult, old, suffering from an incurable illness or in agony. Moreover, no one can demand this homicide gesture for himself or for another person that he is responsible for, nor can he consent to this explicitly or implicitly. No authority is able to order it legitimately, nor allow it. As this is a violation of the divine law, an

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[1] Andreea Rîpeanu, *Roman Law*, (Bucharest: Cermaprint Publishing House, 2017), 24-26.
[2] Almoş Bela Trif, Vasile Astărăstoae, Liviu Cocora, *Euthanasia, Assisted Suicide, Eugenia, Pro Verus Contra, Great Dilemmas of Humanity*, (Bucharest: InfoMedica Publishing House, 2002), 3.

offense against the dignity of the human person, a crime against life, an attack against humanity". However, the declaration contains a sentence that is favorable to the use of painkillers to relieve pain and to the right to refuse the extraordinary measures of life support.

Similar to the position of the Catholic Church, the Orthodox Church was also against euthanasia, claiming both theological arguments, and medical arguments. Thus, euthanasia interrupts the ascending evolution from face to resemblance, symbolizing the effort of the human being, who receives the face of God by the act of creation, to achieve the resemblance to God, as „Love bears all things, believes all things, hopes all things, endures all things."[3]. The acceptance of the suffering that precedes death, of the cross before death is redeeming, and patience is a virtue that brings salvation in the latest hour, as „he who endures to the end shall be saved"[4]. The medical bioethics itself is against euthanasia, considering it contrary to the medical ethics, because the doctor has the moral and professional duty to fight for the patients' life, not to end it[5], invoking the legal interpretations of human rights against euthanasia, according to which „the right to life does not imply the right to death[6]."

The medically assisted suicide is legal in Belgium, Luxemburg, the Netherlands, Switzerland, Spain, Japan, Australia, Cambodia, Columbia, Canada, as well as in five American states – California, Montana, Oregon, Washington and Vermont. In Romania, according to art. 190 – The homicide committed on the victim's request, mentioned in the Criminal Code, „The homicide committed on the explicit, serious, conscious and repeated request of the victim suffering from an incurable disease or from a serious impairment, medically certified, causing permanent suffering that is difficult to bear, is punished by imprisonment from 1 to 5 years". At the same time, in article 22 of the Medical Deontology Code of the College of Physicians, euthanasia is believed to be one of the acts that are contrary to the fundamental principles of practicing the profession of doctor.

2. Conceptual clarifications and delimitations

A unanimously accepted definition of euthanasia is impossible, since the precise basis of these definitions consists in strong moral convictions, however contradictory; if those who are for euthanasia see it as a release or aid granted to persons to be able to die with dignity, those who oppose euthanasia qualify it as murder or as suppression of life.

The explicative dictionary of Romanian language proposes two definitions for euthanasia, respectively „painless death" and „method to cause an early, painless death, by doctors, to a person suffering from an incurable illness, to put an end to his hard or extended suffering".

In one definition, euthanasia is believed to be an action or a lack of action by which a health professional or a person close to the individual suffering from an incurable illness, deliberately causes the patient's death, out of the wish to put an end to his life marked by suffering[7].

According to another definition, euthanasia would represent a totality of medical actions or lack of actions with ethical-legal support and in a patient's interest, shortening the suffering of an ill person who is currently not benefiting from an etiological treatment, in terms of medical science, on the contrary, for whom the prognosis is a close and unavoidable end"[8]. In other words, euthanasia is an act of assisting in the suppression of one person's life in circumstances that are medically justified[9].

Essentially, euthanasia consists in the action of painless suppression of the life of a person whose hard and extended suffering is believed to be irretrievable, willingly prejudicing the right to life[10].

Considering the fact that euthanasia has benefited from various classifications, in order to systemize the types of euthanasia, two criteria are important, respectively the personal will of the sick person[11] and the doctor's action[12], however, regardless of the type of euthanasia, one must avoid creating confusion between rights and liberties, namely that, from the philosophical-spiritual point of view, the human being

[3] I. Cor. 13:7.

[4] Mt. 10:22.

[5] For these purposes, Pavel Chirilă, *„Bioethics and Human Rights"*, in Nicolae Răzvan Stan (editor), *The Orthodox Church and Human Rights* (Bucharest: Universul Juridic Publishing House, 2010), 269.

[6] Jean-Francois Renucci, *Treaty of Human Right European Law*, (Bucharest: Hamangiu Publishing House, 2009)111; Victor Duculescu, *Legal Protection of Human Rights*, (Bucharest: Hamangiu Publishing House, 2008), 315.

[7] Laura Macarovschi, Oana Mihaela Vișan, *International Protection of Civil and Political Rights*, (Bucharest: Sintech Publishing House, 2014), 108.

[8] Almoș Bela Trif, Vasile Astărăstoae, Liviu Cocora, Euthanasia, Assisted Suicide, Eugenia, Pro Verus Contra, Great Dilemmas of Humanity, 73.

[9] Alexandru Boroi, *Crimes Against Life*, (Bucharest: Naţional Publishing House, 1996), 39.

[10] Nicolae Purdă, Nicoleta Diaconu, *Legal Protection of Human Rights*, Edition II, reviewed and completed, (Bucharest: Universul Juridic Publishing House, 2011), 185.

[11] In relation to the personal will of the ill person, euthanasia may be volitional (when the patient, fully aware, decides to terminate his life), involuntary (when the patient has not been consulted in relation to the termination of his life, although he has the capacity to decide, or if he previously declared that he refuses euthanasia) and non-volitional (when the life of an ill person is terminated, because said person can no longer decide for himself whether to live or die, because of his mental or physical condition).

[12] In relation to the doctor's action, euthanasia may be active (when death occurs deliberately and actively, by positive means) and passive (when death is caused deliberately by abstention from or interruption of current measures of treatment or of feeding).

is free to end his life when he deems fit, but the right to proceed accordingly does not exist legally, ethically or socially.

By reference to freedom, one of the greatest fundamental values of mankind, marking its historical course and evolution and placing our analysis in a philosophical frame, the man's choice of life or of death is the expression of manifestation of his own freedom of thinking and the result of an individual decision, or, as the German philosopher, Martin Heidegger, appreciated, as representative of the existentialist conception, in mid-20th century, the decision of the human being to end his life is an act of supreme freedom. From this point of view, of the abstract man and of freedom as general value, one may begin to agree with the social, institutionalized acceptance of assisted death.

From another point of view, of the Dutch philosopher Baruch Spinoza, who defined freedom as an „understood necessity", man is a free being not when he does what he wants or what he desires, but when he understands and becomes aware of the major objective needs of his social environment and of the environment of the era when he lives, proving himself responsible. Consequently, the acceptance of the decision to die is grounded on a strictly personal responsibility and may be made by any human being, without however calling upon other persons to bear witness to his disappearance.

3. Legal and case-law framework in terms of euthanasia

Moving on to the legal frame, most states of the world establish, defend and guarantee by law the right to life, and reject, implicitly, the recognition of the right to assisted death.

At international level, in article 3 of the Universal Declaration of Human Rights[13], it is stipulated that „Everyone has the right to life, liberty and security of person", and in article 6(1) of the International Covenant on Civil and Political Rights[14], it is stipulated that „ Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".

In articles 2, 3, 7 and 8 of the European Convention of Human Rights, are regulated: the people's right to life, the right to health, the prohibition of torture and of inhuman or degrading treatments, as well as the respect for private life.

Considering the requests filed to the European Court of Human Rights by citizens of certain states, by which they requested support to enable their own death, as the law of their country prohibited euthanasia[15], the Council of Europe adopted the Recommendation no. 1419/1999, arguing its position against euthanasia by the fact that the right to life is guaranteed on the grounds of article 2 of the European Convention of Human Rights, and the states have the obligation to protect their own citizens, to refuse their intentional death, „regardless of their reasons and of the desire to die, expressed by an incurable sick person or by a dying person, this is no legal justification for actions destined to cause death and does not constitute a legal ground to cause the death of another person".

In support of its position, the European Court of Human Rights has held the fact that the text of article 2 is not capable to create a right to self-determination, based on which one may have the possibility to choose between life and death, and it does not give the individual the right to ask the state to allow him or to facilitate his death[16].

Art. 2 of the Charter of Fundamental Rights of the European Union regulates the right to life: „ Everyone has the right to life. No one shall be condemned to the death penalty, or executed", appreciating that, as long as individuals that represent a serious social danger are not and cannot be convicted by the national law of the states to physical suppression, even more so the persons wishing to die cannot be granted the wish to commit suicide.

The European Convention for the protection of human rights and of dignity of the human being with regard to the application of biology and medicine[17] aims at protecting the human being and guarantees to any person, without discrimination, the respect of its integrity and of the other fundamental rights and freedoms with regard to the application of biology and medicine by the parties to this convention. In art. 1 para. (2) of the Convention, it is shown that every signing State adopts in its domestic legislation the necessary measures to give effect to the provisions of the Convention, and art. 27 stipulates that none of the provisions of this Convention "shall be interpreted as limiting or otherwise affecting the possibility for a Party to grant a wider measure of protection with regard to the application of biology and medicine than is stipulated in this Convention".

In Chapter II of the Constitution of Romania, the fundamental Rights and Freedoms are provided, and, according to art. 22 para. (1): „The right to life, as well as the right to physical and mental integrity of person

[13] Corina Florenţa Popescu, Maria-Irina Grigore-Rădulescu, *Legal Protection of Human Rights*, (Bucharest: Universul Juridic Publishing House, 2014), 54-55.

[14] Raluca Miga-Beşteliu, Catrinel Brumar, *International Protection of Human Rights*, Lecture Notes, V edition, (Bucharest: Universul Juridic Publishing House, 2010), 43; Corina Florenţa Popescu, Maria-Irina Grigore-Rădulescu, *Legal Protection of Human Rights*, 56.

[15] Cristina Otovescu-Frăsie, Andreea Băndoi, „*Respect of the right to life versus euthanasia",* The Romanian Magazine of Bioethics, Vol. 7, No. 2, (April – June 2009): 13.

[16] By decision Prettyc. United Kingdom of April 29, 2002, CEDO believed that the prohibition of euthanasia did not constitute a violation of the right to life, refusing to acknowledge the person's right to die.

[17] Corina Florenţa Popescu, Maria-Irina Grigore-Rădulescu, *Legal Protection of Human Rights*, 66.

are guaranteed". In developing the constitutional provisions, the New Criminal Code, in its special part, regulates crimes against persons, as well as crimes against life, body integrity and health.

As previously shown, in the category of crimes against life, art. 190 of the Criminal Code incriminates the homicide on the victim's request, a crime that does not exist in the Criminal Code of 1969. Although, according to art. 26 para. (2) of the Constitution of Romania, reviewed, „any natural person has the right to freely dispose of himself", the homicide on the victim's request or the active euthanasia has been incriminated, because the right to dispose of another person's life does not exist, even though said person may demand such a solution explicitly, seriously, consciously and repeatedly, due to his suffering. Art. 190 of the Criminal Code considers the case of a person suffering from an incurable disease or from a serious impairment, who asks for the termination of his life in order to put an end to unbearable sufferings that he must endure and who no longer hopes in the possibility to get better or to heal his impairment[18].

The existence of union legal regulations and of the case-law of ECHR have not prevented the differentiated reflection of euthanasia in the frame of national laws of the European States, a fact determined by the different legal thinking and by the manifested religious influences.

In those States where euthanasia is forbidden by legal regulations, the ill persons and their families addressed the justice to end their suffering or the suffering of family members.

Thus, in France, president Jacques Chirac rejected, in 2003, the euthanasia request filed by Mrs. Marie Humbert's son, Vincent Humbert, aged 21, but the mother gave her son a lethal dose of barbiturates.

In 2008, Remy Salvat, aged 26, suffering from a very rare degenerative malady, addressed the French president, Nicolas Sarkozy, the request to allow him to die with dignity, but, following the president's refusal, the young man committed suicide in August.

In UK, the supreme court, in 1993, made a favorable decision and admitted the petition filed by the parents of Anthony Bland, aged 17, allowing the doctors from NHS hospital to unplug his machines, because, in 1989, following the collapse of a tribune of the Sheffield stadium, Anthony had suffered serious cerebral lesions.

Also in UK, the justice was on the side of young Hannah Jones, aged 13, suffering from a serious heart disease for more than eight years, because of which she had spent very much time in hospitals and had been submitted to multiple surgical interventions. Thus, scheduled for a heart transplant, the little girls refused, stating that she could no longer endure new surgeries and pain and claiming that she no longer wished to stay in hospital and be consulted by doctors.

In Romania as well, Eugen Constantin Anghel, aged 28, suffering from cirrhosis, esophageal varices, umbilical and inguinal hernia and hepatic encephalopathy, asked president Traian Băsescu, by a letter addressed to him, to be allowed to undergo euthanasia, but the answer was negative.

4. Conclusions

The moral convictions, the medical and legal arguments, the theological and religious points of view represent enough reasons to make it impossible to establish the uniformity of legal solutions concerning euthanasia, as no regulation, no matter how comprehensive it is, is able to provide an answer to the multitude and variety of human and clinical situations. However, the remarkable evolution of medical technologies and techniques, doubled by a change of the individual and collective vision of death and agony, contributes to a new reflection of euthanasia in the system of values and of social institutions.

References

- Boroi Alexandru, *Crimes Against Life*, Bucharest: Național Publishing House, 1996
- Chirilă Pavel, „*Bioethics and Human Rights*", in Nicolae Răzvan Stan (editor), *The Orthodox Church and Human Rights*, Bucharest: Universul Juridic Publishing House, 2010
- Duculescu Victor, *Legal Protection and Human Rights*, Bucharest: Lumina Lex Publishing House, 2008
- Macarovschi Laura, Vișan Oana Mihaela, *International Protection of Civil and Political Rights*, Craiova: Sintech Publishing House, 2014
- Miga-Beșliu Raluca, Brumar Catrinel, *International Protection of Human Rights*, Lecture Notes, edition V, Bucharest: Universul Juridic Publishing House, 2010
- Otovescu-Frăsie Cristina, Băndoiu Andreea, „*Respect of the right to life versus euthanasia*", *Romanian Magazine of Bioethics*, Vol. 7, No. 2 (April – June 2009)
- Popescu Corina Florența, Grigore-Rădulescu Maria-Irina, *Legal Protection of Human Rights*, Academic Lecture, Bucharest: Universul Juridic Publishing House, 2014
- Renucci Jean-Francois, *Human Right European Law Treaty*, Bucharest: Hamangiu Publishing House, 2009
- Rîpeanu Andreea, *Roman Law*, Bucharest: Cermaprint Publishing House, 2017
- Toader Tudorel and others, *New Criminal Code*, Bucharest: Hamangiu Publishing House, 2014

[18] Tudorel Toder and others, *New Criminal Code*, (Bucharest: Hamangiu Publishing House, 2014).

SHANG YANG 商鞅 AND LEGALIST 法家 REFORM IN THE ANCIENT CHINESE STATE OF QIN 秦

Daniel HAITAS*

Abstract

Legalism has played a major role in the history of the Chinese legal and governmental tradition. One of the major exponents and formulators of this school of thought in ancient times was Shang Yang, an official in the state of Qin. Shang Yang oversaw a program of law reform in Qin in such areas as criminal law and the economic life of the country which aimed to strengthen the power of the state. This can be said to have had long term consequences for both Chinese and world history, in that the strengthening and reorganization of Qin along the lines of Legalist principles helped lead to its gaining preeminence amongst the other states vying for influence in the Warring States period, ultimately leading to the unification of China under the rule of the Qin dynasty.

Keywords: *Shang Yang, Legalism, law reform, Qin state, criminal law, economic regulation.*

1. Introduction

Throughout much of the history of the Chinese legal and governmental tradition, two different schools of thought have been portrayed as competing and coexisting at the same time; these are the Legalists 法家 and the Confucians 儒家[1]. Both sought to maintain social order, yet differed in the primary methods through which they sought to achieve this end[2]. The Legalists generally believed in increasing the power of the ruler through written laws that would strengthen the power of the state[3], while the Confucians, whose beliefs are seen as a manifestation of feudal and traditional Chinese values[4], placed more emphasis upon the idea that the ruler had to support and adhere to a certain moralistic order, which involved following proper rules of proprietary and behaviour.[5] An important member of the Legalist school was Shang Yang, an official in the state of Qin during the fourth century B.C.[6] Two areas in which he had a particularly strong influence were criminal law and in regulation of the economic life of the state. These shall be examined in this study, as well the general legal and governmental philosophy which inspired Shang Yang's reform program. As shall be seen, Shang Yang advocated a system of strong centralized rule and the promulgation of written laws that would be known among the general population, which included a system of strict punishments to be applied equally to all. Additionally, he implemented reforms that favoured agriculture at the expense of commerce.

This study particularly draws on the *Book of Lord Shang* 商君書, the earliest surviving and foundational text of the Legalist school whose authorship is attributed to Shang Yang[7]. It has been noted that very few studies on the *Book of Lord Shang* have been done in European languages, and indeed, the only complete English translation of the book was made by Jan J.L Duyvendak in 1928[8]. Thus, it is hoped that the present work may contribute to increasing knowledge of this vital part of the Chinese legal and governmental history. Indeed, this is a topic that goes beyond the interest of just antiquarians; the issue of Legalist and Confucian thinking, and their respective places in Chinese society, are still being debated even today in modern China.[9] As a result, an accurate study and assessment of the past may furnish insights and instruction for issues being faced today. Such a study is also of interest more broadly, offering insights into the nature of law generally, its origins, uses, and purpose.

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[1] Xin Ren: Tradition of the Law and the Law of the Tradition: Law, State, and Social Control in China, Greenwood Press, Conneticut, 1997, 19.

[2] T'ung-Tsu Chu: Law and Society in Traditional China, Mouton, Paris, 1961, 226.

[3] Yongping Liu:, Origins of Chinese Law: Penal and Administrative Law in its Early Development, Oxford University Press, Oxford, 1998, 173.

[4] Zhengyuan Fu: Autocratic Tradition and Chinese Politics, Cambridge, Cambridge University Press, 1993 30.

[5] Ren op. cit. 19.

[6] Herrlee G. Creel: Chinese Though from Confucius to Mao Tse-tung, 1953, 141.

[7] There is scholarly debate about the actual authorship of this book; however, the work is accepted by most scholars as containing the basic ideas of Shang Yang's thinking (see Liu op. cit. 175) and as containing parts composed either by himself or his immediate followers, and thus the work has been described as expressing his "intellectual current" (see Yuri Pines: Legalism in Chinese Philosophy. In Edward N. Zalta (ed.): The Stanford Encyclopedia of Philosophy, Winter 2014 edition, https://plato.stanford.edu/archives/win2014/entries/chinese-legalism/) and so, the work shall be used as if expressing his thoughts and opinions.

[8] Yuri Pines and Carine Defoort: Chinese Academic Views on Shang Yang Since the Open-Up-and-Reform Era, Contemporary Chinese Thought, Vol. 47, No. 2, 2016, 59.

[9] See, for example, Ren op. cit. 32.

2. Shang Yang's Background and Philosophy

Shang Yang, who lived during the fourth century B.C., had originally served as an official in the state of Wei 魏.[10] We are told that "In his youth, he was fond of the study of criminal law."[11] He had heard that Duke Xiao of Qin 秦孝公 was seeking capable men to help him strengthen his state and increase his military power[12]. Shang Yang went to Qin, and soon found favour with the duke[13], eventually being appointed to the office of Minister in 357 B.C.[14] As a result of the work that he undertook in Qin, Shang Yang has come to be intimately connected with the rise of the Qin state in the Chinese political landscape[15].

The Zhou dynasty 周朝, which nominally ruled China at the time of Shang Yang, had established itself in 1122 B.C.[16] The nature of Zhou rule in China was essentially feudal, with various vassals and lords being nominally under the jurisdiction of the Zhou king; in time, especially during the Eastern Zhou period (771-249 B.C), these vassals came to gain a great deal of independence in their respective regions, even coming to challenge the authority of the Zhou king, which eventually led to a decline in the strength of the central authority.[17] This led to the Warring States period, which has been described as a 'war against all' amongst the various strong states of China, who sought to spread their influence and territory at the expense of one another.[18] One of these was the state of Qin, located in China's West[19].

In order to properly comprehend the significance and meaning of Shang Yang's Legalist philosophy and his criminal law reforms, it is important to understand something of the traditional values that underlined the political and social structure of Zhou China. It was during the Zhou period that various important developments in Chinese civilisation took place; this included the development of the feudal system, and the various beliefs and customs that were connected to this system[20]. One of the most important concepts that developed during this period was that of *li* 禮[21]. *Li*, which was believed to be the most important factor in governing society, was a body of approved behaviour patterns governing the interaction between individuals in society[22]. It can be said to have captured the spirit of the feudal era, containing within it the relational and hierarchic quality that existed within the political and social structure of feudal China under the Zhou dynasty[23].

Central to the concept of *li* was social interaction and relationships; these rules governing relations between members of society were strongly connected to one's social status, and varied according to the status of the individual and the specific dynamics and nature of the relationship[24]. In addition to this, family relationships were considered to be the foundation of human society[25]; Confucius 孔子 himself had said, 'When a gentleman feels profound affection for his parents, the common people will be stirred to benevolence. When he does not forget friends of long standing, the common people will not shirk their obligations to other people[26].'

The Zhou king was bound to uphold the traditional *li*, with all its rules of proprietary and right behaviour, having to maintain and honour the immemorial customs that had been handed down from ancient times[27]. The empire was to be ruled by natural law, which was a standard held to be sufficient for all public and private activity; moral virtue, which was considered to be inherent within man, was supposed to be the ultimate basis of conduct in every aspect of society[28]. This social and political system, led by the king, the Son of Heaven, was bound to follow the law of Heaven[29]. Confucian thought always emphasised the importance of *li* and considered it to be the primary regulations or 'rules' in governing a society[30]. Confucius had said, 'For giving security to superiors and good government of the people, there is nothing

[10] Creel op. cit. 141.
[11] The Biography of the Lord of Shang in the Shih-Chi. In: The Book of Lord Shang: A Classic of The Chinese School of Law, Arthur Probsthain, London, 1928 8.
[12] Creel op. cit. 142.
[13] Ibid.
[14] Liu op. cit. 175.
[15] J.J.L Duyvendak, Introduction. In: The Book of Lord Shang: A Classic of The Chinese School of Law, Arthur Probsthain, London, 1928, 1.
[16] Fu op. cit. 17.
[17] Ibid 17-18.
[18] Ibid 18.
[19] Robin D. S Yates: The Rise of Qin and the Military Conquest of the Warring States. In Jane Portal (ed.), The First Emperor: China's Terracota Army, London, British Museum Press, 2007, 30.
[20] N. & V. Rajendra - C. Lower: A History of Asia, Melbourne, Longman Cheshire, 1992, 121.
[21] Roberto Mangabeira Unger: Law in Modern Society: Toward a Criticism of Social Theory, Free Press, 1976 93.
[22] Chu op. cit. 230-1.
[23] Unger op. cit. 93.
[24] Chu op. cit. 231.
[25] Ibid 244.
[26] Confucius: The Analects, trans. D.C. Lau, Penguin Classics, London, 1979, Book VIII:2 92.
[27] J.J.L Duyvendak op. cit. 77.
[28] Ibid 78.
[29] Ibid 78.
[30] Chu op. cit. 239-40.

more excellent than the rules of propriety [*li*] [31].' Shu-hsiang said '[*Li*] are the King's great canons[32].'

These abovementioned beliefs differ markedly from Shang Yang's legal philosophy. In order to properly understand the basic tenets of his beliefs, and the reforms that he subsequently implemented in the Qin state, his concept of the origin and nature of law must be examined. The Legalist school that Shang Yang belonged to can be said to have come into being during the time of the Spring and Autumn period, and coincided with the development of ideas that sought to elevate the position of the ruler[33]. Its central tenets began to develop more fully, however, during the Warring States period, which spanned the fourth and third centuries B.C[34]. One of these was the idea that the ruler should centralise all state power in his own hands, create written codes of law with which to govern the country *fa* 法, and rule the population through a bureaucratic system of government, making use of various officials in the handling of affairs[35].

The actual practice and development of Legalism took place mainly in the state of Qin, which was situated on the western frontier of Chinese civilisation[36]. It would appear from a survey of the history of the Qin state that it was an area conductive to the development of Legalist thinking and reform[37]. For example, in 513 B.C. tripods bearing various penal regulations were cast in Qin, which shows that by the Spring and Autumn periods the practice of relying on written laws had already come to exist in Qin[38]. It must also be said that the Qin state, due to its frontier location, had never been as saturated with Chou feudal customs as other parts of Qin[39]. For example the Confucian scholar Hsun Tzu said that Qin 'were less observant of the proper conduct between father and son and husband and wife than were the people of certain other parts of China, because they failed to follow the traditional rules of etiquette and the proper relationships[40].'

In order to understand properly the basic tenets of Lord Shang's philosophy, and as a result, the reforms that were subsequently implemented according to the spirit of his thinking, his concept of the origin of law must be examined, for it could be said to form the root from which all his other concepts grow.

In the *Book of Lord Shang*, Shang Yang states that:

Of old, in the times of the Great and Illustrious Ruler, people found their livelihood by cutting trees and slaying animals; the population was sparse and trees and animals numerous ... In the times of Shen-nung, men ploughed to obtain food, and men wove to obtain food, and women wove to obtain clothing. Without the application of punishments or governmental measures, order prevailed; ... After Shen-nung had died, the weak were conquered by force and the few oppressed the many. Therefore Huang-ti created the ideas of prince and minister, of superior and inferior, the rites between father and son, ... At home he applied sword and saw, and abroad he used mailed soldiers; this was because the times had changed ... Shen-nung is not higher than Huang-ti, but the reason that his name was honoured was because he suited his time.[41]

Here we see that Shang Yang held that during an earlier period of time society functioned without the need for any serious administrative measures; it could be said that society functioned almost naturally, without the need for complex laws. Yet in time, as society developed, and oppression increased, the need finally arose for a more interventionist form of government.

In one instance, when Duke Xiao was discussing policy with his three Great Officers, Kan Lung had warned the Duke against changing the law and customs of the Qin state, saying that 'I am afraid that the empire will criticise Your Highness and I wish that You would reflect maturity[42].' In response to this, Shang Yang said 'a wise man creates laws, but a foolish man is controlled by them; a man of talent reforms rites, but a worthless man is enslaved by them[43].' During this same audience, Tu Chih had said 'I have heard it said, that in taking antiquity as an example, one makes no mistakes, and in following established rites one commits no offence. Let Your Highness aim at that[44].' In response, Shang Yang stated that:

Former generations did not follow the same doctrines, so what antiquity should one imitate ... Wen-wang and Wu-wang both established laws in accordance with what was opportune and regulated laws in accordance with what was opportune and

[31] Confucius, The Li Ki. In James Legge: The Texts of Confucianism, V, Clarendon Press, Oxford, 1885, 258, quoted in Ch'u op. cit. 239.
[32] Shu-hsiang: The Ch'un Ts'ew with the Tso Chuen. In James Legge (ed.): The Chinese Classics, V, Pt. II , Hong Kong, 1872, 660, quoted in Ch'u op. cit. 239.
[33] Kung-chuan Hsiao: A History of Chinese Political Thought: From the Beginnings to the Sixth Century A.D., Vol. I, Princeton University Press, 376.
[34] Liu op. cit. 173.
[35] Ibid.
[36] Creel op. cit. 138.
[37] Hsiao op. cit. 45.
[38] Ibid.
[39] Hucker op. cit. 41.
[40] Quoted in Leonard Cottrell: The Tiger of Ch'in: The Dramatic Emergence of China as a Nation, Rinehart and Winston, Holt, 1962, 116.
[41] Shang Yang: Translation of the Book of Lord Shang, trans. J.J. L Duyvendak, Arthur Probsthain, London, 1928, 284-5.
[42] Ibid 170.
[43] Ibid 171.
[44] Ibid 172.

regulated rites according to practical requirements … There is more than one way to govern the world and there is no necessity to imitate antiquity, in order to take appropriate measures for the state.[45]

Shang Yang clearly challenges the traditional Zhou notions with regard to custom and historical precedent, expounding a doctrine that would free a ruler from what some might be seen as the 'shackles of the past', giving them the ability to respond to the needs of the times.

As to Shang Yang's attitude with regards to the importance of written law and the administration of a society, he said 'Law is the authoritative force of the people, and the key to governing … Rule by law is fundamental to governing[46].' Elsewhere he said:

Of old, the one who could regulate the empire was he, who regarded as his first task the regulating of his own people … For the way, in which the conquering of the people is based upon the regulating of the people, is like the effect of smelting in regard to metal or the work of the potter in regard to clay; if the basis is not solid, then people are like flying birds or like animals. Who can regulate these? The basis of the people is the law. Therefore, a good ruler obstructed the people by the means of the law, and so his reputation and his territory flourished[47].

Here, Shang Yang's attitude differs from more feudal and Confucian notions of the importance of rule by certain moral standards that one exemplifies; instead, the ruler's authority is based upon the enforcement of regulations within a community. This idea of the ruler's authority being based on his power to create and enforce law must be borne in mind when looking at the reforms Shang Yang implemented in the Qin state.

3. Shang Yang and Criminal Law in Qin

Shang Yang implemented a range of reforms in Qin, which were known as a 'change of law' (*bianfa)* [48]. This process essentially aimed at increasing the power of the state, which involved the weakening of the feudal structure[49]. Shang Yang was aided in this endeavor by the *Fa Jing* ("Canon of Laws") 法經[50], which was a legal code put together around 400 B.C by Li Kui, which was made up of six parts[51].

An area that Shang Yang paid special attention to was criminal law, particularly the system of punishments. Shang Yang said that "nothing is more basic than for putting an end to crimes than the imposition of heavy penalties". Shang Yang espoused what appears to have been a novel concept at the time, which was that in the course of a criminal procedure, there was to be no distinction on the application of the law based upon social position[52]. He stated that:

What I mean by the unification of punishments is that punishments should know no degree or grade, but that from ministers of state and generals down to great officers and ordinary folk, whosoever does not obey the king's commands, violates the interdicts of the state, or rebels against statutes fixed by the ruler, should be guilty and not be pardoned. Merit acquired in the past should not cause a decrease in the punishment for demerit later, … If loyal ministers and filial sons do wrong, they should be judged according to the full measure of their guilt[53].

This is a concept very different from traditional feudal Chinese concepts, which considered such things as family relationship, individual merit, friendship, and social status in relation to the administration of justice and the way in which crimes were dealt with.[54] In fact, there had been a Confucian idea that "rules of ceremony do not go down to the common people. The penal statutes do not go up to great officers."[55] One of the aims of this equal application of the law to all levels of society was to maintain the general population's trust in the system of rule[56].

Shang Yang also believed that the laws should be understood and known by the entire population. One measure that was taken in order to achieve this was the placing of laws in prominent places on pillars in order to make them known amongst the whole population[57]. He is cited in the *Book of Lord Shang* as making the following statement:

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[45] Ibid 172-3.

[46] Shang Jun Shu, quoted in Ren op. cit. 20.

[47] Shang Yang op. cit. 285-6.

[48] Fu op. cit., 40. It should be noted that as far as the author is aware, there are no real primary examples of actual, preserved legal statutes implemented by Lord Shang; knowledge of Shang Yang's legal reforms come from various historical accounts instead, and these shall be relied upon, either directly or indirectly.

[49] Ibid 22.

[50] Attila Kormany: „To Enter a Court is to Enter a Tiger's Mouth" The Role of Law in China, 50 Annales U. Sci. Budapestinensis Rolando Eotvos Nominatae, 349 (2009), 359.

[51] Jinfan Zhang: The Tradition and Modern Transition of Chinese Law, Springer, Berlin Heidelberg 2014, 271.

[52] A.F. P Hulsewé: Remnants of Ch'in Law: An Annotated Translation of the Ch'in Legal and administrative rules of the 3rd century B.C. discovered in Yün-meng Prefecture, Hu-pei Province, in 1975, E.J. Brill, Leiden, 1985, 7.

[53] Ibid 278-9.

[54] Hsiao op. cit. 402.

[55] The Book of Rites (Li Ji): English-Chinese Version, trans. by James Legge, Intercultural Press, Washington, Intercultural Press, 2013, par. 68, quoted in Christine Abigail L. Tan: The Cultured Man as the Noble Man: *Jun zi* as a Man of *Li* in *Lun yu*, Kritike, 2015/9/2, 186.

[56] Gray L. Dorsey: Jurisculture: China, Transaction Publishers, New Brunswick and London, 1993, 129. However, this must be qualified by what appears to have been the fact that hierarchy still played a role in the handing down of punishments, with those of aristocratic rank receiving lighter punishments than commoners. See Hulsewé op. cit. 50.

[57] Dorsey op. cit. 127.

For, indeed, one should not make laws so that only the intelligent can understand them, for the people are not all intelligent ; and one should not make laws so that only the men of talent can understand them, for the people are not all talented. Therefore did the sages, in creating laws, make them clear and easy to understand, and the terminology correct , so that stupid and wise without exception could understand them ; and by setting up law officers, and officers presiding over the law, to be authoritative in the empire, prevented the people from falling into dangerous pitfalls[58].

Another reform that can be seen as a manifestation of Shang Yang's philosophy is the harshness of punishments that he developed in Qin; in fact, it can be said such strictness was his avowed policy in implementing his legal program[59]. It was believed that by threatening harsh punishment, the state could increase its exercise of power.[60] He is quoted as saying that:

In applying punishments, light offenses should be punished heavily; if light offenses do not appear, heavy offenses will not come. This is said to be abolishing penalties by means of penalties, and if penalties are abolished, affairs will succeed. If crimes are serious and penalties light, penalties will appear and trouble will arise. This is said to be bring about penalties by means of penalties, and such a state will surely be dismembered[61].

One striking example of the operation of the criminal law regime instituted by Shang Yang is the case when the Crown Prince of Qin broke the law, and Shang Yang required that the infringement be punished; as the heir to the Qin throne could not be subject to such action, his tutor was punished and his teacher branded instead.[62] We are told that after the Crown Prince's tutor and teacher were punished harshly on their master's behalf, and that, subsequently, the population of Qin 'hastened into (the path of) the law[63].'

An area of importance that Shang Yang legislated for was in the area of family relations, which was also affected by his program of criminal law reform. He implemented a system that involved the organisation of the population into groups of ten and five families[64]. This form of organisation was known as the *shiwu* system; the reason why this form of familial organisation was put into placed by Shang Yang in Qin was in order to allow the state to increase its ability to manage what was at the time a relatively mobile population[65]. A particular component of the *shiwu* system was the principle of mutual responsibility[66], which involved the denunciation of crime and joint responsibility in the case of offences[67]. Those who were members of the group of five or ten families would end up sharing in the responsibility for the crime of another member of the family unit[68]. Part of this involved a system of denunciation;[69] one was subject to punishment if the individual failed to denounce the crimes of a member of a fellow *shiwu*[70]. Shang Yang's purpose in instituting these reforms was in order to prevent the growth of powerful units in society that may have resisted the expansion of state power[71]. As to the success of the *shiwu* system implemented by Shang Yang, Han Fei 韓非 wrote that 'the sovereign thereby became glorious and secure and the state thereby became rich and strong[72].'

4. Economic Reforms

One important area in which Shang Yang implemented legal reforms was in the economic sphere[73]. The major thrust of these reforms that private industry and commerce should be strictly controlled and regulated by the state, which he saw as being of lesser importance than agriculture, which was understood as being absolutely fundamental and of the highest importance to the state[74].

One of Shang Yang's most significant reforms was his completely abolishing the *ching* system, which was then replaced by a system of individual property[75]. According to the former system, peasants were bound

[58] Shang Yang op. cit. 334.
[59] Derk Bodde: China's First Unifier: A Study of the Ch'in Dynasty as seen in the Life of Li Ssu, 280?-208 B.C., Hong Kong University Press, Hong Kong, 1967, 167-8.
[60] Creel op. cit. 136.
[61] Shang Yang op. cit. 203.
[62] The Biography of the Lord of Shang in the Shih-Chi, op. cit. 16.
[63] Ibid 16.
[64] Han Fei Tzu: Eight Villainies. In: The Complete Works of Han Fei Tzu: A Classic of Chinese Political Science, Vol. I , W.K. Liao, Arthur Probsthain, 1939, 115.
[65] Liu op. cit. 187.
[66] Han Fei Tzu: On Assumers. In: The Complete Works of Han Fei Tzu, Vol II, trans. W.K. Liao, Arthur Probsthain, London, 1939, 213.
[67] Han Fei Tzu: Eight Villanies, op. cit. , 115.
[68] Han Fei Tzu: On Assumers, op. cit. 187.
[69] Ibid.
[70] Liu op. cit. 188.
[71] Brian E. McKnight: Law and Order in Sung China, Cambridge, Cambridge University Press, 1992, 123.
[72] Han Fei Tzu, Eight Villanies, op. cit. 115.
[73] Bodde op. cit. 170.
[74] Li Yuyie: Legalism emphasized role in agriculture, military, Chinese Social Sciences Today, 2 February 2016, http://www.csstoday.com/Item/3128.aspx.
[75] Duyvendak op. cit. 44.

to the land of their overlords as virtual chattels[76]. Lord Shang's likely purpose in implementing this reform was to break up the feudal system that existed in the area of land ownership[77]. He also probably had the desire to attract settlers from neighbouring states with the prospect of becoming free landholders[78].

Shang Yang also implemented reforms that aimed at repressing commerce in favour of the development of agriculture[79]. Agriculture was seen as something absolutely fundamental and the ultimate source of the state's wealth, while commerce was seen as being somewhat unproductive[80]; he said 'the means, whereby a country is made prosperous, are agriculture and war[81]', and 'Insignificant individuals will occupy themselves with trade and will practise arts and crafts, all in order to avoid agriculture and war, thus preparing a dangerous condition for the state …such a country will be dismembered[82].'

Shang Yang said in regard to the focus on agriculture that by limiting the people's skills and opportunities by prohibiting certain kinds of activity, the population's capacity would be limited; in addition to this, he believed that by focusing on farming, the people would remain 'simple', being content with where they are, and would not have a desire to leave the territory[83]. During Shang Yang's time, the Qin state had a vast territory, but a sparse population[84]. As the human resource was the main factor in agriculture, it was necessary for the aims Shang Yang and the power of the Qin state that the population be kept within the territory of the state[85].

Another area in which Shang Yang ventured into with regards to family organisation was taxation; a family that had two or more males had to pay double taxes[86]. The reason for this was once again related to extending state influence; this taxation policy would prevent the creation of strong family units that had caused difficulties for the authorities during the Spring and Autumn period; it also allowed for the development of more independent units of production so that the population would increase at a faster rate, which in turn would lead the cultivation of wasteland into productive farmland[87].

From the words and actions of Shang Yang in relation to agriculture and trade, several aspects of his philosophy can be seen. First, law is used in order to strengthen the state. Laws implemented in this instance are practical and utilitarian, and he felt free to discard older systems that seem to inhibit the prosperity of the state. His reason for encouraging agriculture and discouraging or controlling trade was because he believed it would strengthen Qin, while commerce was not seen as having the same utility. So, in this instance we see Shang Yang bringing about legal reforms primarily with reference to state power and with a utilitarian eye.

Due to his various reforms, Shang Yang had made many enemies among members of the aristocracy, and after the death of Duke Xiao and his son Huiwen 秦惠文王 ascending to the throne, he was accused of plotting against Qin's new sovereign[88]. So effective had his reforms been that when he fled as a result of the accusations against him, he was unable to find accommodation as no innkeeper dared to receive a traveller not in possession of an internal passport, a law that had been established by Shang Yang himself.[89] Duke Huiwen had his body torn to pieces by chariots,[90] a penalty which Shang Yang had instituted[91].

5. Conclusion

After Shang Yang's death his ideas continued to be influential, with his system of criminal law continuing to form the basis of the Qin penal code[92]. Most importantly, his reform program led to the strengthening of the Qin state, which aided Qin Duke Ying Zhen 嬴政 in defeating the rival states in China, and in 221 B.C proclaiming himself as the 'First Emperor' or *Qin Shi Huang* 秦始皇, thus establishing a unified Chinese empire for the first time in history[93]. Later, the Han dynasty 漢朝, upon its ascension to China's imperial throne, continued to take Shang Yang's code as the basis of its own system of criminal

[76] Bodde op. cit. 170.
[77] Ibid.
[78] Ibid 52.
[79] Bodde, op. cit. 171.
[80] Ibid.
[81] Shang Yang op. cit. 185.
[82] Ibid 186.
[83] Ibid 222.
[84] Liu op. cit. 186.
[85] Ibid.
[86] 'The Biography of the Lord of Shang in the *Shih-chi*' in Duyvendak op. cit. 15.
[87] Liu op. cit. 187.
[88] Zhengyuan Fu: China's Legalists: The Earliest Totalitarians and Their Art of Ruling, M.E Sharpe, London and New York, 1996, 18.
[89] Ibid.
[90] 'The Record of Shang Yang in the *Ch'in-ts'e*'. In Duyvendak op. cit. 32.
[91] Fu op. cit. 18.
[92] Yates op. cit. 30.
[93] Christian D. Von Dehsen, Shang Yang, In: Christian D. Von Dehsen: Lives and Legacies: An Encyclopedia of of People Who Changed the World, Philosophers and Religious Leadesr, Oryx Press, 1999, Phoenix, Yates, 30.

law[94], and which retained the Qin's central administration apparatus in order to aid it in consolidating its rule over the territory that it came to possess[95]. Thus, Shang Yang's worldview and legal and governmental reforms which strengthened the Qin state may be said to have contributed to the ultimate unification of China and the formation of its imperial state tradition. China's ability to assert itself in the international arena as an independent international actor is ultimately rooted in the country's unification in ancient times, which saw disparate and warring kingdoms come together to form a unified state. This event has determined the ultimate destiny of China and to an extent the wider world, and has allowed that country to project itself further afield, from ancient times up until the present day.

The chaotic Warring States period of ancient Chinese history in which Shang Yang lived caused him to seek to bring about a higher degree of order to the political and social life of those times[96]. As has been seen, Shang Yang implemented a program of reforms in such areas as criminal law and economic relations in Qin which utilized written law as a primary tool in strengthening the state, with his measures focusing upon the maintenance and strengthening of the ruler's authority. Despite what has been written about the differences in the Legalist and Confucian schools of thought, it can be argued that they ultimately had the same ends in mind, while essentially differing as to the way in which this was to be achieved. As the Chinese scholar Zeng Zhenyu put it, "There are certain commonalities between Confucius and Shang Yang. They differ just in the means they advocate for the advancement of an ideal society based on morality. For Confucius, the means are ethical education and consequent transformation of the populace. Shang Yang, in distinction, believes that only after reliance on heavy punishments will humans be able to advance on to the new stage of a society ruled by morality[97]." Indeed, there are examples from Chinese history where an actual synthesis between the two took place, a development particularly noteworthy during the Han dynasty period[98]. This is a subject worthy of further research, which reflects the diversity of the intellectual tradition of Chinese civilization, and its ability to utilize and synthesize a myriad of differing currents of thought.

References

- William P. Alford: The Inscrutable Occidental? Implications of Roberto Unger's Uses and Abuses of the Chinese Past, Texas Law Review, 1986/64
- Roger T Ames: The Art of Rulership: A Study of Ancient Chinese Political Thought, State University of New York Press, Albany, 1994
- Derk Bodde: China's First Unifier: A Study of the Ch'in Dynasty as seen in the Life of Li Ssu (280?-208 B.C.), Hong Kong University Press, Hong Kong, 1967
- The Book of Rites (Li Ji): English-Chinese Version, trans. by James Legge, Intercultural Press, Washington, Intercultural Press, 2013, quoted in Christine Abigail L. Tan: The Cultured Man as the Noble Man: *Jun zi* as a Man of *Li* in *Lun yu*, Kritike, 2015/9/2
- Confucius: The Analects, trans. D.C Lau, Penguin Classics, London, 1979
- Confucius, The Li Ki. In James Legge: The Texts of Confucianism, V, Clarendon Press, Oxford, 1885
- Leonard Cottrell: The Tiger of Ch'in: The Dramatic Emergence of China as a Nation, Rinehart and Winston, Holt, 1962
- Herrlee G. Creel: Chinese Though from Confucius to Mao Tse-tung, 1953
- Tung-Tsu Chu: Law and Society in Traditional China, Mouton, Paris, 1961
- Gray L. Dorsey: Jurisculture: China, Transaction Publishers, New Brunswick and London, 1993
- J.J.L Duyvendak, Introduction. In: The Book of Lord Shang: A Classic of The Chinese School of Law, Arthur Probsthain, London, 1928
- Zhengyuan Fu: Autocratic Tradition and Chinese Politics, Cambridge, Cambridge University Press, 1993
- Zhengyuan Fu: China's Legalists: The Earliest Totalitarians and Their Art of Ruling, M.E Sharpe, London and New York, 1996
- Han Fei Tzu: Eight Villainies. In: The Complete Works of Han Fei Tzu: A Classic of Chinese Political Science, Vol. I, trans. W.K. Liao, Arthur Probsthain, 1939
- Han Fei Tzu: On Assumers. In: The Complete Works of Han Fei Tzu, Vol II, trans. W.K. Liao, Arthur Probsthain, London, 1939
- Kung-chuan Hsiao: A History of Chinese Political Thought: From the Beginnings to the Sixth Century A.D., Vol. I, Princeton University Press

[94] Roger T Ames: The Art of Rulership: A Study of Ancient Chinese Political Thought, State University of New York Press, Albany, 1994, 109.

[95] Wei Wu: Cultural Relativism and Universal Fair Interrogation Standards in Europe and China. In Marc Cools, et. al (eds.): European Criminal Justice and Policy, Maklu, Antwerpen, Apeldoorn, Portland, 2012, 155

[96] William P. Alford: The Inscrutable Occidental? Implications of Roberto Unger's Uses and Abuses of the Chinese Past, Texas Law Review, 1986/64, 9.

[97] Quoted in Yuri Pines and Carine Defoort: Chinese Academic Views on Shang Yang Since the Open-Up-and-Reform Era, Contemporary Chinese Thought, 2016/47/2, https://www.tandfonline.com/doi/full/10.1080/10971467.2016.1227112.

[98] Derk Bodde and Clarence Morris: Law in Imperial China: Exemplified by 190 Ch'ing Dynasty Cases with Historical, Social, and Juridical Commentaries, Harvard University Press, Cambridge, 1967, 27-8.

- A.F. P Hulsewé: Remnants of Ch'in Law: An Annotated Translation of the Ch'in Legal and administrative rules of the 3rd century B.C. discovered in Yün-meng Prefecture, Hu-pei Province, in 1975, E.J. Brill, Leiden, 1985
- Attila Kormany: „To Enter a Court is to Enter a Tiger's Mouth" The Role of Law in China, 50 Annales U. Sci. Budapestinensis Rolando Eotvos Nominatae, 349 (2009);
- Yongping Liu:, Origins of Chinese Law: Penal and Administrative Law in its Early Development, Oxford University Press, Oxford, 1998;
- Brian E. McKnight: Law and Order in Sung China, Cambridge, Cambridge University Press, 1992;
- Yuri Pines: Legalism in Chinese Philosophy. In Edward N. Zalta (ed.): The Stanford Encyclopedia of Philosophy, Winter 2014 edition, https://plato.stanford.edu/archives/win2014/entries/chinese-legalism/;
- Yuri Pines and Carine Defoort: Chinese Academic Views on Shang Yang Since the Open-Up-and-Reform Era, Contemporary Chinese Thought, 2016/47/2, https://www.tandfonline.com/doi/full/10.1080/10971467.2016.1227112;
- N. & V. Rajendra - C. Lower: A History of Asia, Melbourne, Longman Cheshire, 1992;
- Xin Ren: Tradition of the Law and the Law of the Tradition: Law, State, and Social Control in China, Greenwood Press, Conneticut, 1997;
- Roberto Mangabeira Unger: Law in Modern Society: Toward a Criticism of Social Theory, Free Press, 1976;
- Robin D. S Yates: The Rise of Qin and the Military Conquest of the Warring States. In Jane Portal (ed.), The First Emperor: China's Terracota Army, London, British Museum Press, 2007;
- Li Yuyie: Legalism emphasized role in agriculture, military, Chinese Social Sciences Today, 2 February 2016, http://www.csstoday.com/Item/3128.aspx;
- Shang Yang: Translation of the Book of Lord Shang, trans. J.J. L Duyvendak, Arthur Probsthain, London, 1928;
- Shu-hsiang: The Ch'un Ts'ew with the Tso Chuen. In James Legge (ed.): The Chinese Classics, V, Pt. II, Hong Kong, 1872;
- Christian D. Von Dehsen, Shang Yang, In: Christian D. Von Dehsen: Lives and Legacies: An Encyclopedia of of People Who Changed the World, Philosophers and Religious Leaders, Oryx Press, 1999, Phoenix, Yates;
- Wei Wu: Cultural Relativism and Universal Fair Interrogation Standards in Europe and China. In Marc Cools, et. al (eds.): European Criminal Justice and Policy, Maklu, Antwerpen, Apeldoorn, Portland, 2012;
- Jinfan Zhang: The Tradition and Modern Transition of Chinese Law, Springer, Berlin Heidelberg 2014.

THE DECIMATION OF THE INTRA EU BITS

Beatrice Onica JARKA*

Abstract

The article concentrates on the process which led to the decimation of the intra-EU Bilateral Investment Treaties, due the affirmation of the public policy of European Union which takes precedence over the international obligations arisen for states from Bilateral Investments Treaties (BITs) and other multilateral investment treaties. In a last update on the situation, the Court of Justice of the European Union found on 6th of March 2018 for a first time, by way of providing answers to a preliminary question addressed by German Federal Court of Justice, that the arbitration clause in intra EU BITs is incompatible with the European Law as it provides a mechanism for settling investment disputes which is not capable of ensuring the proper application and full effectiveness of EU law, having an adverse effect on the autonomy of EU law.

The effects of the Court of Justice of the European Union decision on 6th of March 2018 are going to be various at national, european and international level from the transformation of the still existing intra EU BITs or multilateral investments treaties, in useless international instruments to changing entirely the investment law system of guarantees and perhaps to engaging the state or EU responsibility for internationally wrongful acts.

Keywords: *Intra – EU BITs, arbitration clause, EU law, investor –state dispute.*

1. Introduction

The story of the intra EU BITS reached on March 6, 2018, its climax. By the judgment in Slovak Republic v. Achmea BV[1], the Court of Justice of the European Union (EU) found that investor-State arbitration under the Bilateral Investment Treaty between the Netherlands and Slovakia is incompatible with EU law.

Bilateral Investment Treaties (BITs) are agreements which extablish the terms and conditions for private investment by nationals and companies of one state in another state.

BITs insure for the investments made by an investor of one Contracting State in the territory of another Contracting State several guarantees referring *inter alia* to fair and equitable treatment, the most favoured nation principle, the national treatment principle, direct or indirect compensation in the event of expropriation.

The specificity of many BITs is that such legal instruments provide for an alternative dispute resolution mechanism, under which an investor whose rights under the BIT have been violated could recourse directly to international arbitration, either under the auspices of the ICSID (International Center for the Settlement of Investment Disputes[2]), or under other international treaties, instead of suing the host State in its own courts. Such process is known as the Investor State Dispute Settlement (ISDS).

The first BIT ever signed was between Pakistan and Germany in 1959[3]. Since then, more than 2000 BITs had been signed, many of them between the EU countries, out of which most of them, at least for one party, before such countries become EU members. For a long time, BITs and the alternative dispute resolution system provided under BITs functioned quite well. ICSID and other arbitration institutions dealing with investor states settlement have been succesfull in passing enforceable awards subject to the limited review of the national tribunals of enforcement and cancelation under New York 1958 Convention.

The growing number of investor state disputes based on BITs between member states had trigger EU attention and reaction which finally materialised in declaring by the Court of Justice of EU of the incompatibility of BITs with the EU law. The position of EU institutions has passed through several phasis with the reach of such strong final outcome, which, as

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[1] The judgement of the European Court of Justice in case C-284/16, dated March 6, 2018, makes reference to a request for a preliminary ruling regarding a Bilateral investment treaty concluded in 1991 between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic and still applicable between the Kingdom of the Netherlands and the Slovak Republic and its provision enabling an investor from one Contracting Party to bring proceedings before an arbitral tribunal in the event of a dispute with the other Contracting Party and the Compatibility with Articles 18, 267 and 344 TFEU — Concept of 'court or tribunal' — Autonomy of EU law. Information are available at: doclang=EN&mode=req&dir=&occ=first&part=1&cid=404057.

[2] ICSID is the International Center for Settlement of Investment Disputes established under ICSID Convention, entered into force on October 1966, and which has been ratifed by 153 Contracting States, in 2018. More information about ICSID could be found at https://icsid.worldbank.org.

[3] The Treaty for the Promotion and Protection of Investments Germany and Pakistan was adopted on 25 November 1959, 457 U.N.T.S. 24 and entered into force on 28 November 1962.This document is available on the United Nations Treaty Collection website at: http://treaties.un.org/Pages/showDetails.aspx?objid=0800000280132bef

we shall demonstrate is consolidating the European public policy within the autonomy of the EU law and establishes an imposed supremacy of the EU law over the international obligations predating EU law.

This paper shall consider, the rise of the ISDS disputes under intra EU BITs, the evolution of the EU institutions positions on the matter and finnaly the effect of the EU Court of Justice procedures at least on the intra – EU BITs and perhaps on the entire existing system of ISDS.

2. Content

2.1. Short history of Intra EU –BITs

In the 1990s, most EU Member States from Western Europe countries signed BITs with Central and Eastern European nations. Among these contries were the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia, Romania and Bulgaria.

While the 12 new Central and European states became EU members the BITs between them and EU countries became BITs between EU Member States, or intra-EU BITs.

The specific of the situation in the new EU member states, as newly democracy and free economies, led to the conclusions of privatisations agreements with investors which contained advantages or state subsidies of significant proportions for such investors in order to be attracted to invest in these regions. Joining the EU implied also that these agreements needed to comply with EU law, which most of them did not, as they were failing sometimes to comply with EU state aid policy. This led to a series of withdrawals of such advantages finally, ending in investor state dispute settlementsunder the arbitration clause provided by BITs.

Until 2014, based on the UNCTAD data, which was considered in an European Commission report on Investor-to-State Dispute Settlement.[4], there has been a total of 608 known ISDS claims (out of which 356 cases were concluded). Investors from the EU Member State are the largest users of ISDS. In the same report[5], it appears that cases brought by investors from the European Union were in total 327, thus accounting for more than 50 % of ISDS cases initiated and that investors from almost all EU Member States have brought ISDS cases (except Estonia, Slovakia, Romania, Bulgaria, Malta and Ireland). Combined, investors from the Netherlands, the UK, Germany, France, Spain and Italy have launched all together 236 cases, representing 72 % of all EU based[6].

2.2. Raise of the EU position

In its 2006 report[7] to the Council of European Union, the Economic and Finance Committee (EFC) takes note that there were currently around 150 Bilateral Investment Treaties (BIT) still in force between the EU Member States (200, according to EU Commission[8]), while part of their content has been superseded by Community law upon accession. In order to avoid legal uncertainties and unnecessary risks for EU Member States in the unclear situation, Member States (MS) were invited to review the need for such BITs agreements; and inform the Commission about the actions taken in this context so that progress can be reviewed by the EFC by the end of 2007.

In 2015, The Directorate General for Internal Policies remarks in its Study for the Juri Committee titled Legal Instruments and Practice of Arbitration in the EU[9] that the underlying problem of intra-EU BITs is the relationship between public international law (and, in particular, international investment law) on one hand and EU law on the other hand. According to the same report[10], investment deals, to a great extent, with subject matters, which are also covered by the EU law, such as the free movement of capitals. The Directorate General for Internal Policies further concludes that investment law and EU law potentially enter into conflict and the existence of intra-EU BITs could amount, from the point of view of EU law, to discrimination between EU citizens and therefore run contrary to Article 18 TFEU, as they afford foreign investors standards of protection which are not necessarily the same as the ones included in EU law.

2.3. Sketching of the EU position in regards of the arbitral awards based on intra – EU BITS

Although the position of the EU institutions was general, there were two cases in particular in which enforcement of arbitral awards grounded on BITs infringements was at stake, and the Commission and recently the European Court of Justice by the decision dated March 6, 2018, took a clear stand on the incompatibility of intra EU BITs with EU law.

These cases were: *Micula v. Romania*[11] (based on a BIT between Sweden and Romania) and *Achmea v.*

[4] The report of the European Comission on facts and figures on Investor –to – State Dispute Settlement is available at http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153046.pdf,

[5] Ibidem.

[6] Ibidem.

[7] The 2006 report of the Economic and Financial Committee to the Commission and the Council on the Movement of Capital and the Freedom of Payments is available at http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%205044%202007%20INIT

[8] ibid, infra note iv.

[9] Legal instruments and practice in the EU – Study for the Committee Jury is available at http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf

[10] Ibidem.

[11] IOAN MICULA, VIOREL MICULA, S.C. EUROPEAN FOOD S.A., S.C. STARMILL S.R.L. AND S.C. MULTIPACK S.R.L. CLAIMANTS v. ROMANIA RESPONDENT ICSID Case No. ARB/05/20, dated 11 December 2013 is avalable at https://www.italaw.com/sites/default/files/case-documents/italaw3036.pdf.

Slovakia[12] (based on a BIT between Netherlands and Slovakia).

2.3.1. Micula v. Romania

In the Micula v. Romania, the issue of the incompatibility of the EU law with BIT arbitration awards had been the EU State aid rules. On this issues the EU Commission ruled on 30 March 2015. The case arose from certain exemptions from Romanian customs duties, enacted before Romania joined the EU. When Romania began accession talks with the EU, the disputed incentives were repealed in order to comply with the EU State aid rules. Such repealment was the source of the dispute that Micula brothers, investors in Romania, brought before an arbitration tribunal under the Romanian-Swedish bilateral investment treaty (BIT). The Commission intervened in the proceedings as *amicus curiae*, pointing out that the disputed incentives breached the state aid rules, and that any reinstatement of those incentives, as a result of the arbitration, would itself also amount to unlawful state aid. Nonetheless, in the Award of 11 December 2013[13], the Arbitral Tribunal found that by revoking the incentives allowed to the Claimants, Romania "violated the Claimants" legitimate expectations with respect to the availability of the such incentives until 1 April 2009. The Arbitral Tribunal further concluded[14] that, with the exception of maintaining the investors' obligations under the existing law after revocation of the relevant incentives, "Romania's repeal of the incentives was a reasonable action in pursuit of a rational policy." However, the Tribunal went on to state[15] that: "[T]his conclusion does not detract from the Tribunal's holding […] above that Romania undermined the Claimants" legitimate expectations with respect to the continued availability of the incentives until 1 April 2009. As a result, Romania's actions, although for the most part appropriately and narrowly tailored in pursuit of a rational policy, were unfair or inequitable agreements.

Following the proceedings initiated in the Romanian Courts for the enforcement of the damages awards in the Romanian courts, the Commission intervened once again[16]. Ignoring the Commission position, the Romanian courts ordered the execution of the arbitration awards, followed by executor actions to seize the accounts of Romania's Ministry of Finance in order to make payment.

While Romania funds were being seized tin the processs of enforcement of the arbitration award, the EU Commission initiated an investigation[17] on the grounds that payment of the damages awarded by the arbitration tribunal appeared to constitute State aid. In its decision dated March 30, 2015[18], the EU Commission confirmed among others that its State aid analysis was not precluded by the fact that the aid arose through the payment of compensation awarded by an arbitral tribunal.

Indeed, the Commission affirmed that "In the case of intra-EU BITs, the Commission takes the view that such agreements are contrary to Union law, incompatible with provisions of the Union Treaties and should therefore be considered invalid." (para 128) Furthermore, the Commision helds: "Where giving effect to an intra-EU treaty by a Member State would frustrate the application of Union law, that Member State must uphold Union law since Union primary law, such as Articles 107 and 108 of the Treaty, takes precedence over that Member State's international obligations." In this sense, the EU Commission found that the payment (however resulted from the forced enforcement) of the compensation awarded by the arbitration tribunal to the Micula brothers and their associated companies amounted to the granting of an incompatible State aid, and the Commission ordered Romania to recover it.

The Micula brothers, and their companies, have appealed the decision to the General Court in Case T-646/14, which ended, according to the request of the applicants lodged at the Court Registry on 2 December 2015 to discontinue proceedings, with the President Order[19] dated February 29, 2016, who ordered the removal of the case from the General Court Register.

In Micula v. Romania arbitral award, the European Commission had its last word in declaring that EU law in state aid is breached by the ICSID award and that in the ierarchy between the Union primary law, such as Articles 107 and 108 of the Treaty, and international obligations, the first takes precedence over that Member State's international obligations.

[12] The final award in PCA Case No. 2008-13 in the matter of an arbitration before a tribunal constituted in accordance with the agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, signed on 29 april 1991, entered into force on 1 october 1992 ("treaty") –and the United Nations Commission on International Trade Law Arbitration Rules ("UNCITRAL Arbitration Rules") -Betweenachmea B.V. (formerly known as "Eureko B.V.") ("Claimant") –and the Slovak Republic ("Respondent," and together with Claimant, the "parties") is available at https://www.italaw.com/sites/default/files/case-documents/italaw3206.pdf

[13] Ibid. infra note 11

[14] Ibidem.

[15] Ibidem.

[16] COMMISSION DECISION (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral award Micula v Romania of 11 December 2013(notified under document C(2015) 2112 available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015D1470

[17] Ibidem.

[18] bidem.

[19]ORDER OF THE PRESIDENTOF THE FOURTH CHAMBER OF THE GENERAL COURT dated 29 February 2016 in Case T – 646/14 is available at: http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130deb00bb5867733494c9075dcf1954e1eb4e34KaxiLc3eQc40LaxqMbN4Pb34Ke0?text=&docid=174864&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=270324

2.3.2. Slovak Republic v. Achmea B.V.

In comparision the Micula v Romania, in the Slovak Republic v. Achmea B.V.[20], EU Court of Justice had finally the chance to deliver its word on the compatibility of the EU law with the intra EU BITs, going to essence of such incompatibility.

The case refers to a dispute between Dutch insurer Achmea B.V. (formerly known as Eureko B.V.) and Slovakia. In 2006, Slovakia partly reversed the previous liberalisation of its health insurance market, and vis-à-vis the Claimants, it prohibited the distribution of profits generated by Achmea's Slovak insurance activities.

In 2008, Achmea brought arbitration proceedings against Slovakia under the BIT on the grounds of violation of substantive treaty standards. The dispute was solved by an ad-hoc arbitral tribunal constituted under the UNCITRAL Rules, seated in Frankfurt[21] , which found in its 2012 award that, Slovakia had violated the existing BIT and ordered it to pay approximately EUR 22.1 million of damages to Achmea.

Slovakia challenged the arbitral award on jurisdiction before the German court[22], arguing that the arbitral tribunal lacked jurisdiction to hear the claims because the arbitration clause embedded in Article 8 of the BIT was incompatible with EU law, especially in relationship with articles 18, 267 and 344 of the Treaty on the Functioning of the European Union (TFEU).

In these proceedings, the Higher Regional Court of Frankfurt decision of 18 December 2014 – Case 26 Sch 3/13[23] rejected Slovakia's arguments, finding that the BIT was not incompatible with the aforementioned provisions of the TFEU. Further, the German Federal Court of Justice decision of 3 March 2016 – Case I ZB 2/15, in hearing the appeal, referred questions on the compatibility with EU law of the BIT's arbitration clause to the Court of Justice of the EU for a preliminary ruling, stating nevertheless that in its view the arbitration clause was not contrary to the provisions of the TFEU.

In its Opinion[24] delivered on 19 September 2017, the Advocate General (AG) of the Court WATHELET concluded in principle that the specific BIT under analysis is not incompatible with EU law and the specific three articles from TFUE. In delivering its opinion, AG noted that for a long time, the argument of the EU institutions, including the Commission, was that BITs were instruments necessary for the accession to the EU and EU actually encouraged the countries of Central and Eastern Europe to sign them. The AG noted that these treaties did not contain any provisions within them that said they ceased to apply once the relevant country joined the EU, which normally if considered *ab initio* incompatible with EU law should have had happened. In addition, all Member States and the EU itself had ratified the Energy Charter Treaty[25] (ECT) which is a multilateral investment treaty and no Member State sought an opinion from the Court of Justice on the compatibility of the ECT with EU law.

By the Decision on 6th of March 2018, the Grand Chamber of Court of Justice of EU found departing from AG opinion and the position taken by the German Courts that the BIT in question is not compatible with EU law. Although the Court analysed the BIT between Austria and Slovakia, the rationale of the Court goes to the essence of the incompatibility between intra - EU BITs and European law.

The main argument used by the Court of Justice of the European Union in its resoning is the principle of autonomy of EU law[26]. According to this principle, EU law is characterised by the fact that it stems from an independent source of law, the EU Treaties, and by its primacy over the law of the EU Member States. Based on this principle, in the opinion of the Court, the EU treaties *"have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally…"*[27] and to the obligations of the EU Member States to insure its uniform and consistent territorial application by mean of the preliminary question as indicated in Article 267 TFEU.

Continuing its line of reasoning, the Court found[28] that the arbitral tribunal constituted under the BIT must rule on the basis of the law in force of the contracting state involved in the dispute as well as other (international) agreements between the contracting parties, which includes EU law and because of this characteristic may be called to use the preliminary question procedures. Nevertheless, the Court considered that the arbitral tribunal constituted under Article 8 of the BIT cannot be regarded as a court or tribunal of a Member State and has no power to make a reference to the Court of Justice of the European Union for a preliminary ruling. Taking notice of the fact that the arbitral award rendered by the tribunal under the BIT is, in principle, final and – by virtue of the applicable procedural law which is determined by the tribunal itself through the choice of the arbitral seat – subject only to limited judicial review by the competent

[20] Ibid. infra note 1

[21] Ibid. infra note 12.

[22] Ibidem.

[23] The Higher Regional Court of Frankfurt decision of 18 December 2014 – Case 26 Sch 3/13 is available at: https://www.italaw.com/sites/default/files/case-documents/italaw7079.pdf

[24] OPINION OF ADVOCATE GENERAL WATHELET delivered on 19 September 2017 (1) Case C-284/16 Slowakische Republik v Achmea BV is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62016CC0284

[25] Ibidem.

[26] Ibid. infra note 1.

[27] Ibidem.

[28] Ibidem.

national courts, the Court concluded that investor-state arbitration derives from a treaty by which MS agree to remove disputes concerning the application or interpretation of EU law from the jurisdiction of their own courts, and hence from the system of judicial remedies which the TFEU requires them to establish on questions of EU law. By this particular kind of agreement included in the BIT, the Netherlands and Slovakia established, in the opinion of the Court, a mechanism for settling investment disputes which is not capable of ensuring the proper application and full effectiveness of EU law. For all the considerations above, the Court concluded[29] concluded that the arbitration clause contained in the said BIT is incompatible with certain key principles of EU law and that it has an adverse effect on the autonomy of EU law.

2.4. Pro- action of EU Commission in decimation of intra-EU BITs.

The European Commission has not been restricted to manifest its poistion in particular cases of arbitral awards grounded on intra-EU BITs., but rather took defintive stand in decimating these bilateral agreement. In 2015, the European Commission has initiated infringement proceedin[30] against five Member States requesting them to terminate intra-EU bilateral investment treaties between them.

While the BITs were thus aimed at strengthening investor protection, for example by means of compensation for expropriation and arbitration procedures for the settlement of investment disputes, since enlargement, such 'extra' reassurances should not be necessary, as all Member States are subject to the same EU rules in the single market, including those on cross-border investments (in particular the freedom of establishment and the free movement of capital). In the opinion of the Commission[31], EU investors also benefit from the same protection due to the EU rules (e.g. non-discrimination on grounds of nationality), while intra-EU BITs confer rights on a bilateral basis to investors from some Member States only, which amounts to discrimination based on nationality which incompatible with EU law.

Such line of reasoning has supported the Commission decision to request five Member States Austria, the Netherlands, Romania, Slovakia and Sweden to bring the intra-EU BITs between them to an end. Due to the fact that most Member States have taken no action, the Commission felt obliged in 2015 to launch the first stage of infringement procedures against the five Member States.

At the same time, the Commission requsted information from and initiating an administrative dialogue with the remaining 21 Member States who still have intra-EU BITs in place and noted with satisfaction that two Member States – Ireland and Italy – have already ended all their intra-EU BITs in 2012 and 2013 respectively.

It is worth noting the position of Jonathan Hill, EU Commissioner for Financial Services, Financial Stability and Capital Markets Union which said: "Intra-EU bilateral investment treaties are outdated and as Italy and Ireland have shown by already terminating their intra-EU BITs, no longer necessary in a single market of 28 Member States. We must all act together to make sure that the regulatory framework for cross-border investment in the single market works effectively. In that context, the Commission is ready to explore the possibility of a mechanism for the quick and efficient mediation of investment disputes."

The infringments procedure were put on hold during the Couurt of Justice of the European Union proceedings in Achmea v. Slovakia.

On 27 February 2017, the Romanian Parliament adopted Law 18/2017 on the termination of Bilateral Investment Treaties concluded between Romania and European Union Member States (Law). The Law has been published in the Official Gazette no. 198 of 21 March 2017 and will enter into force on 24 March 2017. Law 18/2007 approves the mutual and unilateral termination of all the 22 intra-EU BITs concluded by Romania and which are currently still in force.

2.5. EU law taking precedence over the International obligations

Achmea v. Slovakia marks certainly the decimation of the intra EU BITs, although it is only the climax in a long standing of the affirmation of the European public policy and its precedence over the public international law obligations of states. BITs, intra EU and general had been seen as one of the strongest instruments aimed at providing legal certainty and protecting foreign investors against the risks of policy changes and the possible lack of neutrality and impartiality of judges and domestic courts of the host State. As mentioned above, the countries from the Central and Eastern European were actually encouraged before accesion to EU to conclude BITs with the existing then EU MS.

In comparison with international arbitration, to which ISDS reseambles, the resolution of the dispute grounded on BIT infringement rests on an international treaty governed by public international law and it is based on principles aimed at protecting the investor, such as the principle of fair and equitable treatment or the principles of national treatment, most favored nation or full protection and security[32]. BITs are preferred by the foreign investors as they provide a

[29] Ibidem

[30] The press release of the Commission dated June 18, 2015 mentions the Commission s position in the initiation of infringements at http://europa.eu/rapid/press-release_IP-15-5198_en.htm

[31] Ibidem

[32] See Ana M. López-Rodríguez, PhD* INVESTOR-STATE DISPUTE SETTLEMENT IN THE EU: CERTAINTIES AND UNCERTAINTIES in Jouston Journal of International Law vol 40/1, 2.21.2018. at: http://www.hjil.org/wp-content/uploads/Rodriguez-Lopez-FINAL1.pdf

level playing field where States shed their privileges and litigate on an equal basis with private companies[33].

This brings within ISDS based on BITs intra EU or general. private level interests and the general interest on the same level. ISDS under BITs applies a commercial arbitration procedure to disputes which deal with the conformity of the exercise of the regulatory and administrative authority of the host State under the perspective of international law, which places such agreements at the level of public international order.

Moreover the force of the arbitration clauses is drawn and interpreted according to international public law which rules the BITs and give within national laws rayfing the BITs or orther multilateral investments treaties the superseeding status international public law has in the national public order of the national states.

The mere existance of an arbitral tribunal under BITs dealing with matters coming within EU Law and public policy, made EU to feel compelled to have a strong position against intra EU BITs and further against BITs with countries outside EU. With many occasions EU through the Commission and the Court of Justice declared, undoubtly the incompatibility with EU law of any judicial body or international tribunal that jeopardizes the principles of autonomy and primacy of EU law and the exclusive competence of the Court of Justice in its interpretation and application[34].

The main reasons provided by the Court in its opinions[35] referred to the need to respect the primacy and autonomy of EU law and the exclusive competence of the Court to interpret and apply EU law; to the need to preserve the exclusive competence of the Court in any dispute between the Member States concerning the interpretation or application of the Treaties, enshrined in art. 344 TFEU; to the need to guarantee the exclusive competence of the Court to rule on the distribution of responsibility for breach of an international agreement between the EU and its Member States and on the proper respondent in a proceeding; to the need to avoid further reviews of EU law, including secondary law, by the any other International Tribunal.

It is not surprinsing that the same kind of reasoning was actually used by the Court in its judgment in Achmea v. Slovakia delivered on 6th of March 2018. It is of interest that the judgement was delivered in relationship with an award rendered under intra-EU BITs by arbitral tribunals seated within the EU and in this regards, the effects of such judgement on ISDS before tribunals seated outside the EU, as well as intra-EU disputes under the Energy Charter Treaty, may be less definitive. It nevertheless rounds the general superior position which EU law and its own judicial system took in international law relationship which will undoubtly lead to the consolidation of this position in eliminating any judicial application and interpretation of EU law through other international tribunals. It is to be seen how investment arbitral tribunals will further react and if and how future ISDS if any shall suvive in Europe.

3. Conclusion

The ISDS days based on intra-EU BITs are numbered, as there will be no ISDS if the effects of the ISDS awards based on intra- EU BITs would not be recognised in the EU member states. The position of the European Commission requesting the termination of intra EU BITs addressed to five states under infringement procedure opening shows the determination in the decimation of the intra EU BITs, which will likely dissapear or shall not be further used for ISDS. It is obvious that EU order is tending to eliminate any extra legal system which would infringe primacy and autonomy of EU law and the exclusive competence of the Court to interpret and apply EU law and if it takes the ISDS in general so be it. There is nothing to fear herein except for a possible judicial review of such primacy over international public law obligations solved at the level of the International Court of Justice (ICJ) based on a infringements of BITs.

How would ICJ consider the issue? Is Court of Justice of the EU the only one to interpret and apply EU law? What about international public law to which actually ISDS belongs?

References

- COMMISSION DECISION (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral award Micula v Romania of 11 December 2013(notified under document C(2015) 2112 available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015D1470, accessed on March 10th, 2018
- Ana M. López-Rodríguez, PhD* INVESTOR-STATE DISPUTE SETTLEMENT IN THE EU: CERTAINTIES AND UNCERTAINTIES in Jouston Journal of International Law vol 40/1, 2.21.2018. at: http://www.hjil.org/wp-content/uploads/Rodriguez-Lopez-FINAL1.pdf, accessed on March 10th, 2018
- OPINION OF ADVOCATE GENERAL WATHELET delivered on 19 September 2017 (1) Case C-284/16 Slowakische Republik v Achmea BV is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62016CC0284, accessed on March 7th, 2018

[33] Ibidem.
[34] Ibidem.
[35] Ibidem.

- The Higher Regional Court of Frankfurt decision of 18 December 2014 – Case 26 Sch 3/13 is available at: https://www.italaw.com/sites/default/files/case-documents/italaw7079.pdf accessed on March 10th, 2018.
- The report of the European Comission on facts and figures on Investor –to – State Dispute Settlement is available at http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153046.pdf, accessed on March 10th, 2018
- The 2006 report of the Economic and Financial Committee to the Commission and the Council on the Movement of Capital and the Freedom of Payments is available at http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%205044%202007%20INIT, accessed on March 9th, 2018

PROTECTING EU VALUES. A JURIDICAL LOOK AT ARTICLE 7 TEU

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Abstract

Every European state that wishes to become a member of the European Union (EU) must adhere to the values enshrined in Article 2 of the Treaty on European Union (TEU). After accession, it is assumed that all Member States are further bound by these same values, such as the rule of law. However, the successful enlargement of the EU, especially towards the new democracies of Eastern Europe, gave rise to the need for a means to balance this somewhat utopian view of irreversible common ground. Thus, in 1999, in preparation for the wave of accession of 2004, the Treaty of Amsterdam introduced Article 7 in TEU as a means of protecting EU values in the Member States. The study makes a juridical analysis of this text, focusing on its content, its possible legal effects, its pluses and minuses in representing an efficient means of dissuasion in relation to the Member States that have raised concerns of serious breaches of the rule of law in the last few years. The main goal is to identify the vulnerabilities of this legal mechanism in order to find solutions for its improvement and to suggest complementary measures which might aid obtaining positive results. The way this matter is addressed shall shape the future of the EU.

Keywords: *European Union; values; rule of law; illiberalism; Article 7 TEU.*

1. EU values in peril

In the last few years the EU's institutions, especially the European Commission and the European Parliament, have shown an increasing focus on protecting the values enumerated in Article 2 TEU[1]. These values are meant to represent the very basis for the Member States' agreement to work together within this original integration organisation, since Article 49 TEU states that respecting and promoting them is a condition for accession to the EU[2].

For the most part of the EU's existence, neither the EU, nor the Member States, had any cause for concern about the solidity of this common ground. However, at the end of the 1990s and the beginning of the years 2000, the European Union's institutions were preparing to implement the expansion policy towards Eastern Europe and were negotiating with 12 states aspiring to membership status[3], some of them still undergoing a complex reform process to consolidate their newly found democracy. The number of Member States was expected to grow from 15 to 27. In this context, the Treaty of Amsterdam[4] inserted a new text in TEU, former Article F.1[5], which was supposed to act as a preventive measure by empowering the EU to determine the existence of a serious and persistent breach by a Member State of EU values and, eventually, to "suspend certain of the rights deriving from the application of this Treaty to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council."[6] The Treaty of Nice[7] amended this Article, to allow a public warning that there is a clear risk of a serious breach of EU values by a Member State, further emphasizing that the objective is to have the Member State reconsider its position, rather than act when the damage is already done.

The study shall make a legal analysis of Article 7 TEU, in correlation to Article 2 TEU, then it shall present the steps taken so far by EU institutions in applying this text in response to concerns about serious breaches of the rule of law by some Member States, especially in the last three years.

The matter is not only recent and in development, as it is the first time Article 7 TEU might be applied, but it is also of the utmost importance for the future of the EU, giving rise to a fiery debate about the efficiency of the means to protect EU values at the disposal of EU institutions and about complementary solutions that

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[1] Article 2 TEU reads: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." The Treaty on European Union was signed at Maastricht on 7 February 1992 and is in force since 1 November 1993. For the consolidated version of TEU see: http://eur-lex.europa.eu/collection/eu-law/treaties/treaties-force.html, last accessed on 10 March 2018.

[2] Article 49 TEU first thesis of the first paragraph: "Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union."

[3] In 2004 the EU welcomed: Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia and in 2007 Bulgaria and Romania.

[4] Signed on 2 October 1997. It entered into force on 1 May 1999.

[5] Currently Article 7 of the consolidated version of TEU.

[6] Article 1 point 9 of the Treaty of Amsterdam, available at: https://europa.eu/european-union/sites/europaeu/files/docs/ body/treaty_of _amsterdam_en.pdf, last accessed on 10 March 2018.

[7] Signed on 26 February 2001. It entered into force on 1 February 2003.

might be adopted, such as infringement actions or the multi-speed EU or the differential allocation of funds.

The study aims to identify the weaknesses of Article 7 TEU and give suggestions on how it could be improved, to present the actions taken so far by EU institutions on its basis and to assess their efficiency, in an effort to see the limits of the current mechanisms and to find complementary ones that would favor constructive solutions.

Given the great interest the subject matter stirs up in legal literature, there are quite a few doctrinal works that have taken up the topic. The study intends to offer a more technical approach, focused on the legal texts and on the juridical aspects of the problems being debated.

2. The legal mechanism for protecting EU values

2.1 The creation and development of Article 7 TEU

The 1993 Copenhagen European Council took the view "that post-communist central and eastern European countries had a vocation to become members of the Union"[8]. One of the three criteria the European Council set out for the candidate country aspiring to membership was achieving the "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities"[9]. This led to a development of the normative basis for enlargement, which included amending Article 49 TEU by the Treaty of Amsterdam in the sense of expressly providing the cadidate's obligation to respect the principles the Union is founded on: liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law[10].

A complementary legal measure, designed to ensure this criterion is met also post-accession, was the introduction in TEU of current Article 7. The initial text established the competence and described the procedure which allowed the Council to determine the existence of a serious and persistent breach by a Member State of the principles mentioned above and to apply the sanction of suspending certain rights of that state deriving from membership status, such as the right to vote in the Council.

Further, the Treaty of Nice added a first paragraph that permitted the Council to determine even just the existence of a clear risk of a serious breach of the principles and to address appropriate recommendations to that state[11]. This leaves the necessary room for a diplomatic solution before the *fait accompli*. The Commission expressed the view that: "By giving the Union the capacity to act preventively in the event of a clear threat of a serious breach of the common values, Nice greatly enhanced the operational character of the means already available under the Amsterdam Treaty, which allowed only remedial action after the serious breach had already occurred[12]."

The last amending treaty that reformed EU constitutional law, the Treaty of Lisbon, inserted current Article 2 in TEU and modified Articles 7 and 49 TEU accordingly, replacing the reference to the principles set out in former Article 6 paragraph 1 TEU with the reference to the values EU is founded on[13].

It also replaced the words 'The Council, meeting in the composition of the Heads of State or Government and acting by unanimity' with 'The European Council, acting by unanimity', in order to differentiate between the Council and the European Council. The latter was officially included among EU's institutions by the Treaty of Lisbon[14]. It is composed of the heads of state or government of the Member States, together with its President and the President of the Commission. The High Representative of the Union for Foreign Affairs and Security Policy takes part in its work. It has a political role, providing the EU with the necessary impetus for its development and defining the general political directions and priorities. It does not exercise legislative functions[15]. The Council, on the other hand, is the traditional legislative of the EU and it consists of a representative of each Member State at ministerial level [16].

The other adaptations the Treaty of Lisbon made to Article 7 TEU are of a technical nature[17] and they do not represent fundamental changes to the procedure.

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[8] Hillion, "EU Enlargement", 193.

[9] Conclusions of the Presidency of the European Council in Copenhagen, 21-22 June 1993, page 13, available at http://www.consilium.europa.eu/en/european-council/conclusions/1993-2003/, last accessed on 10 March 2018.

[10] Article 1 points 8 and 15 of the Treaty of Amsterdam, available at: https://europa.eu/european-union/sites/europaeu/files /docs/body/treaty_of_amsterdam_en.pdf, last accessed on 10 March 2018. See also Fuerea, *Manualul…*, 2011, 67.

[11] Article 1 point 1 of the Treaty of Nice, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12001C/TXT, last accessed on 10 March 2018.

[12] *Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based*, Brussels, 15.10.2003, COM(2003) 606 final, available at: http://ec.europa.eu/transparency/regdoc/rep/1/2003/EN/1-2003-606-EN-F1-1.Pdf, last accessed on 10 March 2018.

[13] Article 1 points 3, 9 and 48 of the Treaty of Lisbon, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2007:306:FULL&from=EN, last accessed on 10 March 2018.

[14] For the legal recognition and role of the European Council prior to this treaty, see Craig and de Búrca, 2009, 68-72.

[15] Article 15 paragraphs 1 and 2 TEU.

[16] Article 16 paragraphs 1 and 2 TEU. For a comparison between the Council and the European Council, see Fuerea, 2011, *Manualul…*, 102-103.

[17] For a concurrent opinion, see Gâlea, 2012, 28.

2.2. Article 7 TEU's content[18]

Since respecting and promoting the common EU values by all Member States represents the foundation of the EU and the basis for the application of the principle of mutual trust, the scope of Article 7 TEU is not confined to areas covered by EU law but extends to areas where the Member States can act autonomously. As recent history proved, it is more often in the fields where there is no obligation to have harmonized legislation that national measures are more likely to be questionable.

Also, Article 7 TEU is not designed as a remedy for individual breaches in specific situations. It is a solution of last-resort, a concerted action for systematic problems, that raise to a certain threshold of seriousness and persistence.

As presented above, Article 7 TEU offers two possibilities for protecting EU values, each with its own procedure:

a) for the Council to determine the existence of a clear risk of a serious breach of EU's values by a Member State;
b) for the European Council to determine the existence of a serious and persistent breach of EU's values by a Member State.

In the first case, the first paragraph of Article 7 TEU provides that the Council can act on the basis of a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission and only after hearing the Member State in question and obtaining the consent of the European Parliament. The Council may decide, by a majority of four fifths of its members, either to make recommendations, or to declare that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2 TEU.

Thus, the Council has the discretion to appreciate on the grounds of the matter: whether there is a risk, whether that risk is clear and what values are in peril by the national measures the state in question has taken or is about to take; whether the materialisation of the risk would amount to a serious breach. The threat is potential, but it must be clear, obvious, unequivocal.

From a procedural point of view, the discretion is reduced to the nature of its decision: wether it is enough to just make recommendations or to directly declare the existence of the risk. The other procedural conditions are quite restrictive: just three subjects are allowed to start the procedure; the Council cannot start it *ex officio*; the Council has to obtain first the consent of the European Parliament, given with an absolute majority of two thirds of its component members[19]; it has to hear the Member State in question; it has to verify regularly if the grounds on which it detetermined the existence of the clear risk subsist.

It is not clear who has the primary responsibility for starting the procedure and assessing the situation. As 'Guardian of the Treaties', it would seem that the institution with the executive role, the European Commission, is responsible with following the facts and making its findings known to the other institutions. This is confirmed by the Commissions actions in recent years, as it shall be shown in subsection 2.4.

Since there isn't an express interdiction, the Council may follow the procedure and decide to give recommendations and, if those recommendations are not fully observed, it may follow it again and declare the existence of a clear risk.

The second case has two stages, in a logical succession in the sense that sanctions may be applied only after the existence of a serious and persistent breach of EU's values by a Member State is determined.

The second paragraph of Article 7 TEU is dedicated to the first stage. This time the European Council has the discretion to assess the grounds of the matter: whether there is a breach of one or more values; if that breach is serious enough; if it is persistent.

The Commission explained that, in order to determine the seriousness of the breach a veriety of criteria will have to be taken into account, including the purpose and the result of the breach", like the fact that vulnerable social classes are affected and that several values are breached simultaneously. Further, the Commission noted that persistence can be expressed in a veriety of manners, like: adopting legislation or

[18] Article 7 TEU reads: "1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2.The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.

4.The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5.The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union." Text available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016M/TXT, last accessed on 10 March 2018.

[19] Article 354 paragraph 4 of the Treaty on the Functioning of the European Union (TFEU).

administrative instruments or mere administrative or political practices of the authorities of the Member State that already form the object of complaints or court actions; systematic repetition of individual breaches; repeated condemnations for the same type of breach over a period of time by an international court such as the European Court of Human Rights and not demonstrating the intention to take practical remedial action[20].

The procedure in paragraph 2 of Article 7 TEU is even more restrictive than in paragraph 1. Now there are only two subjects that can start the procedure, a third of the Member States or the European Commission; the prior approval of the European Parliament is still required and the European Council must decide unanimously. However, the vote of the representative of the state in question and the abstentions are not taken into account for achieving unanimity[21].

The third paragraph of Article 7 TEU sets forth the sanctions. This second stage is a possibility for the Council, not an obligation, as deduced from a grammatical interpretation of the text which contains the verb 'may'. Thus, the Council may decide to suspend certain of the rights of the Member State in question, including the right to vote in the Council, although the state shall still be bound by all the correlative obligations.

The Council must act by a qualified majority and must take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The fourth paragraph of Article 7 TEU allows the Council to modify or to revoke these sanctions, also with a qualified majority, if the situation that determined the European Council to declare the breach changes. The principle of symmetry is applied in part, only with respect to the Council's power to apply and modify or revoke the sanction. But, by doing so, the Council makes an implicit decision on the persistence of a serious breach although it does not have the power to declare its existence.

The fifth paragraph of Article 7 TEU sends to the provisions of Article 354 TFEU for the voting arrangements applying to the institutions involved in the two procedures.

One observation that can be made after reading Article 7 TEU is that there is no obligation to follow first the procedure in paragraph 1 of Article 7 in order to be able to start the procedure in paragraphs 2-4 against the same Member State. There is nothing in the text to limit direct recourse to paragraph 2 if the facts of the matter call for a more ferm position from the EU, as there is nothing to limit using them in a succesive manner if the facts of the case allow it.

Also, one can even imagine a simultaneous application of both procedures, the first for some national measures that present risk to one or more EU values and the second for other national measures that amount to breaches of other EU values, with regard to the same Member State. However, such an approach might not be practical. It is probably more efficient to treat the matter as a whole and to take the firmer action.

Another observation is that there aren't any legal elements to facilitate the assessment of the risk or of the breach. The Council and the European Council have the discretionary power to qualify the factual elements presented to them about the measures implemented or about to be implemented by a Member State as representing a clear risk for one or more of EU's values or as amounting to a serious and persistent breach of one or more EU values.

Furthermore, many legal notions do not have a definition in the Treaties. The values in Article 2 TEU, such as democracy, the rule of law, respect for human rights, pluralism or tolerance, do not have a predefined content. They are abstract notions and it is not always easy to say if a certain measure poses a risk to or represents a breach of one of them.

Of course, a systematic interpretation of these notions is possible to some extent, as for some, like gender equality, there is subsequent EU legislation.

Sometimes the interpretation of the content of these values can be deduced from the Court of Justice of the European Union's jurisprudence, or from that of other international courts, such as the Court of Human Rights or from other international agreements EU Member States are parties to.

Doctrinal works may also offer pertinent arguments and explanations to aid interpretation.

A detailed analysis of the values the EU is founded on would far exceed the scope of this study, as each of them is a vast subject in itself.

However, it is useful to mention a few details about the rule of law. The notion is complex and there isn't consensus on all of its definitional elements. The interpretation of this term also depends on "specific national historical diversities of a political, institutional, legal"[22] and philosophical nature.

Still, there is a rather general agreement that the rule of law has two constituent elements: the formal one, regarding the authority of the lawmaker and the quality of the law (the law should be adopted by a freely and fairly elected majority; the law should be clear, predictable, stable, not retroactive) and the substantive one, concerned with obeying and correctly applying the law (no one is above the law; an independent judiciary;

[20] Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based, Brussels, 15.10.2003, COM(2003) 606 final, page 8, available at: http://ec.europa.eu/transparency/regdoc/rep/1/2003/EN/1-2003-606-EN-F1-1.Pdf, last accessed on 10 March 2018.

[21] Article 354 paragraph 1 TFEU.

[22] Bárd, Carrera, Guild and Kochenov, 2016, 53.

access to justice and judicial review; proportionality; equality and non-discrimination; transparency) [23].

Having considered the broad view of the rule of law, two authors defined "rule of law backsliding as the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal cheks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party"[24].

2.3. Legal effects

Article 7 TEU produces, first of all, declaratory effects. The consequence of applying the procedures described in the first two of its paragraphs is, basically, a warning signal from the other Member States for the Member State in question. As we have seen above, only if the Member State has already breached one or more of EU's values in a persistent and serious manner, concrete sanctions can be imposed, consisting in a suspension of certain rights provided by the Treaties, such as the right to vote in the Council.

The text does not specify what are the rights that may be suspended and offers just the example of the right to vote in the Council. Thus, it is for the institution enabled to apply the sanction, the Council, to choose from the rights established for the Member States by the Treaties that represent EU's constitutional law. The only obligation of the Council is to choose the sanction taking into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

If this is the only limit for the Council's discretion, one can wonder if the Council could suspend, for example, the distribution of funds to that state or its right to vote in all the other institutions.

Even if such measures could be imposed it is difficult to get to this point because of the large majorities required for a legal vote and especially because the European Council must decide in unanimity. It is true that the state in question cannot vote (*nemo iudex in causa sua*) and that abstentions are not taken into account, but recent developments have shown that two or more Member States may be in similar situations and express support for each other. The consequence is that the Member States in question could veto the European Council's decision and avoid being sanctioned by the Council.

Since Article 7 TEU uses the singular when referring to a member state, there is nothing in the text to suggest the European Council could do anything else than deal with the situation in each state separately. This conclusion is supported by the principle that responsibility is personal.

On the other hand, there is also the argument that if Article 7 TEU is to be interpreted in the light of the *effet utile* principle, then the two or more Member States should lose their veto of sanctions against the other in case Article 7 TEU is triggered against all of them[25].

The Member State in question could have resorted to using the annulment action established by Article 263-264 TFEU[26] against the Council's decision and against the European Council's decision. The legal requirements regarding what acts can be challenged, by whom and against whom would have been met. The state would have had to observe the time limit of 2 months and to present the factual and legal aspects as to amount to one of the reasons for annulment: lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers[27].

However, such a possibility was precluded by the Treaty of Lisbon, which inserted new Article 269 in the TFEU. This text gives the Court of Justice[28] jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 TUE. The action may be filed only by the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in Article 7 TEU. There is a time-limit of one month from the date of such determination and the Court is obliged to rule within one month from the date of the request.

This legal remedy appears as a special type of annulment action, with a specific object: the acts adopted by the Council and the European Council on the basis of Article 7 TEU. The parties may only be the Member State in question and the institution that adopted the act. The reasons for annulment are confined to procedural aspects. For example, an infringement of a procedural requirement would be if the Council decides without the consent of the European Parliament.

The Court does not have jurisdiction to substitute itself to the Council or the European Council and decide otherwise on the grounds of the matter, nor can it apply other, lesser or harsher, sanctions.

The procedure is rapid, but, in our opinion, there is nothing to prevent the Member State from asking the suspension of application of the act until the Court gives its judgment[29].

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[23] See also Kochenov and van Wolferen, 2018, 4-5, Bárd, Carrera, Guild and Kochenov, 2016, 53-56, Leal-Arcas, 2014 and Tamanaha, 2007.
[24] Pech and Scheppele, 2017, 7.
[25] See Pech and Scheppele, 2017,24.
[26] About the annulment action, see Schütze, 2012, 260-273 and Fuerea, 2016, *Dreptul…*, 65-74.
[27] Article 263 paragraph 2 TFEU.
[28] The former Court of Justice of the European Communities. Different from the General Court and the former Civil Service Tribunal, but part of the Court of Justice of the European Union.
[29] See Article 278 TFEU and Article 39 of Protocol No. 3 to TFEU on the Statute of the Court of Justice of the European Union.

2.4 The first attempts to apply Article 7 TEU

Hungary is the first EU Member State that took national measures which raised concerns about the state's commitment to EU values, especially the rule of law. As early as 2011, the President of the Commission adressed the issue of a new Hungarian law that put all media under the control of a media council which contained only members of the governing party[30]. With a comfortable majority in parliament, the governing party made a constitutional reform and then passed a number of other laws crticised by EU officials for non-compliance with the rule of law, such as the one that would affect the independence of the Central Bank or the one lowering the retirement age for judges, prosecutors and public notaries. The Commission started infringement procedures[31].

The Hungarian Prime Minister in office since 2010 explained in multiple speeches that his government has adopted a new approach, illiberalism, which does not reject the fundamental principles of liberalism, but adds a special, national approach[32].

By 2013 the idea of a systemic problem started taking shape and the President of the Comission stated that: "Safeguarding its values, such as the rule of law, is what the European Union was made to do, from its inception to the latest chapters in enlargement.

In last year's State of the Union speech, at a moment of challenges to the rule of law in our own member states, I addressed the need to make a bridge between political persuasion and targeted infringement procedures on the one hand, and what I call the nuclear option of Article 7 of the Treaty, namely suspension of a member states' rights.

Experience has confirmed the usefulness of the Commission role as an independent and objective referee. We should consolidate this experience through a more general framework. It should be based on the principle of equality between member states, activated only in situations where there is a serious, systemic risk to the rule of law, and triggered by pre-defined benchmarks.

The Commission will come forward with a communication on this. I believe it is a debate that is key to our idea of Europe[33]."

This new instrument was to be a soft law one, not legally binding, called the Rule of Law Framework[34]. It was adopted in March 2014 and it is meant to be an early warning tool, a pre-Article 7 TEU procedure. Esentially, it allows the Commission to assess the situation, to issue an opinion about the existence of a systemic threat to the rule of law, to make recommendations and to monitor their implementation[35].

We share the opinion that "Article 7(1) TEU implicitly empowers the Commission to investigate any potential risk of a serious breach of EU values by giving it the competence to submit a reasoned proposal to the Council should the Commission be of the view that Article 7 TEU ought to be triggered on this basis. […] The Rule of Law Framework merely makes more transparent how the communication between the Commission and the potentially offending government shall proceed"[36].

Though it was clearly designed for Hungary, this instrument was to be used first in relation to Poland. After the legislative elections in October 2015, the governing party won an absolute majority and started taking a series of controversial measures. The first was to nullify the election of constitutional judges by the prior parliament and to elect new ones. The Constitutional Tribunal declared the election of the new judges unconstitutional, but the government refused to publish or acknowledge this ruling. This determined the European Commission to follow the Rule of Law Framework and to adopt a Recommendation on 27 July 2016[37], but the results were not positive. Poland refused to comply and even threatened to formulate an annulment action[38] against the Rule of Law Framework, even if it cannot be the object of such an action, since it is not legally binding.

Poland continued on this path, adopting even more concerning measures, like the Act of 22 July 2016, considered a final act of constitutional capture that strongly limited the independence of the

[30] Statement by President of the European Commission José Manuel Durão Barroso at the press conference held after the meeting of the Commission with the Hungarian Presidency of the Council, 7 January 2011, Speech/11/4, available at: http://europa.eu/rapid/press-release_SPEECH-11-4_en.htm, last accessed on 10 March 2018.

[31] See, for example, the judgment of the Court of Justice in case C-286/12, available at: http://curia.europa.eu/juris/ document/ document.jsf?text=&docid=129324&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1032099, last accessed on 10 March 2018. The Court declared that by adopting a national scheme requiring compulsory retirement of judges, prosecutors and notaries when they reach the age of 62 – which gives rise to a difference in treatment on grounds of age which is not proportionate as regards the objectives pursued – Hungary has failed to fulfil its obligations under Articles 2 and 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

[32] See, for example, Prime Minister Viktor Orbán's Speech at the 25th Bálványos Summer Free University and Student Camp, 26 July 2014, Tusnádfürdő (Băile Tuşnad), Romania, available at: http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp, last accessed on 10 March 2018.

[33] See State of the Union address 2013, 11 September 2013, http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm, last accessed on 10 March 2018.

[34] European Commission presents a framework to safeguard the rule of law in the European Union, Strasbourg, 11 March 2014, press release available at: http://europa.eu/rapid/press-release_IP-14-237_en.htm, last accessed on 10 March 2018.

[35] For more details, see Kochenov and Pech, 2016 and von Bogdandy, Antpöhler and Ioannidis, 2016.

[36] Pech and Scheppele, 2017, 12.

[37] Available at: http://europa.eu/rapid/press-release_IP-16-2643_en.htm, last accessed on 10 March 2018.

[38] See Articles 263-264 TFEU.

Constitutional Tribunal[39], and the three justice laws that allowed the governing party to appoint the president of the Constitutional Tribunal and to reenact a law that had been declared unconstitutional. Also, four new acts were passed in one month, that allowed the government to fire all judges of the Supreme Court and replace the leadership of the lower courts.

In response, the Commission chose to adopt a second Recommendation on 21 December 2016 and a third one on 26 July 2017 and initiated infringement proceedings arguing that the independence of judges is undermined by the introduction of a different retirement age for female and male judges and by giving the Minister of Justice the discretionary power to prolong the mandate of judges who have reached the retirement age, as well as to dismiss and appoint court presidents, even if independence is required by Article 19 paragraph 1 TEU and Article 47 of the EU Charter of Fundamental Rights[40]. The course of this infringement procedure has only reached the Reasoned Opinion[41].

The European Parliament has supported the Commission's concerns and adopted three Resolutions: of 13 April 2016, 14 September 2016 and 15 November 2017, calling on the Polish Government to comply with all provisions relating to the rule of law and fundamental rights enshrined in the Treaties, the Charter of Fundamental Rights, the European Convention on Human Rights and international human rights standards, and to engage directly in dialogue with the Commission[42].

The Council, on the other hand, was silent for the most part. It discussed the issue in the General Affairs Council on 16 May 2017 and told the Commission to continue dialogue with Poland, despite criticising Poland for lack of cooperation.

Finally, after two years of unfruitful dialogue with Poland, the Commission decided to activate Article 7 paragraph 1 TEU and to make the formal proposal to the Council. The Commission explained: "It is up to Poland to identify its own model for its justice system, but it should do so in a way that respects the rule of law; this requires it to safeguard the independence of the judiciary, separation of powers and legal certainty.

A breach of the rule of law in one Member State has an effect on all Member States and the Union as a whole. First, because the independence of the judiciary – free from undue political interference – is a value that reflects the concept of European democracy we have built up together, heeding the lessons of the past. Second, because when the rule of law in any Member State is put into question, the functioning of the Union as a whole, in particular with regard to Justice and Home Affairs cooperation and the functioning of the Internal Market, is put into question too[43]."

On 1 March 2018, the Parliament gave its consent for the Commission's proposal to trigger Article 7 paragraph 1 TEU and to ask Poland to address the risk[44]. The procedure is ongoing and, even if the majorities required by Article 7 paragraph 1 TEU are reached, it is doubtful that new recommendations will be observed by Poland. As to sanctions, Hungary has already declared it shall support Poland and implied it will veto an eventual European Council decision in this respect[45]. We shall have to see if the doctrinal view that the two states could not veto each other's sanctions because that would take away the *effet utile* of Article 7 TEU shall prevail or not.

In Hungary's case the Commission did not activate the Rule of Law Framework, despite multiple resolutions adopted by the European Parliament[46] and despite continuing to criticise some of the measures adopted by the government, like the laws that allowed political control over the appointment of judges and their individual career and even case asignment to specific judges, or the ones that targeted the Central European University and foreign funded non-governmental organisations. The Commission took the view that, unlike Poland, Hungary never refused dialogue and has made some progress[47].

In legal literature, the explanations found are of a more practical nature and focus either on the support Hungary receives in the European Parliament as a member of the largest political group, the European People's Party, whereas Poland is part of a much smaller political group or on the gravity of the situation in the sense that Hungary passed these laws after legally modifying its Constitution by virtue of its large majority in parliament, whereas Poland did it after

[39] See Śledzińska-Simon and Ziółkowski, 2017, pages 18-21.

[40] European Commission launches infringement against Poland over measures affecting the judiciary, Brussels, 29 July 2017, press release available at: http://europa.eu/rapid/press-release_IP-17-2205_en.htm, last accessed on 10 March 2018.

[41] Independence of the judiciary: European Commission takes second step in infringement procedure against Poland, Strasbourg, 12 September 2017, press release available at: http://europa.eu/rapid/press-release_IP-17-3186_en.htm, last accessed on 10 March 2018. For more details on the infringement procedure, see Fuerea, 2016, *Dreptul…*, 112-123.

[42] See, for example, Resolution of 15 November 2017, available at: http://www.europarl.europa.eu/sides/getDoc.do? type= TA&language=EN&reference=P8-TA-2017-0442, last accessed on 10 March 2018.

[43] Rule of Law: European Commission acts to defend judicial independence in Poland, Brussels, 20 December 2017, press release available at: http://europa.eu/rapid/press-release_IP-17-5367_en.htm, last accessed on 10 March 2018.

[44] Press release available at: http://www.europarl.europa.eu/news/en/press-room/20180226IPR98615/rule-of-law-in-poland-parliament-supports-eu-action, last accessed on 10 March 2018.

[45] Viktor Orbán's speech at the 28th Bálványos Summer Open University and Student Camp, 22 July 2017, Tusnádfürdő (Băile Tuşnad), Romania, available at: http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/viktor-orban-s-speech-at-the-28th-balvanyos-summer-open-university-and-student-camp, last accessed on 10 March 2018.

[46] For example, the Resolutions of 10 June 2015, 16 December 2015, 25 October 2016 and 17 May 2017.

[47] Pech and Scheppele, 2017, 19.

infringing the decision of its Constitutional Tribunal, which it refused to publish and observe. Poland continued with measures to undermine the independence and legitimacy of the constitutional court. Thus, constitutionality of national legislation can no longer be guaranteed, which in turn affects the principle of mutual trust between Member States[48].

Finally, the European Parliament was the one that took the stand and adopted a Resolution on 17 May 2017 in which it stated its belief that the current situation in Hungary represents a clear risk of a serious breach of the values referred to in Article 2 of the TEU and warrants the launch of the Article 7 paragraph 1 TEU procedure, then instructed its Committee on Civil Liberties, Justice and Home Affairs to initiate the proceedings and draw up a specific report with a view to holding a plenary vote on a reasoned proposal calling on the Council to act pursuant to Article 7 paragraph 1 of the TEU[49]. The resolution is still being prepared and nothing has been made public yet.

Some concerns have been expressed about certain deficiencies in other Member States, such as Bulgaria, Greece, Italy, Romania and Slovakia[50], but the EU institutions have not indicated that starting the mechanism for the protection of EU values is imminent. Also, Bulgaria and Romania are still under the Verification and Cooperation Mechanism.

2.5. Solutions for increasing efficiency

As deduced from the presentation above, there is a quest for solutions to improve the efficiency of the mechanism that Article 7 TEU represents and/or for complementary measures.

The text of Article 7 TEU could be improved, for example, by reducing the majorities for a legal vote in the EU institutions involved, by forbidding Member States that are in similar situations to veto each other's decisions in the European Council or by introducing new types of sanctions[51]. Still, this might prove to be very difficult because it would mean amending the founding Treaties, a procedure which requires each and all of the Members States to ratify the amending treaty[52]. Of course, the Member State or States in question would refuse to act against their own interest. In such a case, Article 48 paragraph 5 TEU provides the matter shall be referred to the European Council and no other legal consequence. Thus, a legal vicious circle, which only leaves the possibility of a political solution.

As we have seen, a complementary measure of the Commission was to start infringement proceedings on multiple specific matters. This has the advantage of the intervention of the Court of Justice and the possibility to apply pecuniary sanctions. The disadvantage is having to fit into the frame of Articles 258-260 TFEU, as interpreted so far by the Court of Justice and not being able to tackle the systemic issue, the situation as a whole. In principle, the Commission or another Member State has to argue that specific obligations provided for the Members States by the Treaties have been disrespected.

However, it was suggested that the Commission could adopt a more ambitious interpretation of its infringement powers and adjust them to deal with Member States that systematically challenge the rule of law by bringing together a set of distinct complaints into a single action and by insisting on reversing the damage caused to the uniform application of EU law across the Union or even by arguing a violation of Article 2 directly[53].

While we find pertinent the first two doctrinal proposals, the last of them seems to create a parallel system with Article 7 TEU. It would appear that the general rule, that violations of EU law can be the subject of an infringement procedure, would be applied in parallel with the special norm, that provides for specific sanctions for the violation of Article 2 TEU.

Furthermore, as we have seen above, the exact content of the concepts behind the values is difficult to identify and some of the criticised measures are often taken in areas of national jurisdiction, where the Court of Justice of the European Union does not have competence[54]. So, relying direcly on Article 2 TEU might mean, at least in part, to subject such measures to the judicial review of the Court of Justice. It is doubtful the Court would agree to take the view of such an extensive interpretation of its powers.

Another complementary measure could be reforming other areas of EU competence in a sense that would affect the rogue state's interests and stimulate it to comply with EU values. A few proposals have been made:

a) a multi-speed EU[55] or a two-tiered EU[56] with a stronger integration for those in the euro group,

[48] See Pech and Scheppele, 2017, 23.

[49] Resolution available at: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2017-0216, last accessed on 10 March 2018.

[50] See von Bogdandy, Antpöhler and Ioannidis, 2016, page 1. See also Halmai, 2017. For an opinion on the causes that make central and eastern European countries more vulnerable to facing a crisis of constitutional democracy, see Bugarič and Ginsburg, 2016.

[51] For introducing gradated sanctions, culminating with expelling, see Bugarič, 2016, 14-15.

[52] See Article 48 TEU. For a commentary on this Article, including the problem of what would happen if a Member State does not proceed with the ratification of the amending treaty, see Hartley, 2010, 88-92.

[53] Pech and Scheppele, 2017, 32. In support of this opinion, see Bárd, Carrera, Guild and Kochenov, 2016, 30.

[54] For a concurrent opinion, see Bugarič, 2016, 13.

[55] See the *White paper on the future of Europe – Reflection and scenarios for the EU27 by 2015*, COM(2017)2015, 1 March 2017, page 20, available at: https://ec.europa.eu/commission/sites/beta-political/files/white_paper_on_the_future_of_europe_en.pdf, last accessed on 10 March 2018.

[56] *Reflection paper on the deepening of the Economic and Monetary Union*, COM(2017) 291 final, Brussels, 31 May 2017, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017DC0291, last accessed on 10 March 2018.

since some of the central and eastern European countries, including Hungary and Poland, are not in the Eurozone;

b) withholding or suspending the allocation of EU funds or more strict criteria for funding. Both Hungary and Poland have benefited from important regional and cohesion EU funds;

c) reform of citizens' initiative and political party funding, in order to increase democratic legitimacy[57].

Some of these measures could still be blocked because they would require an amending treaty.

The proposal regarding the different levels of integration[58] offers Member States more choices but might have the effect of discouraging trust in the European project in the countries outside the hard core of integration.

As far as funding is concerned, this would put pressure on the governments of the Member States involved but would affect primarily their inhabitants and the development of those regions of the internal market, diminishing, on the long run, the chances for the state to ever reach the common standards, against the very purpose of the EU funding.

Increasing public participation to decisionmaking and transparency of funding of the parties could have a positive effect on preserving liberal democracy and increasing public trust in the EU, but its results will probably show in some time. It does not provide an answer for the current challenges the rule of law faces in some Member States.

If diplomatic solutions fail, the crisis has the potential to persist for quite a long period of time. The Member State or Member States in question could refuse to observe the Council's recommendations, they could ignore or dismiss the declarations under paragraphs 1 and 2 of Article 7 TEU, they might veto the European Council's decision for another state in a similar situation, they might use their right to file actions on the basis of Article 269 TFEU and even refuse to make any progress after being sanctioned. They could even choose to ignore the Court of Justice's judgement in infringement procedures, just as the Polish government "publicly indicated its intention to ignore the Court of Justice's interim injunction to suspend all logging"[59] in a protected forest.

If a state truly no longer shares all of EU's values and the differences are irreconcilable, an amiable separation might be in the best interest of all parties. If they agree, an international convention and/or an amending treaty could be drafted to decide the terms of the split (*mutuus consensus, mutuus dissensus*).

Also, the Member State could unilaterally decide to leave, using Article 50 TEU, just like the United Kingdom of Great Britain and Northern Ireland did.

But what if the other Member States decide expelling is the only solution? This would pose problems because, unlike other international agreements[60], the Treaties of the EU do not provide for a procedure of expelling, nor the grounds for it. The EU would have to resort to the rules of public international law[61]. For example, perhaps it may suspend or terminate the operation of the Treaties in relation to the rogue state on the basis of the violation of a provision essential to the accomplishment of the object or purpose of the Treaties[62], as Article 2 TEU can be considered such a provision.

It seems unlikely extreme events would take place. However, the loss of mutual trust and the dissolution of common values and standards could have other serious, unforseen consequences. For example, it was even noted that if the independence of the judiciary in Poland is structurally undermined, this might raise the issue whether Polish courts still constitute 'courts' within the meaning of Article 267 TFEU and can still be permitted access to the preliminary rulings procedure[63].

This is why it is important for all the parties to understand the gravity of these circumstances and to get actively involved in finding the proper combination of legal and political solutions, within a reasonable timeframe, to prevent the deterioration of the situation and irreparable damage to the EU's unity and strength.

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[57] *State of the Union 2017 - Democracy Package: Reform of Citizens' Initiative and Political Party Funding,* Brussels, 15 September 2017, press release available at: http://europa.eu/rapid/press-release_IP-17-3187_en.htm, last accessed on 10 March 2018.

[58] For more about the concept of integration, see Dumitrașcu, 2012, 17-25.

[59] Pech and Scheppele, 2017, 16.

[60] Article 6 of the United Nations Charter reads: "A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council." Text available at: http://www.un.org/en/sections/un-charter/chapter-ii/index.html, last accessed on 10 March 2018.

Article 8 of the Statute of the Council of Europe reads: "Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine." Article 3 reads: "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I." Text available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680306052, last accessed on 1 March 2018.

For an overview of UN and Council of Europe's monitoring instruments, see Bárd, Carrera, Guild and Kochenov, 2016, 15-26.

[61] See Miga-Beșteliu, 2010, 104-107.

[62] Article 60 paragraph 3 letter b) of the *Vienna Convention on the law of treaties*, concluded on 23 May 1969, available at: https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf, last accessed on 10 March 2018. All of the EU's Member States, except France and Romania, are parties to this convention, as results from the status at 10 March 2018: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en.

[63] Pech and Scheppele, 2017, 35. For more details about the preliminary rulings procedure, see Broberg and Fenger, 2010.

3. Conclusions

The developments in some Member States in the last few years, especially the rise of illiberalism in Hungary and Poland, have been interpreted by the European Union's institutions as posing a clear risk of a serious breach of EU values and especially of the rule of law. This brought into the spotlight Article 7 TEU, the mechanism for protecting EU values in the Member States, introduced in the EU's constitutional legislation in 1999 and amended in 2003, in order to prepare for the biggest wave of accession in the EU's history and to welcome central and eastern European fresh democracies.

An overview of Article 7 TEU's content and its possible legal effects is necessary now that the EU's institutions are preparing to apply it for the first time. The study has taken a juridical look at the text's strengths and weaknesses, in an effort to assess its efficiency in being a deterrent, as well as a sanctioning means and has presented the steps taken so far by the EU's institutions involved in the procedure in order to trigger Article 7 paragraph 1 TEU against Poland and Hungary. The last part was dedicated to an inventory of solutions for improving the protection mechanism, including complementary measures that might help in convincing rogue Member States to reevaluate their interests and their position and to choose a future in the EU.

The main objective of the research was to add to the legal debate and to the doctrinal works which draw attention to the importance and to the gravity of the subject matter in the hope of more involvement from both EU institutions and Member States in using and improving the existing mechanisms for the protection of the common values, values which define EU's identity and which have been so hard to win in the course of our history.

Related topics for further research could be a detailed analysis of each of the values enumerated in Article 2 TEU, in order to determine their definition and their content and a closer look at the proposals for the EU's reformation in the context of the many economic and political challenges it faces, including the first ever exercise by a Member State of its right to withdraw from the Union.

References

- Bárd, Petra, Carrera, Sergio, Guild, Elspeth and Kochenov, Dimitry, 21 April, 2016, *An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights*, CEPS (Centre for European Policy Studies) Paper in Liberty and Security in Europe No. 91/April 2016. Available at: https://papers.ssrn.com/sol3/ papers. cfm?abstract_id=2782340, last accessed on 10 March 2018
- Bugarič, Bojan, 8 May 2016, Protecting Democracy Inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism, in CLOSA, Reinforcing Rule of Law Oversight in the European Union, Cambridge: Cambridge University Press, Forthcoming. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2777179
- Bugarič, Bojan and Ginsburg, Tom, 26 May 2016, *Courts vs. Autocrats in Post - Communist Europe*, to be published in Journal of Democracy, July 2016. Available at: https://papers.ssrn.com/sol3/papers .cfm?abstract_id=2784806, last accessed on 10 March 2018
- Broberg, Morten, Fenger, Niels, 2010, *Procedura trimiterii preliminare la Curtea Europeană de Justiţie*, translated by Constantin Mihai Banu, Bucharest: Wolters Kluwer Romania Press
- Craig, Paul, and de Búrca, Gráinne, 2009, *Dreptul Uniunii Europene. Comentarii, jurisprudenţă, doctrină.,* Fourth Edition, Hamangiu Press
- Dumitraşcu, Mihaela Augustina, 2012, *Dreptul Uniunii Europene şi specificitatea acestuia*, Bucharest: Universul Juridic Press
- Fuerea, Augustin, 2011, *Manualul Uniunii Europene*, Bucharest: Universul Juridic Press
- Fuerea, Augustin, 2016, *Dreptul Uniunii Europene – principii, acţiuni, libertăţi –*, Bucharest: Universul Juridic Press
- Gâlea, Ion, 2012, Tratatele Uniunii Europene. Comentarii şi explicaţii, Bucharest: CH Beck Press
- Halmai, Gábor, 3 May 2017, *Second-Grade Constitutionalism? The Cases of Hungary and Poland*, CSF-SSSUP Working Paper Series 1/2017, Eleven International Publishing. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2962292, last accessed on 10 March 2018
- Hartley, TC, 2010, *The Foundations of European Union Law*, New York: Oxford University Press Inc.
- Hillion, Cristophe, 2011, *EU Enlargement* in *The Evolution of EU Law*, Second Edition, edited by Paul Craig and Gráinne de Búrca, 187-216, New York: Oxford University Press Inc.
- Kochenov, Dimitry and Pech, Laurent, 29 February 2016, *Better Late than Never? On the Commission's Rule of Law Framework and Its First Activation*, 54 Journal of Common Market Studies 2016, pages 1062-1074, University of Groningen Faculty of Law Research Paper 2016-08. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2739893, last accessed on 10 March 2018
- Kochenov, Dimitry and van Wolferen, Matthijs, 17 January 2018, *Dialogical Rule of Law and the Breakdown of Dialogue in the EU*, European University Institute Department of Law Research Paper No. 2018/01. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3104282, last accessed on 10 March 2018
- Leal-Arcas, Rafael, 20 August 2014, *Essential Elements of the Rule of Law Concept in the EU*, Queen Mary School of Law Legal Studies Research Paper No. 180/2014. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2483749, last accessed on 10 March 2018.

- Miga-Beşteliu, Raluca, 2010, *Drept internaţional public*, Volume I, Second Edition, Bucharest: C.H. Beck Press
- Pech, Laurent and Scheppele, Kim Lane, 23 August 2017, *Illiberalism Within: Rule of Law Backsliding in the EU*, to be published in Cambridge Yearbook of European Legal Studies. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009280, last accessed on 10 March 2018
- Schütze, Robert, 2012, *Dreptul constituţional al Uniunii Europene*, Bucharest: Universitară Press
- Sledzinska-Simon, Anna and Ziółkowski, Michał, 5 July 2017, *Constitutional Identity of Poland: Is the Emperor Putting on the Old Clothes of Sovereignty?*. Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2997407, last accessed on 10 March 2018
- Tamanaha, Brian Z., 13 September 2007, *A Concise Guide to the Rule of Law,* Florence Workshop on the Rule of Law, Neil Walker, Gianluigi Palombella, eds., Hart Publishing Company, 2007, St. John's Legal Studies Research Paper No. 07-0082. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1012051, last accessed on 10 March 2018
- von Bogdandy, Armin, Antpöhler, Carlino and Ioannidis, Michael, 23 March 2016, *Protecting EU Values - Reverse Solange and the Rule of Law Framework*, Max Planck Institute for Comparative Public Law & International Law Research Paper No. 2016-04. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2771311, last accessed on 10 March 2018

FROM COVENANTS WITH GOD TO SOCIAL CONTRACT

Horaţiu MARGOI*

Abstract

Even the earliest societies have felt the need to adopt sets of laws to allow their own government. Although we start from an era in which not only the number of literate persons was reduced and even the material means of recording the legislation was even more limited, history has recorded numerous legislative codes since the antiquity. It is difficult to imagine a culture, anywhere on the planet, which has not known, since ancient times, various forms of understanding even though it has recorded different modes of normative expression. The indisputable necessity and applicability of such covenants and treaties also resides in their widespread, from Antiquity, from the political level to the level of relations between just two persons. Most of the covenants were not recorded on a support, the transcription of some by carving in stone, gave the chance of preserving them. It did not take long until man's ability to regulate social, economic, and political forms of organization has gone beyond conventional boundaries and man has received a covenant with divinity. The individual's agreement with society was just one step that, at least retrospectively, seems to be normalized. In time, the Humanity learned that any form of external constraint, be it religious or political-social, can only lead to diminishing, until suppression, of fundamental freedoms.

Keywords: *covenants, treaties, codes of laws, Antiquity, legal systems, Age of Enlightenment, Social Contract.*

1. Introduction

Covenants and treaties have been, since the period of the earliest forms of social organization, foundations for cohabitation and development of almost all groups of people. By establishing a set of rules, known and agreed, it was created a favorable framework to more harmonious relationships, based on a common and immutable value, consisting in the predictability of the other's behavior.

The indisputable necessity and applicability of such covenants and treaties also resides in their widespread, from Antiquity, from the political level to the level of relations between just two persons.

Recent studies identify a considerable number of documents, with covenant value, dated between 2500 - 46 BCE[1], coming even since the Near East, as an important source not only for the history of the area or only for this science.

Although the essential features of a covenant that complies with current normative requirements are also found in the content of those documents, there are significant features distinct from the present understanding of the notion of covenant. Of course, terms such as *treaty, pact, contract, covenant*, from the linguistic point of view, appear as neologisms, related to the temporary distance of the moment of conception of the documents referred to.

The legal construction under which the two convergent wills were met was, naturally, indissolubly linked to the real and symbolic perception of the related times.

It is necessary a special and temporal framing of the concept that fulfills the formal and substantive conditions of a covenant, which can not, in any way, ignore the etymological interpretation of the notion.

2. Content

Reported to the Semitic language family, the akkadian term *birītu*, designates „the *area jointly owned by neighbors [...] but also a lock connecting the ends of a chain* ..."[2] while the Hebrew term *bĕrit*, equivalent to the concept of *covenant*, was used, in laic sense, with the intention of describing association relationships between individuals or between larger groups or even nations.

The reasons for such associations were different and could be deduced, including from the quality of the parties or from the nature of the relationship between them. Thus, the covenants could be concluded, for example, between a powerful, expansionistic nation, as an alternative to the conquest of a nation in its path. Or, the covenants could be concluded between tribes, of similar or different force, in order to keep peace between them or to protect themselves from the attacks of rival tribes. At the same time, there were also covenants made from commercial or civil interests.

Although most of the covenants were not recorded on a support, the transcription of some by

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[1] KA Kitchen and PJN Lawrence, eds., Treaty, Law and Convention in the Ancient Near East, Wiesbaden: Harrassowity, 2012, ap. S. Greengus, Covenant and Treaty in the Hebrew Bible and Ancient Near East, in Ancient Israel's History, edited by BT Arnold and RS Hess, Grand Rapids: Baker Academic, 2014, p. 91

[2] see *HALOT* 1: 157 (s.v. bĕrit); *CAD* B 252-55. For *brt, bryt* in Egyptian documents, v. K. A. Kitchen, P. J. N. Lawrence, *The Fall and Rise of the Covenant, Law, and Treaty, TynBul* 40 (1989): 122-23. v. and id, *Egypt, Ugarit, Qatna, and Covenant, UF* 11 (1979): 453-64, by S. Greengus, *Covenant and Treaty in the Hebrew Bible and in Ancient Near East, in Ancient Israel's History*, edited by BT Arnold and RS Hess, Grand Rapids: Baker Academic, 2014, p. 91

carving in stone, gave the chance of preserving them, not being neglected the number of such artifacts that are nowadays found in the world's important museums.

Correlated with the object of the covenant and, implicitly, with its importance in the subjective appreciation of the *connecting* parties, the time of the conclusion was associated with various rituals, whose significance referred to the sanctions that the party who violated that convention could expect.

According to the conceptualization of the notion of solemnity, age related, the symbolic representation of the gravity of the violation of covenant conditions, whether concluded between individuals, families, tribes, or between nations, was the blood with which it was sealed. Otherwise, this form of sealing the bond grants the title of Blood Covenant and played an important role in respecting the alliances that ensured a peaceful cohabitation.

The covenants, in the translation and interpretation of the terms used in the documents containing them, were *cut*, in the sense that, upon their conclusion, animals of considerable size, predominantly sheep or cattle were sacrificed in a specific manner, then the contracting parties going through certain stages who amplified the solemnity of the moment.

A concrete and meaningful example is illustrated by two treatises dating from the Neo-Assyrian period around 750 BC, concluded by king Mat'ilu of Arpad, a kingdom from Syria, in which the first is written in Akkadian, with the Assyrian King, the other, written in Aramaic, with a regional ally[3].

The historical context was related to the difficult and ingrained situation of the Arpad state, constrained by imminent invasions, to decide between an alliance with Urartu or Assyria, either of which being a serious but indispensable compromise, given the pressure exerted by the two forces to make Arpad a buffer zone[4].

The exceptional situation that made these documents survive the time gives us the privilege of being able to study also the form and substantive of a treaty in that era.

The treaty concluded between King Mat'ilu of Arpad and Ashurnirari had as purpose the permission conferred by the Assyrian king to keep his throne, under humiliating conditions, concurrently agreed with slaughtering an animal.

Of the characteristics of a *Blood Covenant*, the most relevant is that of the effects expanded their validity throughout the existence of a line of descent of each of the parties, the obligations and rights established by those who concluded the covenant being perfectly valid for an unlimited number of subsequent generations[5].

Even in the presence of a descendant that breaks the Covenant, he does not lose, on the merits, its validity, and the sanction of its violation is reflected only to the person who violates it. Following the punishment or the death of the guilty of non-compliance, the initial effects of the Covenant continue to occur, these being considered as only suspended[6].

It is not the case of the Treaty between Mat'ilu and Ashurnirari, being obvious that the acceptance of such conditions represented an ephemeral state, of opportunity, which led to the disruption of the treaty by the disadvantaged and the conclusion of a new covenant with a neighbor ally, as shown.

What is relevant, however, is how more or less subtle symbols were integrated into the covenant closing ceremony, which was a common element of the covenants of that period.

It is difficult to imagine a culture, anywhere on the planet, which has not known, since ancient times, various forms of understanding even though it has recorded different modes of normative expression.

From a historical perspective, *the covenant* was created to enforce a binding agreement, stronger than an ordinary covenant, even having elements of sacredness and eternal life.

Blood was considered vital by most societies, and being inseparable from life, it also involved sacredness. By default, the bloodshed as an irreversible process was sacred, this trace also reflecting on the human actions that were connected with it.

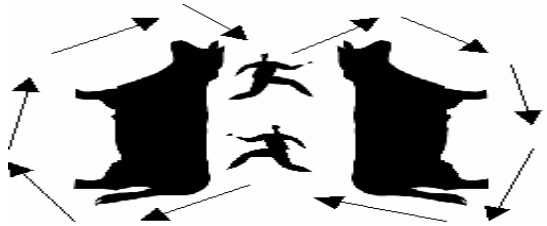
One of the rituals involves two superficial cuts, on the arm or wrist of each contracting party, which were gathered together on top of a vessel of wine, following that the blood dropped to be mixed with the wine by an official priest and given to be drunk to each participant, that they get one blood, one identity. In Antiquity, it was believed that the blood of each part of the covenant entered into the other's body, therefore, their life became unique[7].

The Cutting of the Covenant is a symbolic representation of the Covenant's ending action, also seen from the perspective of the actual cutting of the prepared and killed animal for the Covenant's partners, as a complete and indispensable sacrifice. The offering of the sacrificial animal is the responsibility of King Vassal, as is his life that has been spared, the superior king deciding what kind of animal must be used in the sacrifice to be done by his Priest[8].

From a practical point of view, the cutting technique involves splitting the animal into two equal parts, on the spinal cord, the Priest exposing internal organs to the air. The two kings stood between the halves of the sacrifice and continued walking around each half of the animal, in opposite directions,

[3] S. Greengus, *op. cit*., p. 110
[4] E. G. H. Kraeling, *Aram and Israel or The Aramaeans in Syria and Mesopotamia*, New York: Columbia University Press, 1918, p.10
[5] D. Plant, *The Blood Covenant of God*, Macquarie Fields: Smashwords, 2010, p. 14.
[6] Idem, p. 17
[7] Idem, p. 180
[8] Ibidem, p. 182

following a strict rule, according to the following scheme[9]:



As they meet between the parts of the sacrifice, they addressed, initially, blessings to each other and enumerated their possessions as an inventory of what they intended to become a common heritage. This inventory could include, from case to case, personal property, land, people, towns and villages.

Then they continued to go to the other half of the sacrifice, uttering mutual curses, to divert over the one who violates the Covenant, its descendants or its people[10].

As they meet between the two sides of the sacrificed animal, this ceremony is completed with the command *It will be done for you (or for me) as it was for this animal if we break the covenant*[11].

Subsequent to this part of the ceremony was invoked, through the Priest, the Divinity who was going to be a witness. An important element lies in the fact that it was established, also in this respect, the rule, the gods of the suzerain king having priority over the gods of the vassal king, if covenants were concluded between tribes or peoples[12].

The cut-off animal was also a threat, attached to a solemn oath called *'ālâ* in Hebrew, which includes a curse, addressed the one who did not respect his word[13].

However, the syntax of *cutting a covenant* becomes, with the passing of time, an idiom from time to time, being used in simpler contexts, even if the concluded covenant was not accompanied by the slaughter of an animal[14].

However, the image of the parts of a covenant that goes together among the pieces of sacrificed animal is the incontestable source of expressions used to describe the making of a covenant, among them enumerating enter *a covenant, pass a covenant, or stay a covenant*[15].

It is also possible to notice in the current language, in different cultures, the derivations of the respective phrases, examples being the expression in American English *cut a deal* but also the Romanian *a tăia un pariu*. Also, the expression *going into business*, or the frequent *handshake* at the end of a convention.

Returning to the historical aspects revealed by the great number of covenants, conventions, pacts and treaties from the Near Eastern and inventoried by Kitchen and Lawrence, in the quoted work, we find that the majority are written in Sumerian, Akkadian (Babylonian and Assyrian) and Hittite languages[16]. A significant part of these documents comes from the old Babylonian period (2000-1600 BCE) and concerns the territories and rulers of the current states Iraq and Syria[17].

Documents on diplomatic relations between Hittite kings and their neighbors in Anatolia and Syria form the next large set of documents, written in Akkadian and dating back to about 1400-1000 BCE, while the last important set of documents was around the year 900 -625 BCE, dealing with the relations between Assyria and the kings of the smaller kingdoms in Syria. They were also written in Akkadian and, in some cases, with Aramaic duplicates[18].

Another example of an old covenant of blood is the covenant between Egypt's Ramses II and Hattusilis III of the Hittite Empire, representing, in turn, a true image of the ancient ceremonial rituals for the blood covenant, very close to the Blood Covenant of God in the Hebrew Bible.

Specific to this covenant and distinct from the Safire covenants, it is the archetype of covenant between the equal partners in force, power and wealth, concluded with the purpose of determining and formalizing the relationship between them, caused by a war that had no winner[19].

The Covenant decided the boundaries, establishing the conditions of aid in wartime, regulated the treatment of fugitive slaves, trade and various beneficial laws for both Ramses II and Hattusilis III. The main purpose of their covenant was to help formalize and maintain the relationship between the two kings and their countries[20].

The vassal covenant is the covenant alternative, being the most common form of covenant. Usually, this occurred as a result of the conquest of a king by a stronger king, under the circumstances in which the conqueror saw an advantage in sparing the defeated.

A vassal covenant could also be the result of the respect for a greater king manifested by a inferior king in order to conclude a protective alliance. If the covenant was the result of a friendly relationship or

[9] Ibidem, p. 183-184
[10] Ibidem, p.183-184
[11] Idem, 184
[12] Loc. Cit.
[13] S. Greengus, *op. cit*., p. 94
[14] Loc. Cit
[15] Idem, p. 95
[16] Ibidem, p. 96
[17] Loc. cit.
[18] S.M. Arab, *The Pharaoh Who Made Peace With His Enemies And The First Peace Treaty in History*, www.touregypt.ne, accessed on February 1st 2018, URL:http://www.touregypt.net/featurestories/treaty. html
[19] Idem
[20] D. Plant, *The Blood Covenant of God*, Macquarie Fields: Smashwords, 2010, p. 18.

based on mutual respect, but a king was significantly stronger or richer than the other, then the relationship would be marked by correlated terms such as the *Father and the Son*[21].

If a king was conquering the king of a smaller kingdom, the conquering king will be called the *Lord*, and the younger king will be called the *servant*. The proper name for the servant was *vassal*, hence the name of vassal *Covenant*. Examples of these laws are found in the Treaties of Amarna. They are also reported as the Tell El Amarna Style dating back to the second millennium BCE. They were part of the old culture of the Middle East, involving the Philistine, Hittite and Egyptian cultures[22].

The content of the covenant, with the predominant rights of the suzerain, and the majority of obligations of the vassal, after a preamble in which the first was presented, with all its titles and attributes followed by a historical prologue, in which the relationship between the two and their ancestors was highlighted, followed by an often exaggerated expression of the suzerain's benevolence towards the vassal and his country, included as the main provision that the Great King could have many vassal royalties, while One Vassal can only have a Great King, fact which can be considered as a source of inspiration for monotheistic rules.

Prohibition of any formal relationship between the vassal and any other king outside the suzerain sphere and the fact that the vassal does not have to listen or believe defamation of the Great King, and must immediately report any slander, also presents identifiable similarities, making an easy analogy of the covenants with God in the Hebrew Bible.

Concerning the biblical covenants, the theory according to which they can be classified into two types, major and minor, depending on God's involvement in the covenant conclusion has been highlighted[23].

In the category of the most important covenants are included[24]:

- The covenant with Noah
- The covenant with Abraham
- The covenant with Moses
- The covenant with David

All other covenants are of inferior importance, including covenants between two persons, between individuals and groups of people or between nations[25].

The novelty element, even if it takes from the form and substantive of covenants conceived by people, consists, regarding the important covenants of the Hebrew Bible, in the participation of God, as part of the covenant, not as simple witness.

What is kept in the Hebrew Bible, referring to the usual covenants and treaties in the Ancient Near East, is primarily the structure of the convention.

Thus, the preamble of each of the four covenants is formulated as a statement of God, similar to that of the suzerain, the people being informed by His will.

As far as the Noah Covenant is concerned, it is noteworthy that, from a legal point of view, it can be framed in the unilateral legal acts category, in the sense that God is the only one who makes a promise, a novel fact in texts with legal implications in the period. It is unique that the upper part of the covenant, almighty in this context, should assume obligations without claiming correlative rights.

The covenant with Abraham presents, beyond the distinctive elements of each of the most important biblical covenants, many features common to the treaties concluded between the nations found in the area. We have, when taking vows, the sacrificial animal with all the ritual, along with the reference to the eternity of the effects that will benefit or will show off over all of Abraham's descendants.

However, the content of the Covenant with Abraham also rise some problems of interpretation of its nature, meaning that the obligations assumed by God depend or not on the fulfillment of some conditions by the other party. Opinions are shared, and argumentation for each makes it even more difficult the strictly classification of the covenant into one of the legal categories.

The covenant with Moses, also called the Sinai Covenant, has also a raised controversy that starts from the question of conditional fulfillment of God's promises to the behavior of the other contractual party. Even if we admit that it is not a conditional covenant, although God is the initiator, the covenant is not one among the equals.

The covenant with David fits, along with the covenant promise category, in the sense that God does not require it to fulfill certain conditions.

The idea that comes out is that we are in the presence of two types of conventions in the Hebrew Bible, God's Covenant, for the fulfillment of which a series of conditions binds, and the covenant of God through which promises without asking anything in return[1].

Distinct from these covenants with God, we also mark the presence of a pseudo-covenant, namely the one who designates the relationship of God with Adam. We appreciate that this relationship does not present the elements required to fit into the category of Covenants.

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[21] Idem

[22] C. F. Lincoln, in the article *The Biblical Covenants*, published in the *Bibliotheca Sacra* diary, April 1943, pp. 313-314, www.galaxie.com, URL: <http://www.galaxie.com/article/bsac100 -398-10>, visited on February 3rd , 2018.

[23] Idem

[24] ibidem

[25] M. Weinfeld, *The Covenant of Grant in the Old Testament and in Ancient Near East*, article published in Journal of the American Oriental Society, Vol. 90, No. 2 (Apr. - Jun., 1970), p. 184, ww.wisdomintorah.s3.amazonaws.com,URL:<https://wisdomintorah .s3.amazonaws.com /medialibrary/Grants-and-covenant.pdf>, visited February 1th , 2018

But another covenant made by God, according to the Hebrew Bible, of an importance not to ignore, is the covenant with Israel, preferred to be mentioned in the final part of the work, precisely because of the strong correlation with the formal and substantive of Esarhaddon's famous Treaty of Succession.

This is a recurring theme in the technical literature, which even created the terminology of *paralleling* in search of all the similarities between covenants, the existing treaties in the ancient culture of the Near East, and the biblical covenants[26].

However, no reasonable researcher can ignore the resemblance, almost overlapping, between the text of the Treaty and the Deuteronomy 28.

The curse section of Deuteronomy correlates many curses with suggestive images. These images, as many researchers have observed, are identical to those of the *Esarhaddon Neo-Assyrian Succession Treaty*[27]. Moreover, some passages are quasi-identifiable.

It should not keep track that we are in the presence of civilizations from the Near East cultural region, whose level of legal concept development was considerable, both at the practical and theoretical level. We cannot ignore the numerous but especially well-drafted legislative codes existing in this region. It is easy to understand that the influence of a culture so developed in the geographical proximity is not only impossible to block but also to lack rational justification.

Legislative collections in the Near East space offer a useful point of comparison with biblical law materials, many theories about legal discourse that can be interpreted in different ways being issued. Three approaches to the interpretation of law collections of the ancient Near East are collected[28].

By studying in parallel the nature, forms and, especially, the substantives of the Hebrew Bible covenants with those found in the representative covenants of the ancient Near East, the conclusion that can be drawn is that of a cultural community that is not limited to legal issues. On the contrary, it extends to socio-political areas, having impact over collective consciousness, especially in the presence of a solid set of common values.

Thus, for the first time, we have an absolutely special quality of a co-contracting party, although the convention itself is not a particular legal category. It is the contract with the Divinity, having different objects, but also invariably stipulating obligations from its part.

It would lack objectivity not to observe that there rules a special character of these conventions that resides in that no penalties are stipulated for disrespecting the Divinity commitments, but this does not diminish the novelty of this type of approach at the level of a contractual relationship circumscribed to a religion.

What emerges more obtrusive from this convention is the awareness of the interdependence between the parties concluding it, coming out the premises of another type of contract difficult to conceptualize, to a certain extent, given the disproportion, at least apparent, between the mere individual, citizen and state authority.

That is why, in a somewhat natural logic, that inglorious believer, with an immeasurable apprehension to God, dared to claim something from this, other than the usual way of a praying.

The mere individual realizes that no argument is viable and cannot resist if he ignores the importance of his quality in relation to even a powerful and ineffable Creator, as is in the culture that conceived this kind of convention.

This kind of contract is a good foundation for a normal citizen to claim obligations correlated with the rights assigned to an authority with a disproportionately high power, and much more concrete, in this case.

The reference is to what the theory has known as the Social Contract, and among its promoters is the one who took over and carried forward the concepts of Francis Bacon, the 17th century philosopher, Thomas Hobbes.

The model of conception of this construction of a legal nature, but with wide socio-political effects, was outlined on the basis of two conventions, one among citizens, with the aim to cede the common rights to a single sovereign and the second convention, under the form of an authorization granted by all of them to a single person[29]. We are in the presence of a double contract[30] with a strong and relevant connection, without one being the principal and the other additional, them having only a certain temporal and logical succession.

The premise is the one in which, the individual, in his primordial condition, natural, pre-juridical state without having the consciousness of a superior authority, outside the divinity, motivated mainly by the need to live in peace, gives up his natural state and causes a political configuration characterized by artificialism, individualism and a representative system[31].

Once outlined, the Social Contract theory takes root, attracting other distinguished thinking personalities, among them standing out the English philosopher John Locke and Jean Jacques Rousseau.

Although he stands out from Hobbes' vision also by identifying an essential problem in setting up a rule-based civilization, not authorizing the exercise of power, Locke asserts that the citizen does not gives up

[26] W. S. Morrow, *An introduction to biblical law*, Grand Rapids : Eerdmans Publishing Co., 2017, p. 67
[27] S. Parpola şi K. Watanabe, *Neo-Assyrian Treaties*, 28–58, apud S. Greengus, op. cit., p. 116
[28] W. S. Morrow, op. cit., p. 69
[29] T. Hobbes, *Leviatanul*, Bucharest: Herald Publishing House, 2017, p.203 - 205
[30] N. Popa, a.o., *Filosofia Dreptului. Marile Curente*, Bucharest: C.H.Beck Publishing House, 2010, p.155
[31] Idem, p.156 - 158

his part of sovereignty, and if the power that he, along with the others who compose the people, entrusted it, is confiscated to the detriment of the true belonging, they can also run force to replace those who govern[32].

Without being necessarily divergent but bringing consolidations and, above all, superposing to the edifice conceived by Hobbes and Locke, Rousseau consecrate the theory of *freedom - autonomy* on which the constitutional theory of human rights and fundamental freedoms is based, as well as the theory of limiting the power by consolidating them[33].

Remarkable is what Rousseau states when establishing the individual's priority with the state, contrary to the Aristotelian philosophy, affirming, in an age still tributary to some concepts that were not individual-based, that the state is a creation of it and, in the absence of a free will of the individual, the state cannot exist, society being itself a legal act[34].

At the same time, the French thinker states that freedom can only exist between peers, referring to an abstract legal freedom, and even the least inequality affects the freedom of one party[35], the notion defining the social contract, from the quorum's perspective, being the one's man will.

One of Rousseau's essential grievance is to create a harmony between what law permits with what interests dictate, so that justice and utility not to be in conflict[36].

Conclusion

What emerges as one of the conclusions is the idea of evolution, not so much of the courage to express the deep will of individual, taken rather in its individuality, but especially of the form of expression of the concepts of justice and freedom that define this as a human being.

Any form of external constraint, be it religious or political-social, can only lead to diminishing, until suppression, of fundamental freedoms. The mere awareness of the relationship of mutual dependence between individual and authority gives rise to a mutual duty of respect to the most sensitive and finer fibers.

From the moment that Individual dared to approach his relationship with God under equal conditions of contract, and the Creator himself allowed this, without feeling offended or by considering it a blasphemy, it is inadmissible that an Individual's creation, even of a major complexity, such as the State, to be claimed superior to any citizen.

It is not by accident that these manifestations of higher thought have as instruments legal institutions, the right being, certainly, the best buckler of humanity, both for relations between individuals and between them and entities of different and superior dimensions.

References

- Arab, S. M., *The Pharaoh Who Made Peace with his Enemies And the First Peace Treaty in History*, http://www.touregypt.net/featurestories/treaty.html , reached at February 1st 2018
- Arnold, B. T. and Hess, R. S., *Ancient Israel's History*, collective volume, Grand Rapids: Baker Academic, 2014
- Greengus, S., Covenant and Treaty in the Hebrew Bible and in the Ancient Near East, in the collective volume Ancient Israel's History, Grand Rapids: Baker Academic, 2014
- Hobbes, T., *Leviatanul*, Bucharest: Herald Publishing House, 2017
- Kitchen, K. A. and Lawrence, P. J. N., *The Fall and Rise of Covenant, Law, and Treaty*, Cambridge: Tyndale Bulletin, nr. 40, 1989
- Kitchen, K. A. and Lawrence, P. J. N., *Treaty, Law and Convenant in the Ancient Near East*, Wiesbaden: Harrassowity, 2012
- Kraeling, E. G. H., *Aram and Israel or The Aramaeans in Syria and Mesopotamia,* New York: Columbia University Press, 1918
- Lincoln, C. F., *The Biblical Covenants*, Bibliotheca Sacra, April 1943
- Parpola, S. and Watanabe, K., *Neo-Assyrian Treaties*, Helsinki: Helsinki University Press, 1988
- Plant, D., *The Blood Covenant of God*, Macquarie Fields: Smashwords, 2010
- Popa, N. a.o., *Filosofia Dreptului. Marile Curente*, Bucharest: C.H.Beck Publishing House, 2010
- Rousseau, J.J., *Contractul Social*, Bucureşti: Stiinţifică Publishing House, 1957
- Weinfeld, M. *The Covenant of Grant in the Old Testament and in the Ancient near East*, Michigan: Journal of the American Oriental Society, nr.2, 1970

[32] Idem, p.165
[33] Ibidem, p.173
[34] Ibidem, p.175
[35] Ibidem, p.177
[36] J.J. Rousseau, *Contractul Social*, Bucureşti: Editura Stiinţifică, 1957, p.81

INVENTORY OF PUBLIC GOODS. CURRENT REGULATION AND NORMATIVE PERSPECTIVES

Dan Constantin MÂȚĂ*

Abstract

The Romanian Constitution of 1991, revised in 2003, does not explicitly regulate the notion of a public domain. The core of the regulation of this notion is found in several normative acts regarding the land fund, the local public administration or the public property. Public goods have a derogatory legal regime from common law based on the general public interest that the administration has the mission to accomplish. Generally, Article 860 paragraphs (1) - (2) of the Civil Code provides that the public goods belong to the national, county or, where appropriate, local public domain, and the appropriate delimitation is made under the law.

The public administration authorities have the obligation to draw up and update the inventory of goods in the public domain in accordance with the provisions of Articles 20-21 of Law no. 213/1998 on public property. The inventory procedure differs depending on the category of the public domain and the authority that centralizes the inventory. In the case of the inventory of goods in the public domain of the administrative-territorial units, it is also necessary to adopt a Government decision certifying the belongingness of the goods to the county or local public domain. The draft of the Administrative Code brings important changes in the procedure for inventorying the goods in the public domain of the administrative-territorial units by eliminating the requirement of attestation by a Government decision.

The article analyzes the current regulation of the inventory procedure for public goods and the impact of the changes envisaged by the adoption of the Administrative Code of Romania draft.

Keywords: *public domain, inventory, attestation, Administrative Code.*

1. Introduction

The 1991 Constitution of Romania does not explicitly regulate the notion of a public domain, but regulates the dualist regime of ownership right: private property and public property.

According to Article 136 paragraph (3) of the Constitution, the following categories of property are the sole object of public property: "Subsoil public riches, airspace, waters with potentially valuable energy, of national interest, beaches, territorial sea, natural resources of the economic area and of the continental plateau, as well as other assets established by means of the organic law, are the sole object of public property [1]."

The constitutional text has been amended several times along with the revision of the fundamental law by Law no. 429/2003 on the revision of the Romanian Constitution[2]. Compared to the original text on property, provided by Article 135 of the Constitution adopted in 1991, by the provisions of Article 1 section 69 of the Law no. 429/2003 provided the following:

a) from the listing of the assets that are the sole object of public property, communication channels have disappeared because some of them (gas or oil pipelines, electricity lines) may also form the object of the private property right;
b) the wording "riches of any kind in the subsoil" has been replaced by "riches of public interest of the subsoil";
c) the requirement that the water with potentially energetic potential be "of national interest" was added;
d) it has been established that any other assets which may be the sole object of public property, other than those provided for in the constitutional text, shall be determined by an "organic" law[3].

From the current form of Article 136 paragraph (2) of the Constitution, two criteria may be identified for the classification of public property: the criterion of the destination of the assets (*the public interest or the national interest*) and the criterion of the law declaration (*and other assets established by organic law*) [4].

The notions of public use and public interest are not defined in the legislation, falling into the category of indeterminate legal concepts, which allow a wide margin of appreciation from the central or local public administration authorities with attributions in the administration of the public domain[5]. In the case law of the European Court of Justice, notions of "public

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[1] In the same sense see the provisions of Article 859 paragraph (1) of the Law no. 287/2009 on the Civil Code (republished in the "Official Gazette of Romania", Part I, No. 505 of July 15, 2011), as subsequently amended and supplemented.

[2] Published in „The Official Gazette of Romania" Part I, no. 758 of October 29, 2003.

[3] Alexandru-Sorin Ciobanu, *Drept administrativ, Activitatea administrației publice, Domeniul public* (Bucharest, Editura Universul Juridic, 2015), 157.

[4] Dana Apostol Tofan, *Drept administrativ*, volumul II, 3rd edition (Bucharest, Editura C.H. Beck, 2015), 261.

[5] Apostol Tofan, *Drept administrativ*, 286.

utility" and "public interest" are considered "blind concepts" that "have an elusive nature, being vague principles that are issued and redefined by court or other public authorities, in particular cases"[6].

In the Romanian doctrine, the assets for public use are considered to be those assets accessible to all, because by their nature they are of general use: streets, public roads, public squares, public beaches, bridges. *Public assets* are assets which by their nature are intended to be used in a public service in order to carry out activities of interest to the community without being directly used by any person: schools, hospitals, theaters, museums, libraries, railroads[7].

The normative origin of the notion of the *public domain* is found in several normative acts regarding the land fund, the local public administration or the public property.

The need to regulate the public domain by special rules, derogations from the rules of common law, is related to the purpose of ensuring the general public interest by public administration authorities[8].

In a post-communist doctrine reference, the public domain was defined as "those goods, whether public or private, which, by nature or express provision of the law, must be preserved and transmitted to future generations, representing values intended to be used in the public interest, either directly or through a public service, and subject to an administrative regime or a mixed regime in which the regime of power is determined, being owned or, where appropriate, guarded by legal persons of public law" [9].

This definition bases the theory of the public domain *lato sensu* in the doctrine of administrative law in the post-communist period by including in this notion some private property assets, due to their special importance in national patrimony, are governed by a regime of public law, of "guard and protection" of the public interest or, where appropriate, public use"[10].

In another perspective, to which we agree, the public domain was defined as "all movable or immovable assets belonging to the state or administrative-territorial units, which by law or by their nature are of use or of public interest, used directly by the public or dedicated to a public service and subject to the administrative legal regime"[11].

The notion of a public domain should not be mistaken for the notion of an *administrative domain*, the latter comprising all the movable or immovable assets belonging to the State and the territorial administrative units, irrespective of whether they belong to the public domain or to the private domain[12]. The administrative domain has a narrower content than the patrimony of the state and of the administrative-territorial units, comprising both the active side, consisting of patrimonial rights, as well as the passive side, consisting of the patrimonial obligations[13].

The public domain assets are subject to a derogatory legal regime from the common law based on the public interest that the administration has the task of performing. Generally, Article 860 paragraphs (1) - (2) of the Civil Code provides that the public property belongs to the national, county or, where appropriate, local public domain, and the appropriate delimitation is made under the law.

In the doctrine, the following conditions for inclusion of assets in the public domain were highlighted[14]:

a) the asset belongs to a community (state or administrative-territorial unit) being acquired in one of the ways provided by law;
b) the asset is assigned to a general interest destination, through direct public use or through a public service.

2. Inventory of public assets

The public domain may be of national interest, when the ownership belongs to the state, or of local interest, when the ownership belongs to communes, towns, municipalities or counties[15].

Law no. 213/1998 on the public property assets[16], with the subsequent amendments and completions, stipulates in Article 3 paragraphs (2) - (4) the composition of the public domain categories:

a) *the public domain of the state* is composed of the assets provided in Article 136 paragraph (3) of the Constitution, from those stipulated in section I of the annex to the Law no. 213/1998, as well as other assets of public national use or interest, declared as such by law;
b) *the public domain of the counties* consists of the assets referred to in section II of the annex to the Law no. 213/1998 and other assets of national public use or interest, declared as such by a decision of the county council, unless there are declared by law assets of national public use or interest;

[6] Cătălin-Silviu Săraru, *Drept administrativ, Probleme fundamentale ale dreptului public* (Bucharest, Editura C.H. Beck, 2016), 335.
[7] Emil Bălan, *Dreptul administrativ al bunurilor* (București, Editura C.H. Beck, 2007), 51.
[8] Bălan, Dreptul administrativ al bunurilor, 4.
[9] 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 (Bucharest, Editura All Beck, 2005), 173.
[10] Iorgovan, Tratat de drept administrativ, p. 173.
[11] Rodica Narcisa Petrescu, *Drept administrativ* (Bucharest, Editura Hamangiu, 2009), 263; Emilia Lucia Cătană, *Drept administrativ* (Bucharest, Editura C.H. Beck, 2017), 223.
[12] Ciobanu, Drept administrativ, 176.
[13] Bălan, Dreptul administrativ al bunurilor, 40; Săraru, Drept administrativ, 327.
[14] Cătană, Drept administrativ, 223.
[15] Anton Trăilescu, *Drept administrativ*, 3rd edition (Bucharest, Editura C.H. Beck, 2008), 90.
[16] Published in „The Official Gazette of Romania" Part I, no. 448 of November 24,1998.

c) *the public domain of communes, towns and municipalities* is made up of the assets referred to in section III of the annex to the Law no. 213/1998 and other assets of local public use or interest, declared as such by a decision of the local council, if they are not declared by law assets of national or county public use or interest.

The belongingness of an asset to the public domain and the public interest to which it corresponds is done through a procedural operation called *domain classification*. This operation differs from the actual recording of an asset in a public domain of a holder, referred in the doctrine as *domain incorporation*, and which always follows the domain classification[17].

According to the provisions of Article 23 of Law no. 213/1998 disputes regarding the demarcation of the public domain of the state, counties, communes, cities or municipalities are of the competence of the administrative courts.

Law no. 213/1998 regulates the possibility of transferring an asset from the public domain of the state or of the administrative-territorial units to another category of public domain[18]. According to Article 9 paragraphs (1) - (6) these are:

a) *the transfer of an asset from the public domain of the state to the public domain of an administrative-territorial unit* shall be made at the request of the county council, respectively of the General Council of the Bucharest Municipality or of the local council, as the case may be, by a decision of the Government, being truned from asset of national public interest into an asset of local or county public interest;
b) *the transfer of an asset from the public domain of an administrative-territorial unit to the public domain of the state* is made at the request of the Government, by a decision of the county council, respectively of the General Council of Bucharest Municipality or of the local council, being truned from asset of county or local public interest into an asset of national public interest;
c) the transfer of an asset from the public domain of the county to the public domain of an administrative-territorial unit within the territorial district of the respective county is made at the request of the local council, by a decision of the county council, being turned from asset of county public interest into an asset of local public interest;
d) the transfer of an asset from the public domain of an administrative-territorial unit from the territorial district of a county to the public domain of the respective county shall be made at the request of the county council, by a decision of the local council, being turned from asset of local public interest into an asset of county public interest;
e) the transfer of a good from the public domain of an administrative-territorial unit to the public domain of another territorial-administrative unit within the county is made at the request of the local council, by decision of the local council of the commune, town or municipality which owns the asset and by decision of the local council of the commune, town or municipality to the ownership of which it is transmitted;
f) *the transfer of an asset from the public domain of a county to the public domain of another limitrophe county* is done at the request of the county council, by a decision of the county council of the county in the ownership of which the asset is and by decision of the county council of the county in the ownership of which it is transmitted;
g) *the transfer of an asset from the public domain of Bucharest Municipality to the public domain of Ilfov County* is made at the request of the county council, by a decision of the General Council of Bucharest Municipality and by a decision of the county council of Ilfov County[19].

The public administration authorities have the obligation to draw up and update the inventory of public assets in accordance with the provisions of Articles 20-21 of Law no. 213/1998.

The state inventory of public assets is drawn up and amended, as the case may be, by the ministries, by the other specialized bodies of the central public administration, as well as by the local public administration authorities that manage such assets. The centralization of the inventory is carried out by the Ministry of Finance and is subject to approval by the Government[20].

The inventory of assets in the public domain of the administrative-territorial units shall be drafted and amended, as the case may be, by special commissions, chaired by the presidents of the county councils, by the mayor of Bucharest Municipality, by the mayors of the administrative-territorial units, as well as by the persons delegated by them[21].

[17] Bălan, Dreptul administrativ al bunurilor, 52.

[18] In accordance with the provisions of Article 860 paragraph (2) of the Civil Code "the assets which form the exclusive object of the public property of the state or of the administrative-territorial units according to an organic law cannot be transferred from the public domain of the state to the public domain of the administrative-territorial unit or vice versa after the amendment of the organic law".

[19] The last three modalities are strictly carried out in order to develop certain fixed-term investment objectives, stipulated in the decision of the local council, the county council, respectively the Bucharest Municipality [Article 9 paragraph (8) of the Law no. 213/1998].

[20] See: Government Decision no. 1705/2006 for the approval of the centralized inventory of assets in the public domain of the state, published in the "Official Gazette of Romania", Part I, no. 1020 of December 21, 2006, as subsequently amended and supplemented; Order of the Minister of Public Finance for approval of the Statements regarding the drawing up and updating of the centralized inventory of public domain assets of the state no. 1718/2011, published in the "Official Gazette of Romania", Part I, no. 186 of March 17, 2011.

[21] The composition of the special commissions for drawing up the inventory of assets that make up the public domain of communes, towns, municipalities and counties is provided in Article II of the Technical Norms for the drawing up of the inventory of assets that make up the

After drafting, the inventories are appropriated by the decision of the local public administration authorities and are centralized by the county council, respectively by the General Council of Bucharest Municipality. Subsequently, the inventories are sent to the Government in order to declare the belongingness of the assets to the county or local public domain

In the jurisprudence of the Supreme Court, the decisions of the local public administration authorities by which the inventory lists are acquired were considered to be the preparatory acts of the Government's decision to prove the belonging of the assets to the county or local public domain, without producing legal effects themselves and consequently, they cannot be the subject of a separate action in an administrative court[22].

In the doctrine, this interpretation has been criticized by the main argument that regardless of the subject matter of a regulation "a Council decision can only be an administrative act, an act of authority which, by definition, produces certain legal effects, even if they rather have procedural impact"[23].

Regarding the Government's decision to certify the belongingness of the assets to the county or local public domain, also the jurisprudence of the High Court of Cassation and Justice, emphasized that "it has no constitutive ownership effect in favour of the administrative-territorial units" and "the legal effect of the document issued by the central authority is only an attestation of the legal regime of public property differentiated by the legal regime of private property, which belongs to the territorial-administrative unit"[24].

3. Regulating the inventory of public assets in the draft of the Administrative Code of Romania

The draft of the Administrative Code of Romania, in the form registered with the Romanian Senate on December 12, 2017[25], regulates the legal regime of the public domain in Title I of Part Five, entitled *Exercise of the public property right of the state or of the administrative-territorial units*.

Regarding the inventory of assets in the public domain of the state Article 292 paragraph (1) of the draft introduces the rule that it is drawn up and amended exclusively by the ministries or by the other specialized bodies of the central public administration, "both for the assets administered by them and for the assets administered by the units under the subordination, coordination or under their authority and is approved by Government Decision".

Therefore, in the forthcoming regulation, the possibility of drawing up and amending the inventory on public assets in the state's public domain and by the local public administration authorities administering such assets is eliminated. On the other hand, the Administrative Code draft stipulates that "holders of the right of administration, concessionaires and public utility institutions exercising a real right over the public property of the state are obliged to include these real rights in the integrated cadastre and land registry system" [Article 292 paragraph (3)][26] .

Significant changes are envisaged in the regulation of the inventory of assets in the public domain of the administrative-territorial units.

Generally, Article 293 paragraph (1) of the draft provides that "all assets belonging to the administrative-territorial units shall be subject to annual inventory. The deliberative authority shall be provided annually by the executive authority with a report on the status of asset management."

Similarly to the current regulation, the inventory of the assets that make up the public domain of the administrative-territorial unit is drawn up and updated by a special commission, chaired by the mayor, respectively by the county council president or a person empowered by them. Once the inventory has been drawn up, it is approved by decision of the local council, respectively, by a decision of the county council.

Each decision shall be accompanied by two categories of documents: "a) Proof of ownership, accompanied by land book excerpts which shows the registration of the right of ownership in the land book and the fact that the property in question is not burdened; b) "statement on one's own responsibility of the secretary of the administrative-territorial unit that the property in question is not subject to disputes at the time of the decision" (Article 293 paragraph (6)].

The novelty is the fact that these decisions are no longer centralized by the county council, respectively the General Council of Bucharest Municipality, with a view to sending them to the Government. Also, the requirement for the Government to adopt a decision stating the belongingness of the assets to the county or local field disappears.

In the draft of the Administrative Code, however, it is stipulated that, after adoption, the decision of the deliberative authority of the territorial-administrative unit shall be communicated to the prefect and the ministry with attributions in the field of public

public domain of communes, towns, municipalities and counties, approved by GD no. 548/1999, published in the "Official Gazette of Romania", Part I, no. 334 of July 15, 1999.

[22] Ciobanu, Drept administrativ, 180.

[23] Ciobanu, *Drept administrativ*, 180-181.

[24] Apud Cătană, Drept administrativ, 250-251.

[25] https://www.senat.ro/legis/lista.aspx?nr_cls=L132&an_cls=2018

[26] Regarding this article, we mention that the Government of Romania expressed its point of view in replacing the phrase "public utility institutions" with the phrase "the holder of the right to use free of charge". See:
https://www.senat.ro/legis/lista.aspx?nr_cls=L132&an_cls=2018

administration, together with the documents stipulated in Article 293 paragraph (6) of the project. The deadline for communication is no more than 10 working days after the date of the decision.

The communication is not made for the purpose of issuing or adopting an administrative act certifying the belongingness of the assets to the public domain of the administrative-territorial units, but for informing and drawing up a point of view on the decision and the accompanying documents. This point of view is issued by the ministry with attributions in the field of public administration within maximum 60 days from the registration of the communication of the decision. During this period, the Ministry may request information from the competent authorities and institutions, which are obliged to respond within 30 days of registration of the request.

Following the communication of the point of view by the ministry with attributions in the field of public administration, two options are possible: a) amendment of the decision of the deliberative authority of the administrative-territorial unit in order to ensure compliance with the legal norms, if the ministry has notified matters that are contrary to these norms; b) adoption of a decision of the deliberative authority of the territorial-administrative unit, which certifies the inventory of the public domain assets of the administrative-territorial unit, if the ministry did not notify matters that are contrary to the legal norms.

On the basis of the decision which certified the inventory of public domain assets of the administrative-territorial unit, the mayor and the chairman of the county council request the final registration of the goods in the land register.

A positive aspect of the Administrative Code draft is the express mention of the legal nature and effects of the decisions of the deliberative authorities of the administrative-territorial units: "the decision regarding the approval of the inventory of the assets that make up the public domain of the administrative-territorial unit and the decision confirming the inventory of the asset / assets in the public domain of the administrative-territorial unit are of an individual character, becoming mandatory and producing effects from the date of communication by the secretary of the administrative-territorial unit to the executive authority" (Article 293 paragraph (6)] [27].

3. Conclusions

Regulating the legal regime of the public domain is one of the constants of public law. The doctrine of administrative law in Romania has "recovered" the past two decades this traditional institution of administrative law by formulating critical remarks and *lex ferenda* proposals.

Regarding the inventory of public assets in the administrative-territorial units, several criticisms have been expressed regarding the legal nature of the decisions of the local public administration authorities, by which inventory lists (administrative act or preparatory act to the Government's decision to certify) are acquired. The matter has acquired practical relevance in the circumstances in which the supreme court practice has decided on the character of preparatory act of such a decision.

From this perspective, a beneficial aspect of the future regulation of the legal regime of public assets is the clarification of the legal nature and of the effects of the decisions of the local public administration authorities on the inventory of assets in the public domain of the administrative-territorial units.

References

- Dana Apostol Tofan, *Drept administrativ*, volumul II, ediția a 3-a (București, Editura C.H. Beck, 2015)
- Emil Bălan, *Dreptul administrativ al bunurilor* (București, Editura C.H. Beck, 2007)
- Dumitru Brezoianu, *Drept administrativ român* (București, Editura All Beck, 2004)
- Emilia Lucia Cătană, *Drept administrativ* (București, Editura C.H. Beck, 2017)
- Eugen Chelaru, *Administrarea domeniului public și a domeniului privat*, Ediția a 2-a revăzută și completată, (București, Ed. C.H. Beck, 2008)
- Alexandru-Sorin Ciobanu, Drept administrativ, Activitatea administrației publice, Domeniul public (București, Edditura Universul Juridic, 2015)
- George N. Coca, *Dreptul administrativ al bunurilor* (București, Editura Universul Juridic, 2011)
- 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)
- Corneliu Manda, *Drept administrativ, Tratat elementar*, Ediția a V-a (București, Editura Universul Juridic, 2008)
- Anton P. Parlagi, *Dicționar de administrație publică*, Ediția a 3-a (București, Editura C.H. Beck, 2011)
- Rodica Narcisa Petrescu, *Drept administrativ* (București, Editura Hamangiu, 2009)
- Ovidiu Podaru, *Drept administrativ*, vol. II, *Dreptul administrativ al bunurilor* (București, Editura Hamangiu) 2011

[27] Note that in section 61 of the Opinion of the Legislative Council regarding the legislative proposal on the Administrative Code of Romania the necessity to replace the phrase "are of an individual character" with the expression "have an individual character" was pointed out.
See https://www.senat.ro/legis/lista.aspx?nr_cls=L132&an_cls=2018

- Cătălin-Silviu Săraru, Drept administrativ, Probleme fundamentale ale dreptului public (București, Editura C.H. Beck, 2016)
- Elena Emilia Ștefan, *Drept administrativ*, Partea a II-a (București, Editura Universul Juridic, 2013)
- Anton Trăilescu, *Drept administrativ*, Ediția a 3-a (București, Editura C.H. Beck, 2008)
- Verginia Vedinaș, *Drept administrativ*, Ediția a IX-a (București, Editura Universul Juridic, 2015)

TRANSFER OF PROPERTY ASSETS

Vasilica NEGRUȚ*

Abstract

Starting from the current jurisprudence on the transfer of property assets, in this article, using logical interpretation and also comparative analysis, we intend to investigate the conditions under which an asset from the private domain of the state can be transferred to its public or private domain of an administrative-territorial unit in its public domain, according to the law (article 863 letter d) of the Civil Code). Also, the analysis also concerns the transfer of an asset from the public domain to the private domain, under the conditions established by Law no. 213/1998 on publicly owned property. The recent amendments to this legislative act were also determined by the complex cases brought before the courts regarding the transfer of property assets.

In conclusion, if the asset belongs (according to its purpose, to the national or local public use or interest) to the national or local public domain, then the transfer is carried out according to the procedure established by art. 9 of the Law no. 213/1998, respectively by an administrative act of an individual character, a decision of the Government or a local council. If the object is the exclusive object of public property of the state, according to an organic law, it is also possible by law to transfer the public domain of the state to that of an administrative - territorial unit. It is about the organic laws of modifying the organic law by which the assets have been declared the exclusive object of public property of the state.

Keywords: *public property; transfer; public domain; private domain; government.*

1. Introduction

The notion of a public domain reverts to a current notion after 1989, especially after the adoption of Law no. 18/1991, which establishes the categories of land belonging to the public domain, exempted from the rule of the reconstruction of private property right[1].

The notion of *public domineering* is the result of sustained research by doctrines, authors of public law and private law[2].

The well-known Professor Victor Prudhon, in his paper *Tratatul domeniului public/ The Treaty of Public Domain*, advocated the need to allow an exorbitant legal regime from civil law for certain public assets.[3] Prudhon has the merit of highlighting the relativity of the principle of the inalienability of the public domain, considering that it applies as long as it lasts the public service to which the asset of the public domain in question is assigned[4].

The theory of domineering is an essential change brought to property in civil law[5].

As the well-known professor Jean Vermeulen points out, "the discussions that arise around the notion of a public domain are not only of a theoretical, doctrinal interest, but of a practical interest, the public domain being subjected to a special legal regime that removes it not only from the legal regime of individual property, but also from the legal regime of the private domain of the state subject to the provisions of common law."[6]

Professor Ion Filipescu considered that all property subject to public property law are "domineering assets" and make up the "administrative" domain, within which some public property assets are of "public domain", while others are of "private domain"[7].

Professor Ion Filipescu's thesis takes into account the French legislation according to which public property designates all the assets belonging to public authorities or institutions[8].

In the specialized literature, it is appreciated that the notion of the public domain must be applied to "the

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[1] According to art. 5, par. (1) of the Law no. 18/1991, with subsequent modifications and additions, "it belongs to public domain the land on which there are buildings of public interest, markets, roads, street networks and public parks, ports and airports, forest land, river and river beds, the lakes of public interest, the bottom of the inland sea and the territorial sea, Black Sea shores, including beaches, lands for nature reserves and national parks, archaeological and historical monuments, ensembles and sites, nature monuments, lands for defense needs or other uses which, according to the law, are in the public domain or which by their nature are of public use or interest".

[2] Liviu Giurgiu, Domeniul public, Seria "Repere Juridice"/Public Domain, The series "Legal landmarks", Editura Tehnică, Bucharest, 1997, p. 12.

[3] Emil Bălan, Dreptul administrativ al bunurilor/ Administrative law of assets, Editura C. H. Beck, Bucharest, 2007, p. 8.

[4] Antonie Iorgovan, *Tratat de drept administrative/Treaty of administrative law*, vol. II, 4 Ed., Editura All Beck, Bucharest, 2005, p. 136.

[5] Liviu Giurgiu, *op. cit.*, 1997, p. 12.

[6] Jean Vermeulen, Curs de drept administrative/Course of administrative law, Bucharest, 1947, p. 181.

[7] Ion Filipescu, Domeniul public și privat al statului și al unităților administrativ-teritoriale/ The public and private domain of the state and of the administrative-territorial units, in Dreptul/The law no. 5-6/1994, pp. 75-76.

[8] Alexandru-Sorin Ciobanu, Drept administrativ. Activitatea administrației publice. Domeniul public/ Administrative law. Public administration activity. Public domain. Editura Universul Juridic, Bucharest, 2015, p. 170.

whole of the assets used or exploited by or for the human collectivities[9]".

The distinction between the public domain and the private domain was made on the basis of the provisions of art. 476 of the old Civil Code, considering that the public domain consists of the assets affected by the general and unsuspected use of being private property[10].

According to this article, "*the highways, small roads and streets that are in charge of the state, rivers and floating or floating rivers, shores, shore additions and seaports, natural or artificial ports, shores where the ships can be in general, all parts of Romania's land, which are not private property, are considered as being part of public domain.*"

After 1989, Law no. 18/1991 classifies lands in public domain lands and private domain lands.

The opinions expressed after 1990 on the notions of "public property" and "public domain" are found in several relevant theses: a) the thesis that the two notions are equivalent, supported both by authors of administrative law and by authors of civil law (Mircea Preda, Valentin Prisăcaru, Eugen Chelaru[11]); b) the thesis according to which the public domain is the exclusive object of the public property right (Corneliu Bîrsan, Valeriu Stoica, Marian Nicolae); c) the thesis which establishes the existence of a report from the whole, the notion of domain being wider than the notion of public property (Antonie Iorgovan)[12]; the identification of a broad and a narrow meaning of the notion of a public domain (Liviu Pop) [13].

In contemporary doctrine, the phrase "public domain" has a broader meaning[14], which includes not only public property assets, as listed in Law no. 213/1998, but also the categories of assets of private property which present a significance and importance that go beyond the interests of their holders, leading to the coexistence of two different regimes applicable to them, namely the common law (as it is about a right of private property) and an exorbitant regime that includes public power rules[15].

Therefore, the notion of a public domain is not limited only to assets belonging to the public property, but in some aspects it belongs to the public domain also the assets (mobile or immovable) which are private property[16]. These assets, which are subject to a mixed regime (private and public law) and which can be found in the property of any subject of law, are included in the national cultural patrimony, "being national values to be passed on from generation to generation" have always been the subject of special protection[17].

In André de Laubadère's view, all these special rules as a whole, derogations from common law are the "regime of domineering[18]".

In conclusion, the idea of domineering concerns, on the one hand, the assets of public property and, on the other hand, some assets of private property that are subject to special protection and security.

1.1. Definition of Public Property

The implementation of Law no. 287/2009 on the Civil Code (through Law No. 71/2011) imposed a new view of the matter, as by this normative act an important part of the Law no. 213/1998, which, until that date, was considered to be the main regulation, derogating from the common law, was designed for the legal regime applicable to public property.

In this respect, it was questioned the regulation of public property by the New Civil Code, which, in art. 2, par. (1) establishes the object of regulation of this normative act: "The provisions of this Code regulate the patrimonial and non-patrimonial relations between persons, as subjects of civil law"[19].

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[9] Mihai T. Oroveanu, *Tratat de drept administrative/Treaty of administrative law*, Editura Universitatea Creştină „Dimitrie Cantemir", Bucharest, 1994, p. 417.

[10] Idem.

[11] Eugen Chelaru, *Administrarea domeniului public şi a domeniului privat*/*Administration of the Public Domain and the Private Domain*, 2 Ed, CH Beck, Bucharest, 2008, p. 42. The author considers that "the notions of public domain and public property are equivalent, the first not doing anything other than determining the assets that are subject of public property law", concluding that ordinary laws could not use public and private terms in a meaning other than that given by the Constitution.

[12] Professor Corneliu Birsan denies the existence of a public domain in a broad sense. The author considers that the incorporation in the public domain of the assets comprising the "national forest fund", the "national archive fund", the "national cultural patrimony" and so on are not justified, even if they are subject to a special legal regime regarding their preservation, conservation, management and administration, regardless of the owner of the property right (Corneliu Bîrsan, *Drept civil. Drepturile reale principale/Civil Law, Main Real Rights*, All Beck, Bucharest, 2001, p. 97).

[13] Dana Apostol Tofan, *Drept administrative/Administrative Law*, vol. II, 4 Ed, C.H. Beck, Bucharest, 2017, p. 283.

[14] Professor Antonie Iorgovan defines the public domain as "those public or private assets which, by nature or express provision of the law, must be preserved and passed on to future generations, representing values intended to be used in the public interest, either directly or through a public service subject to an administrative regime or a mixed regime in which the regime of power is decisive, being owned or, as the case may be, guarded by the legal persons of public law" (Antonie Iorgovan, *Tratat de drept administrative*/Treaty of Administrative Law, vol. II, 4 Ed., All Beck, Bucharest, 2005, p. 173).

[15] Verginia Vedinaş, Alexandru Ciobanu, Reguli de protecţie domenială aplicabile unor bunuri proprietate private/Domain protection rules applicable to private property, Lumina Lex, Bucharest, 2001, p. 74.

[16] Antonie Iorgovan, Drept administrativ - tratat elementar/ Administrative law - elementary treaty, vol. III, Proarcadia, Bucharest, 1993, p. 47.

[17] Antonie Iorgovan, *op. cit.*, 2005, p.173.

[18] André de Laubadère, Yves de Gaudermett & Charles Venezia, *Manuel de droit administrative*/Course of administrative law, Paris, 1988, p. 336.

[19] The controversies in the doctrine, as well as the "parallelisms, the inconsistencies and the contradictions between the different normative acts in the field of property" have led to the inclusion in the Government Decision no. 196/2016 for the approval of the preliminary theses of the draft Administrative Code, of the chapter on the exercise of the public and private property right of the State and of the administrative-territorial units. We present some of the "dysfunctions" mentioned in the Government Decision no. 196/2016:

According to art. 858 of the Civil Code, "public property is the right of ownership belonging to the state or an administrative-territorial unit on assets which, by their nature or by the declaration of law, are of public use or interest, provided that they are acquired through one of the modes provided by law".

Under another wording, art. 554, par. (1) of the Civil Code has an almost similar content: "The property of the state and of the administrative-territorial units which, by their nature or by the law, are of public use or interest form the subject of public property, but only if they were legally acquired by them".

As it can be seen, the definition of public property, inspired by civilian doctrine, sets out two elements specific to the legal regime applicable to it[20]: the subjects of public property law (state and administrative-territorial units); the scope of public property, delimited on the basis of the criteria of domineering.

1.2. The Scope of Public Property

Law no. 213/1998, by the provisions of art. 3 generically governs the scope of public property. Thus, the public domain is made up of the assets provided in art. 136, par. (3) of the Constitution, as set out in the Annex, which is an integral part of Law no. 213/1998 and any other assets which, according to the law or by their nature, are of public use or interest and are acquired by the state or by the administrative-territorial units in the ways provided by the law.

According to art. 859, par. (1) of the Civil Code, the exclusive object of public property is the public beneficial interest of the subsoil, the airspace, the water with potentially energetic potential, the national interest, the beaches, the territorial sea, the natural resources of the economic zone and the continental shelf, other goods established by organic law. According to par. (2), the other assets belonging to the state or to the administrative-territorial units are, as the case may be, belonging to the public domain or their private domain, but only if they were also acquired in one of the ways provided by the law.

2. Transfer of Domineering Assets

As it results from the provisions of art. 136, par. (2) of the Constitution, the subjects of the public property law are the state or administrative-territorial units.

According to art. 8 of the Law no. 213/1998, which remained unchanged after the entry into force of the new Civil Code, the transfer of assets from the private domain of the state or of the administrative-territorial units in their public domain, shall be achieved, as the case may be, by a decision of the Government, of the county council, respectively the General Council of Bucharest or the local council. The law further specifies that the decision to transfer property may be appealed to the competent administrative court in whose territory the property is located (art. 8, par. (2) of Law No 213/1998).

It is worth mentioning that the transfer to the public domain of assets belonging to the patrimony of commercial companies, to which the state or an administrative-territorial unit is a shareholder, can be achieved only by payment and with the consent of the general meeting of the shareholders of the respective commercial company. In the absence of such agreement, the assets of the respective company may be transferred to the public domain only by the expropriation procedure for a public utility cause and after a fair and preliminary compensation (article 8, paragraph (3) of Law No. 213/1998).

The Civil Code, in Art. 860 par. (3) *states that assets which form the exclusive public property of a state or administrative-territorial units under an organic law cannot be transferred from the public domain of the state to the public domain of the administrative-territorial unit or vice versa, only as a result of the modification of the organic law. In other cases, passing an asset from the public domain of the state into the public domain of the administrative-territorial unit and vice versa is done under the law.*

It raises the question of what is the meaning of the expression *under the terms of the law* to which the text of the Civil Code refers. The doctrine states that the answer is found in article 9 of Law no. 213/1998, as amended by Law no 224/2016[21].

Clarifications are also brought by the Constitutional Court of Appeal, which stated that "the normative acts that can be used to pass the assets from the public domain of the state into the public domain of the administrative-territorial units are either the organic laws amending the organic law through which the assets have been declared the exclusive object of public property of the state, or the decisions of the Government, when the assets are not an exclusive object of the public property of the state" (Decision of

1. parallelisms on: holders of public property rights; the characters of public property assets; listing the types of assets included in the public domain;

2. contradictions regarding: the owners of the public property right (incorrectly including in this category the sectors of the Bucharest municipality, the local councils, the county councils or the mayors); inappropriate use of "inalienable" expression; persons who can use public property for free use; the right to represent administrative-territorial units in court in disputes concerning the right of public ownership;

3. incomplete regulation on some aspects regarding the legal regime of public and private property of the state and of the administrative-territorial units created the conditions for the proliferation of a non-unitary administrative and sometimes contradictory practice, while at the same time it deprived the private persons of a firm and unequivocal legal reference in their relations with the public administration.

[20] Dana Apostol Tofan, *op. cit*., 2015, p. 266.

[21] Verginia Vedinaș, *Drept administrative/Administrative Law*, X Ed., revised and updated, Ed. Universul Juridic, Bucharest, 2017, p. 487.

the Constitutional Court of Romania No. 406/2016)[22]. In fact, the Constitutional Court notes, as early as 2014, that "as far as the legal mechanism for passing an asset from the public property of the state into the public property of the administrative-territorial units, or vice versa, it must be distinguished, depending on the nature of the asset is passed between the mechanism of passing through the declaration of law or the mechanism of passing through individual acts. Thus, if the property belongs to the public domain according to a declaration of the law, it is also possible by law to make the inter-domain transfer, respectively between the public domain of the state and that of an administrative-territorial unit. However, if the asset belongs according to its purpose, namely the national or local public use or interest, to the national or local public domain, then the transfer is made according to the procedure established by art. 9 of the Law no. 213/1998, namely by means of an individual act, a decision of the Government or a local council, depending on the meaning of the transfer[23]".

Art. 9, par. (1) of the Law no. 213/1998 states that the transfer of an asset from the public domain of the state into the public domain of an administrative-territorial unit is made at the request of the county council, respectively of the General Council of Bucharest Municipality or of the local council, as the case may be, being declared to be an asset of national public interest turned into an asset of local or county public interest.

By decision of the county council, respectively of the General Council of the Bucharest Municipality or the local council, the transfer of an asset from the public domain of an administrative-territorial unit in the public domain of the state can be made at the request of the Government, being declared for an asset of local or county public interest turned into an asset of national public interest (art. 9, par. (2) of Law no. 213/1998).

Regarding the transfer of an asset from the public domain of the county to the public domain of an administrative-territorial unit within the territorial district of the respective county, this transfer is achieved at the request of the local council, by a decision of the county council, declaring an asset from county public interest into an asset of local public interest (art. 9, par. (2) of Law No. 213/1998).

The legislator also envisaged the transfer of an asset from the public domain of an administrative-territorial unit of a county in the public domain of the respective county, that being achieved at the request of the county council, by decision of the local council, declaring from local public interest asset into county public interest (art. 9, par. (4) of Law No. 213/1998).

The transfer of an asset from the public domain of an administrative-territorial unit to the public domain of another administrative-territorial unit within the county is achieved at the request of the local council, by a decision of the local council of the commune, town or municipality in whose ownership there is the asset and by decision of the local council of the commune, city or municipality in whose ownership it is transmitted.

Law no. 213/1998, as amended, contains regulations regarding the transfer of an asset from the public domain of a county to the public domain of another neighboring county. This passage is done *at the request of the county council, by a decision of the county council of the county in whose property the asset is and by decision of the county council of the county in whose ownership it is transmitted*.

The law expressly stipulates that the aforementioned passages are achieved only for a definite period, strictly for the purpose of carrying out investment objectives, *stipulated in the decision of the local council, the county council, respectively the municipality of Bucharest*.

We should mention that the amendment to art. 9 of the Law no. 213/1998 of art. 1, par. 1 of Law no 224/2016 was determined by the multitude and diversity of the issues raised before the administrative litigation courts in this domain.

Various interpretations have been given, both by theoreticians and by the courts, to Article 10 of Law no. 213/1998, which led to the declaration of an appeal in the interest of the law[24].

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[22] In the Decision of the Constitutional Court of Romania no. 406/2016 of June 15, 2016, published in the Official Monitor no. 533 dated July 15, 2016, it was stated that "according to art. 136, par. (3) the final thesis of the Basic Law, referring to art. 860, par. (3) the first thesis of the Civil Code, when the asset is the exclusive object of the public property of the state or of the administrative-territorial unit, under an organic law, the transition from the public domain of the state to the public domain of the administrative-territorial units or vice-versa only operates through a change in the organic law. At the same time, according to art. 136, par. (2) of the Constitution related to art. 860, par. (3) second thesis of the Civil Code, in other cases, namely when the asset may belong, either to the public domain of the state or to the public domain of the administrative-territorial units, the transition from the public domain of the state to that of the administrative-territorial units or vice versa may be achieved, according to the law, respectively under the conditions of art. 9 of the Law no. 213/1998 regarding the public property, with the subsequent modifications and completions, namely at the request of the county council, respectively of the General Council of the Bucharest Municipality or of the local council, as the case may be, by decision of the Government or, symmetrically, at the request of the Government, by decision of the county council, respectively of the General Council of the Bucharest Municipality or of the local council".

[23] Decision of the Constitutional Court no. 1 of 10 January 2014, published in the Official Monitor of Romania, Part I, no. 123 of 19 February 2014.

[24] Decision no. 23 of 17 October 2011 on the examination of the appeal in the interest of the law declared by the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice regarding the interpretation and application of the provisions of art. 10 par. (2) of the Law no. 1/2000 and art. 10 par. (2) of the Law no. 213/1998 referring to the provisions of art. 55 par. (5) of the Law no. 45/2009 on the transfer of the lands under the administration of the institutions provided by art. 9 par. (1) and art. 9 par. (11) of the Law no. 1/2000 in the public domain of the state in the private domain of the administrative-territorial unit, by decisions of the county commissions for the establishment of the land ownership right, with the purpose of reconstructing the ownership right on the old sites in favor of the former owners or their heirs.

If, in the original form, this article concerned the termination of the right of ownership by the property's destruction or its transfer to the private domain after the entry into force of the New Civil Code, art. 10 of the Law no. 213/1998 regulates the transition from the public domain to the private domain, which is achieved, as the case may be, *by a decision of the Government, of the county council, respectively of the General Council of Bucharest Municipality or of the local council, unless otherwise stipulated by the Constitution or by law.*

In this case, the passing decision may be appealed, under the law, to the competent administrative court in whose territory the property is located (art. 8, par. (2) of Law No. 213/1998).

We emphasize that in French law various texts provide for real transfers of property belonging to the public domain from a public person to the benefit of another, by way of derogation from the principle of the inalienability of the public domain (for example, article L3113-1 of the General Code of Public Property or Law of Museums of France No 2002-5 of 4 January 2002) [25].

According to art. L.1 of the General Code of private Property, the holders of the property right are the "classical" public persons, respectively the state, the territorial collectivities and their forms of association, as well as the public institutions. The public domain of a public person referred to in article L.1 consists of goods which are affected for the direct use of the public or a public service, provided that in the latter case they are subject to essential (indispensable) development for the execution of the missions of this public service (art. L2111-1).

3. Conclusions

In conclusion, if the object is the exclusive object of public property of the state, according to an organic law, it is also possible by law to transfer the public domain of the state to that of an administrative - territorial unit. It is about the organic laws of modifying the organic law by which the assets have been declared the exclusive object of public property of the state.

If the asset belongs (according to its purpose, to the national or local public use or interest) to the national or local public domain, then the transfer is carried out according to the procedure established by art. 9 of the Law no. 213/1998, respectively by an administrative act of an individual character, a decision of the Government or a local council.

References

- André de Laubadère, Yves de Gaudermett & Charles Venezia, Manuel de droit administrative/Course of administrative law, Paris, 1988
- Antonie Iorgovan, Tratat de drept administrativ/Treaty of administrative law, vol. II, 4 Ed., All Beck, Bucharest, 2005
- Antonie Iorgovan, Drept administrativ - tratat elementar/ Administrative law - elementary treaty, vol. III, Proarcadia, Bucharest
- Alexandru-Sorin Ciobanu, Drept administrativ. Activitatea administrației publice. Domeniul public/ Administrative law. Public administration activity. Public domain, Universul Juridic, Bucharest, 2015
- Corneliu Bîrsan, Drept civil. Drepturile reale principale/Civil Law, Main Real Rights, All Beck, Bucharest, 2001
- Dana Apostol Tofan, Drept administrativ/Administrative Law, vol. II, 4 Ed, C.H. Beck, Bucharest, 2017
- Emil Bălan, Dreptul administrativ al bunurilor/ Administrative law of assets, C. H. Beck, Bucharest, 2007
- Eugen Chelaru, Administrarea domeniului public și a domeniului privat/Administration of the Public Domain and the Private Domain, 2 Ed, CH Beck, Bucharest, 2008
- Ion Filipescu, Domeniul public şi privat al statului şi al unităţilor administrativ-teritoriale/ The public and private domain of the state and of the administrative-territorial units, in Dreptul/The law no. 5-6/1994, pp. 74-76
- Jean Vermeulen, Curs de drept administrative/Course of administrative law, Bucharest, 1947
- Liviu Giurgiu, Domeniul public, Seria "Repere Juridice"/Public Domain, The series "Legal landmarks", Editura Tehnică, Bucharest, 1997
- Mihai T. Oroveanu, Tratat de drept administrative/Treaty of administrative law, Editura Universitatea Creştină „Dimitrie Cantemir", Bucharest, 1994
- Odile de David Beauregard-Berthier, Droit administratif des biens/Administrative law of goods, 5e édition, Gualiano éditeur, EJA, Paris, 2007
- Verginia Vedinaş, Alexandru Ciobanu, Reguli de protecţie domenială aplicabile unor bunuri proprietate private/ Domain protection rules applicable to private property, Lumina Lex, Bucharest, 2001
- Verginia Vedinaş, Drept administrativ/Administrative Law, X Ed., revised and updated, Universul Juridic, Bucharest, 2017

[25] Odile de David Beauregard-Berthier, *Droit administratif des biens/Administrative law of goods*, 5e édition, Gualiano éditeur, EJA, Paris, 2007, p. 97.

THE REASON AND FIELD OF APPLICATION REGARDING ART. 118 PARA. (3) OF EMERGENCY ORDINANCE NO. 195/2002

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Abstract

This article aims to establish the correct interpretation of the obligation to send to the police unit that detected the contravention a copy of the complaint in relation to the performing of appropriate entries in the driving record. It also deals with the consequences that can be reached unjustifiably in the situation when the police unit does not proceed to perform the appropriate entries in the driving record, although they have become aware of the existence of the complaint, being a legal party cited in a pending trial.

Therefore, if the police body does not make the entries in the driving record as soon as it is notified on the existence and content of a complaint of violation, we can find ourselves under the scope of the provisions of art. 335 para. (2) of the Criminal Code, namely driving a vehicle without driving license. It is an unfair situation, due to the fact the law itself provides that the complaint has a suspensive effect as of the time of the registration, namely when it is filed with the registry of the court, there also being available the possibility of obtaining a court clerk certificate.

This document can prove that the complaint exists, so that, if the potential offender was pulled over for a routine check, the offender would have available all the legal means to prove the existence of the complaint and, by default, of the suspension of the effects of the sanction applied to the offender.

Keywords: *complaint, contravention, driving record, pending trial, art. 118 para. (3) of E.O. no. 195/2002, consequences.*

1. Introduction

This study aims to perform a short review of the obligation provided for by art. 118 para. (3) of G.E.O. no. 195/2002[1] on public road traffic, namely the communication by the offender of a counterpart of the complaint of violation filed with the dockets of the court competent to settle it, in order to make the necessary entries in the diving record.

The legal provisions in question may be subject to different interpretations made both by the offence finding authorities, and in what concerns the practice of the courts of law.

Due to these reasons, we hereby draw the attention on the fact that it is possible to reach non-unitary solutions in relation to the cases of litigants, although, from our point of view, there is only one fair and equitable way to construe the obligation established on the offender, as we will show below.

2.1. The history of the regulation of art. 118 of the Ordinance.

In 2007, art. 118 para. (1) of G.E.O. no. 195/2002 read as follows: "A complaint can be filed against the record of findings within 15 days as of the communication, to the traffic police department in the jurisdiction of which the deed was found".

This legal provision was declared unconstitutional by Decision no. 347 of April 3rd, 2007[2], pronounced by the Constitutional Court of Romania.

Therefore, the Court noted that "the existence of any administrative hindrance, which has no objective or rational justification and which could ultimately deny the free access to justice of the individual, violates the provisions of art. 21 para. (1)-(3) of the Constitution. Therefore, the obligation to file the complaint with the body of the official examiner, as a condition of access to justice, **cannot be objectively and reasonably justified by the fact that, after receiving the complaint, the administrative bodies would be aware of it and would not proceed with the enforcement of the applied fine.** Furthermore, **such a legislative solution could lead to abuses committed by the official examiners of the administrative bodies**, which, ultimately, would lead to their criminal and disciplinary liability, would hinder or deny the right of the claimant to free access to justice".

The arguments of the Court on the unconstitutionality of the challenged provisions can be applied in what concerns the obligation to file the complaint with the police body.

Of course, we do not consider the arguments on the violation of the free access to justice, but rather the thesis on the possibility granted to the police bodies to construe the legal texts in such a manner to commit unjustified, unlawful and also discriminatory abuses.

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[1] Hereinafter referred to as the ***Ordinance***, normative act republished in Official Journal of Romania no. 670 of August 3rd, 2006, as further amended and supplemented.

[2] in what concerns the constitutional challenge of the provisions of art. 118 para. (1), (2) and (5) of G.E.O. no. 195/2002 on public road traffic, decision published in Official Journal of Romania no. 307 of May 9th, 2007.

2.2. Current regulation, rationality and applicability.

Currently, art. 118 para. (3) of the Ordinance provides that "the evidence of the registration of the complaint filed with the court within the deadline referred to in para. (1) is delivered by the offender to the police unit of the official examiner, which **will make the entries in the records and** return the driving license".

Para. (3) of the same normative act shall have to be correlated with para. (2) of art. 118, which provides that "the complaint suspends the enforcement of the fines and additional sanctions as of the date of its registration until the date of the judgment".

Given that the complaint of violation can suspend the enforcement, the consequence is that "the measure on the suspension of the driving right should have been suspended. In the administrative practice, this aspect is shown by the issuance of the "temporary traffic permit" – a certificate issued in case the driving permit was withdrawn in order to be suspended and a complaint of violation was filed with the authority of the official examiner[3]".

Notwithstanding, by analyzing the regulation of para. (3) of the Ordinance, we note that, although the sanctions are suspended as of the registration of the complaint with the court, it can be deemed that the police body will not make the entries unless the complaint is communicated to it by the offender.

It is very normal that the police body is not aware of the existence of the complaint until the receipt of the document in question, but it cannot be considered that it has no obligation to make the appropriate entries in the driving record of the offender, from the moment the complaint is communicated to it by the court of law.

If we admitted that the police inspectorate is able to claim that it was unaware of the registration of the offender's complaint following the communication thereof by the registry of the court, we can imagine that we would reach the application of unjustified and disproportionate solutions, with potential consequences of criminal nature.

As a consequence, we believe that the nature and reason for establishing such a provision has indeed a justification, but strictly as to the period between the filing of the complaint with the competent court of law and the moment when the complaint will actually be communicated by means of the registry of the court to the police inspectorate, in order to file a statement of defense, in connection with the criticisms and arguments found and substantiated in the complaint of violation.

2.3. The failure to perform the appropriate entries in the driving record of the offender and the potential consequences that can occur in the criminal field.

If the police body does not make the entries in the driving record as soon as it is notified on the existence and content of a complaint of violation, we can find ourselves under the scope of the provisions of art. 335 para. (2) of the Criminal Code[4], namely driving a vehicle without driving license.

Therefore, in accordance with the provisions of art. 335 para. (2) of the Criminal Code, we note that the wording of the incident legal text does not leave much room for interpretation:

"Driving a vehicle without driving license:

(2) Driving, on public roads, a vehicle for which a driving license is required by law, by an individual who owns a driving license which was issued for a different category or subcategory than the one in which the vehicle is included, or whose license has been withdrawn or rescinded or who is not entitled to drive vehicles in Romania shall be punished by imprisonment from 6 months to 3 years or by fine".

By analyzing the text above, it can be noted that the opening of a criminal file is very possible and unfortunately, very probable, only because the corresponding information has not been recorded by the police body, the offender having a complaint of violation already filed on the dockets of the courts of law whereby he/she challenged the lawfulness and validity of the record of findings and subsequent penalties.

It is an unfair situation, due to the fact the law itself provides that the complaint has a suspensive effect as of the time of the registration, namely when it is filed with the registry of the court, there also being available the possibility of obtaining a court clerk certificate. This document can prove that the complaint exists, so that, if the potential offender was pulled over for a routine check, the offender would have available all the legal means to prove the existence of the complaint and, by default, of the suspension of the effects of the sanction applied to the offender.

There is also the possibility that the official examiner checks in the database and finds that there is no entry on the complaint, so that, overly zealous, proceeds with the opening of a criminal file, even if the potential offender holds the court clerk certificate.

Therefore, although the offender appealed the record of findings and subsequent penalties, and the police body was notified in this respect by the court of law, the potential risk on the opening of a criminal file substantiated on art. 335 para. (2) of the Criminal Code is not excluded, on grounds that the complaint is not available in the records of the police body.

[3] See in this respect, Ovidiu Podaru, Radu Chiriță, *Regimul juridic al contravențiilor: O.G. nr. 2/2001 comentată*, edition 2, Hamangiu Publishing House, Bucharest, 2011, p. 289.

[4] See in this respect, Law no. 286/2009 on the Criminal Code, published in Official Journal no. 510 of July 24th, 2009, as further amended and supplemented.

Both the doctrine and the practice of the courts of law note that, in case of driving on public road a vehicle without holding a driving license, the immediate consequence "*consists in damaging social relations concerning public roads safety and creating a state of danger because of the existence on public roads of vehicles driven by persons who did not acquire theoretic knowledge and practical abilities for obtaining driving license*[5]".

Furthermore, in what concerns the nature of the application of the measure on the suspension of the driving right, it was noted that "the suspension of the driving right has not a punitive nature, but a preventive one, as it concerns the protection of public interest against the potential risk posed by a driver suspected of serious breach of road traffic rules and especially against the danger represented by the breach of the traffic rules for traffic participants[6]".

Notwithstanding, we can talk about the immediate consequence of the offence provided for by art. 335 para. (2) of the Criminal Code and the preventive nature of the measure on the suspension of the right to drive vehicles on public roads if the sanction remained definitive, namely: either by not challenging the record of findings and subsequent penalties, or by the complaint being definitively dismissed by a court of law.

We hereby mention that we agree with the above-mentioned author in what concerns the reason of the establishment, the nature of the measure and what it is intended to be protected by applying the measure on the suspension of public roads driving right, but we believe that we should not ignore the presumption of innocence.

As a consequence, if the record of findings and subsequent penalties is not appealed within the legal deadline before a competent court of law, the respective administrative act shall remain definitive and shall produce effects.

Notwithstanding, in consideration of the fact that the sanctioned person filed a complaint of violation, the record of findings and subsequent penalties cannot be effective unless a final decision is ruled which maintains the appealed administrative act.

It is obvious that, if the final decision finds that the cancellation of the record of findings and subsequent penalties is required (either due to non-compliance with absolute nullity conditions or non-compliance with the application of relative nullity, provided that the offender was injured), there is no reason or logics to talk about its potential effects, because it will be considered retroactively that it had not existed. Therefore, any sanction applied by means of the respective record shall be deregistered with the driving record of the offender, upon the request of the offender, accompanied at least by the copy of the final decision, in accordance with the legal provisions in force.

We are considering the situation where the sanction on the suspension of the right of driving on public roads had already been suspended by means of the simple registration of the complaint of violation. The fact that the police body can use the legal text of art. 118 para. (3) of the Ordinance to neglect making the appropriate entries in the driving record of the offender or to commit abuses, certainly should not be able to justify the basis for opening a criminal file, otherwise opened without a legal ground.

Given that contraventions also fall under the scope of criminal charges, as it is already well-known, therefore a "dispute must grant the procedural guarantees acknowledged and guaranteed by art. 6 of the European Convention on Human Rights [which is an integral part of the domestic law under art. 11 of the Constitution of Romania and has priority under art. 20 para. (2) of the fundamental law][7]".

According to the case-law of the European Court of Human Rights, the court must examine in every case to what extent the deed committed by the individual who was sanctioned in the field of contraventions represents a "*criminal charge*", under art. 6 of the European Convention on Human Rights. This analysis shall be performed under three alternative criteria, as follows: the nature of the deed, criminal nature of the legal text defining the contravention, according to domestic legislation, and, last but not least, the nature and severity level of the applied sanction.

Therefore, we believe that the application of *non bis in idem* principle is required, and also under art. 6 of the European Convention on Human Rights and art. 4 of Protocol no. 7 to the European Convention on Human Rights whereby the same principle in the criminal field is established.

Therefore, as the doctrine[8] stated, in what concerns criminal liability that can be applied for the commission of the offence of driving on public roads a vehicle by a person whose driving right is suspended, this "*cannot be undertaken as long as the offender was not officially made aware that the competent bodies*

[5] See in this respect, Decision no. 667/A of August 5th, 2014, pronounced by the Court of Appeal of Cluj, criminal and minors division, available on site www.curteadeapelcluj.ro, accessed on 20.12.2017.

[6] See in this respect, Civil sentence no. 3001 of June 29th, 2012, definitive, not published, pronounced by Bucharest Tribunal, division IX of the contentious administrative and fiscal, available in Cristina Titirișcă, *Contencios administrativ: suspendarea actului administrativ: practică judiciară recentă*, Hamangiu Publishing House, Bucharest, 2016, p. 167.

[7] See in this respect, Andrei Pap, Drept contravențional. Culegere de hotărâri judecătorești 2007-2014. Vol. I. Reflectarea jurisprudenței CEDO în procedura contravențională națională, Hamangiu Publishing House, Bucharest, 2015, p. 24.

[8] See in this respect, Vasile Dobrinoiu (coordinator), Ilie Pascu, Mihai Adrian Hotca, Ioan Chiș, Mirela Gorunescu, Costică Păun, Norel Neagu, Maxim Dobrinoiu, Mircea Constantin Sinescu, *Noul Cod penal comentat. Partea specială*, Vol. II, Edition II revised and supplemented, Universul Juridic Publishing House, Bucharest, 2014, p. 716; *The comment of February 28th, 2014 is also available on https://idrept.ro/, site accessed on 08.12.2017*.

ordered the suspension of the driving right[9] *(...) The solution is similar in case the persons against whom the suspension of the driving right had been established filed a complaint of violation whereby requested the annulment of the record of findings and subsequent penalties and this had not yet been definitively settled* [10] ".

In the substantiation of our arguments, we hereby show that, by Civil Decision no. 8458/2014, pronounced by the Court of Appeal of Cluj, the division of the contentious administrative and fiscal[11], in what concerns the text of art. 118 para. (3) the following were noted: "The text refers to the situation where the driving license was withdrawn upon the draw up of the record (…) In the situation of the plaintiff, ***there is nothing to prevent the entry in the driving record to be performed based on the findings of the finding authority, party to the contravention trial***".

Furthermore, in another case[12] which concerned the suspension of the administrative act, the court considered that, "although the plaintiff was returned the driving license only on 20.12.2014, as resulting from the evidence of f. 29, the analysis of the provisions of art. 118 para. (2) and (3) of G.E.O. no. 195/2002 ***the case claimed by the plaintiff cannot be retained as incident, namely that the suspensive effect of the formulation of the complaint of violation would be conditioned by the filing of the proof of registration of the complaint with the police unit the official examiner is part of***. Following the analysis of art. (2) of the aforementioned article, within the limits of the investigation of the appearance of the rights claimed by the plaintiff, the suspensive effect is produced de jure (*ope legis*), ***by the registration of the complaint with the court of law within the deadline provided for by para. (1), the law recognizing the benefit of safeguarding the driving right throughout the judgment of the complaint of violation***. The lack of diligence in the restitution of the driving license, whether or not by fault, cannot represent a precondition of the subsequent claiming of a negative fact, namely those of the failure to exercise a right".

3. Conclusion

In view of the arguments set out in the present study, we conclude that the police bodies should pay more attention and show promptness, professionalism and, last but not least, good-faith, in what concerns the effective registration of the appropriate entries in the driving record of the sanctioned offender.

As we have already noted, by means of the failure to apply and implement these entries in due time, there is a real possibility that a criminal file is opened against the sanctioned person, the consequences being at least questionable, even in case of file closing.

Furthermore, not only the police bodies, but also the courts of law should grant more attention to incident regulations, taking into account the reason for which the measure of the complaint of violation communication to the police body was established, respectively the suspension of the applied sanctions by means of the filing of the complaint with the competent court of law.

In conclusion, in our opinion, the only reason for the establishment of the obligation of the claimant on the communication to the police department of a counterpart of the complaint of violation, takes into account the term between the registration of the complaint of violation and the communication of a counterpart by the registry of the court, in order for the police body to be able to exercise its defense right, by drawing up and formulating a statement of defense.

We believe that this obligation cannot be construed in such a way that it could justify the lack of proper entries recorded in claimant's driving record, especially since the police body becomes party to the litigation contemplating the annulment of the record of findings and subsequent penalties.

References

- M. Andreescu, R.S. Şimonescu-Diaconu, „*Infracţiuni rutiere*", C.H. Beck Publishing House, Bucharest, 2012

[9] See in this respect, Criminal decision no. 1051/2011, pronounced by the Court of Appeal of Galaţi, available in M. Andreescu, R.S. Şimonescu-Diaconu, *Infracţiuni rutiere*, C.H. Beck Publishing House, Bucharest, 2012, p. 128. [*apud* Vasile Dobrinoiu (coordinator), *op. cit.*, 2014, p. 716].

[10] See in this respect, M.A. Hotca (coordinator), Maxim Dobrinoiu, Mirela Gorunescu, Norel Neagu, Radu-Florin Geamănu, *Infracţiuni prevăzute în legi speciale*, edition 3, C.H. Beck Publishing House, Bucharest, 2013, p. 316 [*apud* Vasile Dobrinoiu (coordinator), *op. cit.*, 2014, p. 716].

[11] The quoted decision can be accessed by idrept platform, on the following websie: https://idrept.ro/DocumentView.aspx?DocumentId=77852050&Info=RG9jSWQ9NDU0OTcmSW5kZXg9RCUzYSUyZiU1ZmNhYmluZXQlMmZwamV4dCUyZmluZGV4Jkhpd ENvdW50PTYwJmhpdHM9MWYxKzFmMisxZjMrMWY5KzFmYSsyMDkrMzY1KzM2NiszNjcrMzZkKzM2ZSs1NzkrNTdhKzU4Yis1OGMrNTkxKzU5Mis2ZjMrNmY0KzZmNSs2ZjkrNmZhKzZmZSs2ZmYrNzAwKzcwMys3MDQrNzEzKzhjZis4ZDArOGQzKzhkNys4ZDgrOWE4KzlhOSs5YjErOWIyKzliOCs5YjkrYWU2K2FlNythZjcrYWY4K2FmZCthZmUrYmM1K2JjNitiYzcrYmNiK2JjYytiZGErYzQyK2M0MytjNDQrYzQ4K2M0OStkZDkrZGRhK2RkYitlMTIr, site accessed on 20.02.2018.

[12] See in this respect, Ruling no. 8484/2014, pronounced by Bucharest Tribunal, division of contentious administrative and fiscal, available by means of idrept platform, on the following website: https://idrept.ro/DocumentView.aspx?DocumentId=78081703&Info=RG9jSWQ9Mjc0MTk2JkluZGV4PUQlM2ElMmYlNWZjYWJpbmV0JTJmcGpleHQlMmZpbmRleCZIaXRDb3VudD0zNCZoaXRzPTJiOCsyYzMrMmM0KzJjNSsyY2IrMmNjKzJlZCsyZWUrMmVmKzJmNSsyZjYrYWQ1K2FkNithZGMrYWRkK2FmMythZjQrYWZiK2FmYytiODUrYjg2K2I4OStiOGYrYjkwK2RhZitkYjMrZGI0K2RiZCtkYmUrZGM2KzExZDQrMTFkNSsxMWQ2KzEyMGUr, site accessed on 20.02.2018.

- Vasile Dobrinoiu (coordinator), Ilie Pascu, Mihai Adrian Hotca, Ioan Chiș, Mirela Gorunescu, Costică Păun, Norel Neagu, Maxim Dobrinoiu, Mircea Constantin Sinescu, „*Noul Cod penal comentat. Partea specială*", Vol. II, Edition II revised and supplemented, Universul Juridic Publishing House, Bucharest, 2014
- Andrei Pap, „Drept contravențional. Culegere de hotărâri judecătorești 2007-2014. Vol. I. Reflectarea jurisprudenței CEDO în procedura contravențională națională", Hamangiu Publishing House, Bucharest, 2015
- Ovidiu Podaru, Radu Chiriță, „*Regimul juridic al contravențiilor: O.G. nr. 2/2001 comentată*", edition 2, Hamangiu Publishing House, Bucharest, 2011
- Cristina Titirișcă, „Contencios administrativ: suspendarea actului administrativ: practică judiciară recentă", Hamangiu Publishing House, Bucharest, 2016
- Decision no. 347 of April 3rd, 2007 of the Constitutional Court of Romania
- Decision no. 667/A of August 5th, 2014, pronounced by the Court of Appeal of Cluj
- Criminal Decision no. 1051/2011, pronounced by the Court of Appeal of Galați
- Civil Ruling no. 3001 of June 29th, 2012 pronounced by Bucharest Tribunal, division IX of the contentious administrative and fiscal
- Government Ordinance no. 195/2002 on public road traffic
- Law no. 286/2009 on the Criminal Code
- www.idrept.ro
- www.curteadeapelcluj.ro

THE MORALITY OF LAW IN THE ERA OF GLOBALIZATION

Oana Andra NIȚĂ*

Abstract

The principles of law are an area of an interdisciplinary interest. The axiological, praxiological and teleological axes of law involve approaches from the perspective of philosophy and the philosophy of law in particular. The principles of law determine the existence of material legal reality in their capacity, as premises of the positive legal order. The principles of law affirmatively state its presence in the legal framework, precisely in the processes of law development and realization. In the conditions of the globalization of the positive law, with the overwhelming multiplication of the systemic components (norms, institutions, branches etc.), the recipient of the law risks losing its orientation in the normative-legal space. Therefore, the path of the recipient of the law, irrespective of his position, the legislator, the applicant, or the ordinary recipient of the positive right, is illuminated by the principles of law.

Globalization, as a socio-political phenomenon, also has effects on the legal system: there are increasingly visible signs of a legal monialization, the creation of a right world. The national process will adapt to it, precisely because the international courts have grounded the principles of the universal fair trial. Interconditioning between legality and moral principles is the essential part of the socialization of human life, of its potentiation, realizing itself as being necessary to remove a maximum of harm.

The strong manifestation of the effects of globalization has generated anxiety among broad categories of people, states, and civil society organizations. This is because globalization describes a complex and diffuse reality: financial crises, culture standardization, emerging transnational actors (such as international organizations, multinational companies) and increased interdependence of economies.

The article shows how moral principles are compatible with the current trend of globalization and how thinking about globalization and greater international interdependence would benefit from greater attention.

Keywords: *globalization, moral principles, legality, society, economy.*

1. Introduction

The present paper reaches aspects about the phenomenon of globalization and how it challenges many of the traditional hypothesis about International law, its relationship to national law, the ways in which it is created and the methods of its enforcement. We will try to make a brief study of the normative, moral and institutional implications of globalization and of its theoretical and practical branches in a variety of fields ranging from the regulation of trade and investments, the protection of human rights and the international criminal responsibility of corporations or/and states, security and environmental governance and the safeguarding of the diversity of cultural heritage.

Globalization affects us all directly, even if we are individualized. What is important is the evaluation of the opportunities and risks that globalization entails, distancing us from the current tendencies of demonization, or, on the contrary, the exaggeration of the consequences of this phenomenon. The dynamics of globalization is controlled by economic forces, yet its most important consequences are in the political field. Global issues such as the greenhouse effect can not be solved at the level of a single state because they are neither the consequences of the actions of a single state, nor can local problems be solved within the educational system, for example.

The objectives proposed in the study are the following: defining and realizing a transdisciplinary analyze of the concept of globalization, identifying the role and functions of law in the age of globalization, emphasizing the importance of morality in contemporary culture and civilization, proposing a set of normative regulations in the field of globalization. We will try reaching this objectives by using quantitative methods, as well as demonstrative methods.

According to Kant, the moral obligation of the individual to discover and capitalize on the principle of universal law is inherent to our conscience. Herbert Lionel Hart[1] states that justice demands that globalization is to be carried out justly; that is, fairly without any violation of moral rights and justice, different from legality.

In clear and concise terms, Robert Went[2] demythologises globalization. He refutes the myth that globalization is an entirely new phenomenon and that it is an unavoidable process. While recognising that it poses serious strategic challenges to the Left, he argues that these challenges are not insurmountable and that there is hope for advocating real change. Went puts globalization into its historical context. He shows that there is no option of returning to the postwar mode of

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[1] Hart Herbert Lionel Adolphus, *The Concept of Law*, (Oxford: The Clarendon Press, 1978), 160

[2] Robert Went, *Globalization. Neoliberal Challenge, Radical Responses* (London & Stirling Virginia: Pluto Press, 2000), 2-4

expansion, but that the current trend must be updated. If not, he warns of greater social inequality, levelling of wages, retrogressing the working conditions, life-threatening ecological deterioration and a widespread dictatorship of the market.

2. Interpretation of justice through modern philosophy

The idea of justice will start the individual's morality and will confront his legal feeling by marking human conduct; in other words, the moral law of each person is the determinant of righteous (right) or unfair (unjust) legal laws, in which external conduct is built. Laws of morality and laws of law act in two interrelated dimensions (subjective and objective), based on the same concept and ideal paradigm of justice. The thoughtful subject finds within itself the beginning of the justice, beyond the metaphysical ascension. The moral obligation of the individual is to discover and capitalize on the principle of universal law which, after Kant, is indigenous to our conscience.

Responsibility is trained when man's will is not constrained by internal or external factors and he is "ruled" only by freedom. According to Kant, this is the principle of the autonomy of the will to administer the rational activity of man. Absolutely good will would be the only universal law that any rational being would impose. This Kantian ideal would lead to universal accountability. Good will can be cultivated as a process of liberation from the action of internal factors (thoughts, desires) and external strangers of the proposed desideratum. A person is autonomous to the extent that he succeeds in breaking down his dictated senses, that is, he has rational behavior outside of any constraining way. It is only in this situation that he becomes legally and morally responsible.

According to del Vecchio[3], this duty can also be considered as a principle of law, a perpetual and inviolable prerogative of the person, balanced by the correlative obligation of each one to reflect that limit, beyond which the opposition of the other party would be justified and legitimate. Therefore, the right has its principle in the nature or essence of man, distinguishing itself from morality through the objectivity of the report. All social relations must be measured and constituted according to this principle or the limitation of a universal right to the person inherent in it. This deontological demand remains intangible, keeping its value and meaning untouched, because it is metaphysical, even if the empirical reality does not always conform to the principles of natural law.

Responsibility can be examined from the perspective of morality and law. The morale, which directs the universe of thoughts, desires and human feelings, is the field of responsibility for the escape of the inner (psychic) world of the subject. The positive right, which governs human conduct or deeds in action or inaction, is the area of external responsibility, legal responsibility.

T. Mînzală[4] points out that when an individual does not adhere to the system of official norms, especially legal ones, considering them foreign of his appropiation, these rules are imposed on him, however, and he is required to respect them; they impose an accountability to him. In such a situation, the individual is accountable, not responsible in relation to the norms he disagrees with, but he complies with the obligation. If moral responsibility is implemented, as a rule in relation to oneself implying moral coercive measure, then legal liability is a legal relationship of coercion of the perpetrator, by the competent body, to enforce legal sanctions.

Contemporary doctrines contain a plurality of interpretations of justice. Thus, F. Geny[5] defines justice as an order, a balance established on the basis of an idea of harmony, moral in its substance, externally in its manifestations. J. Dabin[6] sees the matter of justice in *suum cuique tribuere* and considers that the respect of the physical and moral faculties of man and of the goods acquired through this faculty falls within the notion of justice. Le Fur[7] also sees justice in the respect of human personality, to which he adds that of social groups. Ch. Perelman defines the concept of justice through equality as a principle of action after which members of the same essential category must be treated equally.

Given the fact that justice implies equity, we should track their connections. According to Romanian Encyclopaedic Dictionary, equity is not interpreted as justice, but as impartiality, honesty, humanity. Though, justice is fairness. The equitable word comes from the Latin *aequitas* which means: match, justice, temperance. According to Plato[8], equity is the state of the one who is ready to yield from his rights and benefits: moderation in business relations; the right attitude of the rational soul to what is beautiful or ugly (good or bad). For the romans, *aequitas* meaning gets close to the meaning of *law*. After Cicero, *aequitas* is confused with civil justice. According to Celsus, law is the art of good and equity (*jus est ars boni et aequi*). Generally speaking, to the Roman *jurisconsultum*, *aequitas* appears as the goal and ideal of law.

N. Popa[9], for example, portrays equity in unison with justice as a whole director. Gh. Mihai and R.

[3] Dicţionar enciclopedic român, Vol. III. K-P. (Bucureşti: Editura politică, 1965), 128-129
[4] Traian Mînzală. *Studiu asupra principiilor dreptului* (Constanţa: Editura Muntenia, 1996), 48
[5] Dicţionar enciclopedic român, Vol. III. K-P. (Bucureşti: Editura politică, 1965), 218
[6] Dicţionar enciclopedic român, Vol. III. K-P. (Bucureşti: Editura politică, 1965), 200
[7] Dicţionar enciclopedic român, Vol. III. K-P. (Bucureşti: Editura politică, 1965), 75
[8] https://plato.stanford.edu/entries/moral-character/ (accessed 24.02.2018)
[9] Dicţionar enciclopedic român, Vol. III. K-P. (Bucureşti: Editura politică, 1965), 125-127

Motica [10] argue that the principle of justice is dimensioned in legality, equality, equity and good faith, *a priori*, but have characterized justice as "unmistakable in good faith and equity". To avoid suspicion regarding the statements of the authors Gh. Mihai and R. Motica, we find the rigorous explanations in the same source. Equity is proving to be just one of the three components of justice in the sense of principle that bases any system of law. The other two complementary elements of equity are duty and direction. The principle of equity is no other principle than justice, but justice itself is in consensus with good morals. It blunts formal legal equality, a humanization introducing into the legal systems in force the categories of natural morals, from which the justification is also an intimate and in-freedom doing.

M. Djuvara[11] points out that the logical elements of the idea of justice are: bilaterality, parity (initial equality), reciprocity (initial equivalence), exchange and remuneration. So, justice would involve two elements: the ideal one and the other of practical nature. The ideal criterion is good will. Good will, as a universal and spiritual order, is the greatest virtue, according to M. Djuvara. The universal order is transformed into the human consciousness in the form of a principle of morality that directs everything. The virtuous man is the one who conceives the good intention and, implicitly, the justice, therefore, will conform to the universal order, it will fit into the universal harmony. The practical criterion of justice is equity itself that promotes ideas of balance, proportion, safety and order or, what M. Djuvara called the *logical elements of justice*. Applying the law is centered on the principle of equity, aiming at diminishing the gap between "what is" and "what must be," pushing the real to the ideal. Equity would be the golden means that reconciles the demands of absolute justice with the imperfections of positive justice. The point is that where justice is done, equity is required. Positive regulations, even if the area of coverage, revelation, and attachment do not cope with perfect ideal justice, yet equity is not ignored in the positive law. It must therefore be that justice, without leaving the ideal, seek in fact, in the light of the historical circumstances, the means best suited to perfect society. But as society is far from perfection, this achievement is always a compromise, in which the ideal principle appears to be reduced.

According to I. Dogaru, D.C. Dănișor and Gh. Dănișor[12], the legislative policy is a part of the legal policy that establishes the techniques, methods and principles of normalization in order to achieve the legal system finality. The purpose of the legislative policy and the general legal ideal of the legislator is the common good, respectively, there are no real laws than those which suspect the public good of the state. From the point of view of the legal conscience of the legislator, the purpose of the legislative policy can be transformed. Thus, the rise of the goal is determined by the approximation of legislative policy to high morality. Any better lawmaker proposes to his laws a unique purpose - the supreme virtue, that is perfect righteousness. However, the legislator will take all the trouble to investigate and establish measures to pursue purely the morals of a state. Conversely, diminishing the scope of legislative policy is dependent on minimizing the morality of the legislator. If the laws whose sole purpose is the interest of some individuals and not the state, it means that justice is nothing but a word. To avoid extremes in setting the finalities of legislative policy and to sensitize the legislator's conscience, the great Plato[13] recommends the legislator to ask himself often: "Where do I want to go now?" And "if such a mood occurs, am I not mistaking the purpose?" So, the legislator's activity is three-dimensional: cognitive, axiotheleological and praxeodeonic.

The issue of justice has been debated in philosophy for millennia and it has remained an elusive concept to define, while putative definitions have proven to be divisive. Michael Boylan, following Rawls, describes justice as fairness. Fairness includes sometimes treating people in the same way and sometimes differently. He gives the example that if everyone in a family loves chocolate cake equally and, other things being equal, the impartial way to divide a chocolate cake in the family is to give each member an equal share[14]. Judith J. Thomson[15] and R. Simon[16] have discussed the issue of preferential hiring as something that could be demanded by justice. Here the argument was whether or not it is fair to hire people on the basis of certain criteria, such as gender (in the case of women), or race (in the case of blacks), because it would be like giving back to them what they have lost on account of the treatment they got because of their statuses in previous social dispensations. Justice is balancing the scales, where each person has access to what they have the right to without impediment.

For Plato, justice is at two levels – in the individual and in society. An individual is in a state of equilibrium when the different parts of their humanity are in harmony with each other, working together for

[10] Dicționar enciclopedic român, Vol. III. K-P. (București: Editura politică, 1965), 131

[11] Mircea Djuvara, Teoria generală a dreptului (enciclopedia juridică): Drept rațional, izvoare și drept pozitiv (București: Editura All,1995), 401

[12] Dicționar enciclopedic român, Vol. III. K-P. (București: Editura politică, 1965), 84

[13] Platon. Legile (București: Editura IRI, 1995), 400

[14] Michael Boylan, *The Future of Affirmative Actio* (Upper Saddle River, New Jersey: Business Ethics. Prentice-Hall, 2001), 264

[15] Judith Jarvis Thomson, *Preferential Hiring* in M. Boylan (Upper Saddle River, New Jersey: Business Ethics. Prentice-Hall, 2001), 247-252

[16] Robert Simon, *Preferential Hiring: A Reply to Judith Jarvis Thomson* in M. Boylan (Upper Saddle River, New Jersey: Business Ethics. Prentice-Hall, 2001), 253- 255

the benefit of the person.[17] This is possible when the different parts of the human being do their individual duties, without getting into the way of the others. For example, as a rational animal, a human being must act when reason has deliberated and influenced the will to be drawn towards the reasonable thing and the emotions have also come along as per the dictates of reason. A person who acts from emotions and reasons afterwards, is usually in trouble because he is not behaving *qua rational*, but *qua emotional*, which is not their nature, hence misbalance/disequilibrium that he calls injustice.

Likewise, in society every person has a role to play, for the benefit of themselves and society at large. Disequilibrium will result when the different members of society get in each others way; when leaders steal and rule based on their selfish whims and workers abandon their posts in pursuit of pleasure, and when they value and reward behaviours that have no value to society there would be chaos, which leads to unfair treatment of other members of society and indeed, everybody. Justice is when rulers do what is good for the state and lead the country to a life of fair livelihood.

The theme of justice is also found in Immanuel Kant, who starts by cautioning the question "what is justice?"

Can be just as perplexing for a jurist as the well-known question ―What is truth? - is for a logician, assuming, that is, that he does not want to lapse into a mere tautology or to refer us to the laws of a particular country at a particular time. A jurist can, of course, tell us what the actual Law of the land is (*quid sit juris*), that is, what the laws say or have said at a certain time and at a certain place. But whether what these laws prescribe is also just and the universal criterion that will in general enable us to recognise what is just or unjust (*justum et injustum*) – the answer to such questions will remain hidden unless, for a while, empirical principles and searches for the sources of these judgments in pure reason are abandoned[18].

He goes on to explain that, in relation to obligations, justice is about the relationship of people's actions as they affect each other; people's wills in relation to each other and lastly, the relationship of the two wills as autonomous and accommodative of each other in accordance with a universal law. He concludes that justice is therefore the aggregate of those conditions under which the will of one person can be conjoined with the will of another in accordance with a universal law of freedom. Justice is a universal principle, according to him. Every action, he argues, is just [right] that in itself or in its maxim is such that the freedom of the will of each can coexist together with the freedom of everyone in accordance with a universal law. What he means is that every individual has the freedom to act in their own interest and they should be willing to grant that all other free beings like them have the same right. Every person has an equal right to free will. I am free to bind you to what you can bind me to and vice versa. What we are each bound to, can and should never be something we are unable to attain.

3. The phenomenon of globalization

In the last years two phenomena, constitutionalism and globalization, have considerably contributed to changing the appearance of our legal systems. The two are of relatively opposing natures: constitutionalism represents the submission of political power to law, and its scope is that of state; globalization, in contrast, represents the submission of political power to economic power and, as its name suggests, has a scope which goes beyond state borders.

Similarly, with regard to globalization, a distinction between the phenomenon and its legal conceptualization needs to be drawn, that is to say, between the legal changes which arise with globalization and the way these changes are translated into theoretical terms. The notion of globalization is relatively imprecise. As a starting point, one could use a very broad notion, such as Steger´s: "a multidimensional series of social processes which creates, multiplies, gives rise to and intensifies social interchange and interdependence on a global level, while, at the same time it gives rise to an ever growing sense of connection between the local and the distant"[19]. This is, approximately, the notion which many social scientists take as a starting point when they hold that globalization can be described as "the tendency towards a growing interconnection and interdependence between all countries and societies in the world"[20]. It is a process whose engine is international trade and capital flows and which also incorporates aspects "of a social, cultural and, of course, technological nature". If one takes this approach, law can be seen as a recipient of those great changes; not in the scope of causes, but in that of the effects of globalization and, thus, it is claimed, "this dynamic is so strong that it may be provoking a certain degree of obsolescence in legal and political institutions"[21].

Moral justice is important in making philosophy relevant to globalization. In short there should not be any globalization if there is no justice. Justice demands that globalization be carried out justly; that is, fairly without any violation of moral rights. Justice is different from legality, even though the latter

[17] https://philosophynow.org/issues/90/Platos_Just_State (accessed 24.02.2018)
[18] Immanuel Kant, *Critica rațiunii pure* (București: Editura Univers Enciclopedic Gold, 2009), 33-35
[19] Manfred B. Steger, *Globalization: A Very Short Introduction* (Oxford: University Press, 2003), 13
[20] ibidem
[21] ibidem

sometimes is necessary for the former to take root[22]. However, it is clear that laws at local, regional and global levels can be used to circumvent justice as well as to promote it. The major problem with globalization is the possibility of those who are powerful to enact laws that favour them. They would then do things that are legal and yet unjust. The United Nations Organization, for example, can be used by powerful members to do things that are not good for some communities even though they are legal under the organization's regulations and laws. This is very clear in the case of trade. Financial globalization increased the flow of funds across countries, thereby creating linkages that go to capital markets of the world. This would potentially be good for the people, as they may have access to funds, including additional international funds for their countries. Governments of the third world countries are not able to operate, because they are under restrictions exerted by the IMF, World Bank, WTO, OECD and the G8[23].

It is demanded that they globalize; technologize; drive competitors out of business (monopolize) or face the same; liberalise the national market. Any government that does not obey these directives faces dire consequences, such as paying high interest rates on their loans and being denied access to capital. When nation states try to protect their fledgling companies they face international sanctions and the multinational companies can simply decide to pull their investments out of the said countries.

Increased concentration of capital has put excessive, in fact uncontrollable power in the hands of a small group. A few hundred of the world's largest industrial firms control trillions of dollars worth of productive activity. These companies' veto can be enough to hold up all sorts of important political decisions. Financial markets have become the world economy's judge, jury and policeman. National governments themselves have become paralyzed and they can take measures that are not palatable for their citizens in order to honor the requirements of some agreement with an international body, such as the Maastricht Treaty. Globalization becomes, in this way, an alibi for lack of political imagination, abhorrence, social breakdown and antisocial policies.

4. Adapting law to globalization

In relation to obligations, justice is about the relationship of people's actions as they affect each other; people's wills in relation to each other and lastly, the relationship of the two wills as autonomous and accommodative of each other in accordance with a universal law. Justice is therefore the aggregate of those conditions under which the will of one person can be conjoined with the will of another in accordance with a universal law of freedom. Justice is a universal principle. Every action is just [right] that in itself or in its maxim is such that the freedom of the will of each can coexist together with the freedom of everyone in accordance with a universal law. Individuals have the freedom to act in their own interest and they should be willing to grant that all other free beings like them have the same right.

The idea probably underlying the above approach is that the globalization process moves at different speeds in different spheres of society (and, as a result, the awareness of the phenomenon differs depending on the sphere in which it operates within the social reality). In this way, for example, Laporta[24] states that with respect to ownership law and to criminal law "no or hardly any legal globalization exists (...). Financial capital can fly over borders, but legal entitlement to the property of this capital remains under the wing of domestic law (...) crucial aspects of social life and the economic activities of the huge majority of individuals and corporations which inhabit the globalization planet happen to be still regulated by domestic legal norms. Communicative, economic or social globalization are not sufficiently ruled or subjected to norms". Moreover, in his opinion, "the disconnection between the undeniably global nature of many actions and economic activities, and the prevailing private and state nature of the legal norms which support them, produces many perverse consequences which are at the basis of much of the discontent globalization has created". Is this true? It depends on how you look at it.

It is true if we regard law essentially as state law and international law in the classic sense: a law whose main players are fundamentally states. However, perhaps it is not true (or at least not as true) if instead of focusing on "official law" we focus on the legality coming from informal or more or less informal entities. The fact is that many authors believe that the outstanding feature of legal globalization consists in the privatization of law, in the same way that, in more general terms, globalization has resulted in a trend toward the privatization of what is public. The center of gravity has passed from the law, as a product of the state´s will, to contracts between individuals (even if those "individuals" –or some of those "individuals"- are the big multinational companies). This goes hand in hand with a growing (and relative) loss of state sovereignty, as a consequence of the advance of both supranational and transnational law. An example of the first, which is commonly put forward, is the existence of a European law which implies that a great number of the legal norms in force in the European Union are not state norms or are norms which are significantly conditioned by supra-state norms. And what is often put forward as an example of transnational law, is the existence of a new *lex mercatoria* which regulates

[22] Herbert Lionel Hart, *The Concept of Law* (Oxford: The Clarendon Press, 1978), 56

[23] http://www.worldbank.org/en/topic/poverty (accessed 25.02.2018)

[24] Francisco Laporta, *Law and justice in a global society* (Granada: Anales de la Cátedra Francisco Suárez, 2005), 235-236

international trade and which is not made either by national states or by public institutions of an international nature, but instead by the major law firms. The main figures in globalization law are no longer legislators, but rather judges and experts in law not occupying public office.

It is said, moreover, that a new type of law has appeared with globalization – soft law- in which resorting to coercion is less important than in the case of state law. This can be seen in the tendency to favour conflict solving mechanisms (such as mediation or arbitration) which (in contrast to adjudication) are not of an obligatory nature, since they suppose the acceptance of the parties' (who are the ones that appoint the mediators or the arbitrators). It can also be seen in the importance of legal bodies such as the World Trade Organization, regulated by norms and procedures which are different to those existing in classic state law. In the same way, it is held[25] [Ferrarese 2000] that law (globalization law) no longer consists exclusively in norms (in orders), but instead it is held that many of the behaviour rules contained in this "soft law" seek to guide conduct in a flexible way or without trying to impose themselves through coercion: let us, for example, consider the European directives or the growing importance of ethical codes as auto-regulation mechanisms. All of this leads in the end, to the traditional limits of law losing definition: not only in relation to morality and politics, but also in relation to the traditional distinctions between private law and public law or between internal and external law.

Thus, nowadays, elements of private law, such as negotiation or the concept of private interest, play a role in the context of public law: consider, for example, "plea bargaining" in criminal law or "lobbies" as institutions which articulate private interests in the legislative process. What is more, as we have already mentioned, European law limits the internal law of European states and, at the same time, it is usual to speak about a "dialogue" between European and state jurisdictional and legislative bodies; in such a way that law no longer appears as a result of an imposition laid down by a superior, but rather as an agreement reached "from below". Consequently, the function of law is no longer only (or so much) one of prescribing, directing conduct, but rather that of providing ways of acting; its nature is instrumental more than political.

Well, all the above can serve as an argument to show that globalization has indeed had a significant effect on law, transforming many of its institutions, giving rise to new forms of juridicity, modifying the classic functions of law, etc. It is, however, also very important not to lose sight of the fact that law has not only suffered the effects of globalization but has also played a causal role in the process; in other words, all this interchange and interdependence which takes place on a global level –which define globalization- would be impossible if the necessary legal instruments had not been present. Without law (or without a certain type of law) we would not have globalization, and neither would capitalism or market economy existing without the legal institutions which are characteristic of the modern state. So, in relation to globalization, the legal theorists have reacted in different ways, in principle, in accordance with their political tendencies. Thus, those who could be considered to belong to the right political wing spectrum are also those who evaluate the phenomenon (the changes which have taken place in law) in a more positive way. After all, what globalization has meant until now is the victory of neoliberal ideology. One of the most illustrious supporters, Hayek, held that the order which could be found in complex phenomena was of two kinds: created and spontaneous. Spontaneous order is the unsought result of an evolutionary process whose main indicator is the market. The superiority of the market over any other organization of a deliberate type is due to the fact that human beings, in pursuit of their particular desires (whether egoistical or altruistic), make it easier for other people who, generally speaking, will never even meet, to reach their goals. Law´s *raison d´être* is, consequently, an essentially instrumental one: its mission is to contribute to the maintaining of this spontaneous order[26].

Globalization, then, as we said before, essentially means this, the subordination of politics to the market, of the law (or of the treaty) to the contract, which takes material form in the ideal of deregulation: a more globalized economy with fewer ties and, thus, less regulated by legal state norms or by international law norms. It should, however, be clarified that "deregulation" does not exactly mean that rules do not exist or even that fewer rules exist than before. It means, rather, that a type of rules (let us say, those of a public nature) have been substituted by others of a private nature. And this is precisely what causes the phenomenon of globalization to be seen with considerable scepticism from the stand point of a left side ideology.

The liberalization of the economy – deregulation- has gone hand in hand with a lack of measures guaranteeing human rights, particularly, social rights. Perhaps one should remember that, according to Hayek, social justice is one of the greatest threats to western culture, a prejudice of tribal nature, lacking any rational or moral support. Economic globalization has increased world wealth[27], but only at the price of deepening inequalities between countries and individuals and leading to a deterioration of the environment, which could have irreversible consequences for future generations.

Altogether, the law of globalization is clearly an undemocratic law; the loss of state sovereignty has meant a step backwards for democracy, precisely

[25] Maria Rosaria Ferrarese, *Le istituzioni della globalizzazione* (Bolonia: Il Mulino, 2000), 11-13

[26] Caridad Velarde, Hayek, Una teoría de la justicia, la moral y el derecho (Madrid: Civitas, 1994), 261

[27] http://www.unicef.org/mdg/index_childmortality.htm (accessed 25.02.2018)

because the scope it operates within is that of the state. And if this is the situation, then, it is logical that one is rather pessimistic when suggesting a possible solution. After declaring his scepticism regarding global law´s chances of achieving the rule of law, Francisco Laporta, comes to the conclusion that "only processes like the European Union´s seem to meet the precise requirements needed to incorporate the ideal of the rule of law"[28]. Therefore, the solution cannot be found in "transnational private networks in a supposedly anomic world", but rather in "the construction of political units and supranational legal units". However, in his opinion, the legal model to be followed is not exactly that which we previously understood as constitutionalism but, instead, that of a more or less classic state in which the rule of law operates; a law based on rules which derive from a state or a supra-state authority, but which possess coercive backing and allow the advantages of the rule of law to be guaranteed in a broader scope than that of state.

Luigi Ferrajoli, for his part, defines globalization as "a gap in public law" and supports the need for a "world constitutionalism". The "extension of the constitutional state paradigm to international relations" implies, in his opinion, "the greatest challenge posed by the crisis of law and state to legal reason and political reason" and, moreover, represents "the only rational alternative to a future of wars, violence and fundamentalism". According to him, there are no "reasons for optimism", but not because it is a question of a utopic or unattainable program: "it is simply not wanted because it conflicts with the prevailing interests"[29]. Juan Ramón Capella[30] makes an even more pessimistic diagnosis of the situation. As he sees it, what really governs the globalized world is "business, military and political technocracy which takes the role of Plato´s Philosopher King and of his Nocturnal Counsel". Democratic institutions submit and subordinate themselves to this new imperial power [that of the military-industrial conglomeration; that of the big multinationals; that of the experts on financial capital management, on the administration of the big industries, on the creation of public opinion, on the economic, political and military adjustment]. On a daily basis, democratic procedures turn into forms lacking any content, social rights vanish, political rights become increasingly inefficient, except in the submission to global power. In addition, new institutions appear and remain beyond the reach of the exercise of political freedom.

In other areas of law, the incidence of supra-state or transnational regulations derives, simply, from what is demanded by the nature of things. International trade, the internet, migratory flows, ecology or terrorism are phenomena which cannot be regulated (or, at least, not efficiently) in the national scope and which are also not covered by international law understood in its classic sense. It is not, therefore, a question of whether law has ceased to be a state phenomenon but rather one of accepting the fact that juridicity does not only exist in this scope; there is also a suprastate (and infra-estate) juridicity, whose importance is becoming greater every day. Yet, also, insofar as the contract constitutes the typical form taken by juridicity in the scope of globalization, law, logically, tends to be seen less as a product of a political will and, instead, what takes on more importance is a vision of law as a means for obtaining certain ends, as a mechanism of social construction.

The direction in which globalization is causing laws to develop seems to go against a positivist conception of law. It seems to me that law tends to shape itself and to be seen by those who practise it, not so much, or not only, as a system, as a set of preexisting norms, but rather as a practice, as a procedure or a method used in order to reconcile interests, to solve conflicts, etc. This means that the limits of what is juridical disappears to a certain extent, and also implies a new way of understanding the function of science, of theory and of law: it is a question not so much of describing an already completely determined object (in a more or less abstract way), but rather of taking that (certain previously existing materials) as a starting point and showing how they can be used to carry out this practice to achieve certain goals.

5. Morality – in antithesis with "the deity" of globalization

The globalization phenomenon clearly shows the growing juridification of our societies and how wrong it is to take an interpretation scheme of social reality in which law is made to play a subordinated role as a starting point. As we know, this is what happened with the classic Marxist scheme[31], in which law belonged to the superstructure and not to the social base (which is considered to have a determining role), and this is, very probably, a prejudice which remains active in the minds of many social scientists. The result is an undervaluing of the role of law, which implies risks of both a theoretical and a practical nature. Theoretical, because it is impossible to understand our societies, including the globalization phenomenon, if one lacks a certain type of legal education. Practical, because law is, at the very least, a premise for the achievement of the most essential values in social life; to not take legal aspects sufficiently into consideration implies seriously putting at risk the achievement of these values. It is, naturally, not a question of not knowing the social conditioning (which is particularly economic) of law. It is a matter of understanding that economic, legal, cultural, etc.

[28] Francisco Laporta, *Law and justice in a global society* (Granada: Anales de la Cátedra Francisco Suárez, 2005), 25
[29] Luigi Ferrajoli, *La crisis de la democracia en la era de la globalización*, (Granada: Anales de la Cátedra Francisco Suárez, 2005), 50-51
[30] Juan Ramón Capella, *La globalización: ante una encrucijada político-jurídica* (Granada: Anales de la Cátedra Francisco Suárez, 2005), 23
[31] https://www.britannica.com/topic/Marxism (accessed 24.02.2018)

elements constitute a complex unit in which a constant interaction takes place. Thus, law –or certain legal instruments- has contributed to what we call the globalization of our societies but, at the same time, globalization is causing legal systems and the conception of law to change.

A consequence of this way of seeing things consists in recognizing the ambiguous role played by law in our societies: law is equally essential in processes of exploitation and in those of emancipation. The alternative to the so called "deregulation" is not simply the legal regulation of a certain kind of relationships (which are, in fact, regulated legally: by means of private law –contractual- schemes), but rather its legal regulation according to a certain kind of moral and political standards. In other words, we are, one could say, "condemned" to live in legal societies, but the law of our societies (and, as a result, society itself) can take many different forms[32].

And it is here where the concept of human rights, understood as a set of criteria which inspire legal practices, plays a fundamental role. Human rights are founded on morality, yet not on just any morality, but on one of universalistic nature. To deny that certain universal moral principles of an objective validity exist is, in my opinion, a serious error which has been made by a certain left side school of thought, influenced perhaps by two circumstances. Firstly, because in Marxist tradition (a tradition set in motion by Marx himself) morality (and law) was considered to be a part of ideology, in such a way that moral truths could not be said to exist and neither could any "rational" discourse on morality consisting in anything other than the "unmasking" of its deceptive nature. Secondly, because the language of moral truths and of absolute moral values is the language of religion, of the churches: secular, enlightened and rationalist thought – it is believed- leads inevitably to relativism in moral scope.

Even before the current surge of globalization, moral considerations have had a strong foothold in societal problem arenas that were largely "forgotten" by official and regular politics: protection of the natural environment, poverty, injustices within the justice system (e.g. small action groups against Transnational Corporations, the predicament of homeless or stateless people, illegal immigrants etc.), animal rights, protection of minorities and many other issues of "corruption" in the border zones between the regular operating modes of the sub systems of society. These moral issues have a strong case when they are carried forward by individuals for individual reasons. They turn problematic when they become entangled with the standard operating procedures of modern society, for these procedures demand the transformation of moral issues into legal cases. The crucial argument is that no individual, no hero nor villain, however urgent or singular he or she perceives their individual causes to be, can stand above the common man - as represented in the democratic legislature.

The situation is different on the global level. Here moral arguments and moralities play a prominent role because there is no overriding political and legal system providing binding decisions for a global constituency. Hence there is ample room for other ways and means to influence public opinion and frame collective action against all kinds of perceived evil in moral terms.

In spite of its paradoxical constitution, the global moral regime has real effects and consequences for global governance. It highlights the fact that there is no global "modern" politico-legal regime, so a regression to premodern forms of moral governance seems less offending. It points to the predicament of heterogeneous and even clashing religious and moral fabrics of different communities/societies in the world that somehow are joined or coupled together to form a global level of moral reasoning. Of course that underneath this broad umbrella, the differences and their under lying conflicts of interests persist. They impose dynamics upon the moral regime that lead to generalizations on the verge of self-evidence and banality - global justice and freedom for all or similar formulas that necessarily are deprived of any specific meaning. These over-simplified formulas depend on equally simplified images of evil. After the fall of the "empire of evil" the current culprits are perceived to be, once more, imperialism, neo-liberalism or capitalism at large. This self-propelling trivialization seems to be unavoidable since the idea and the regime of global morality conjoins two entities that contradict each other. On the one hand morality is having its legitimate function as a premodern form of integrating close communities like tribes, clans, villages or ethnic groups along the lines of simple, self-evident truths handed down from creator-gods or ancestors. On the other hand, globalization forces this elementary mode of governance on a level that has long lost all the constituent ingredients of a "community" and is even beyond the scope of modern national society.

As globalization connects people, it also raises associated responsibilities between them. Until recently, the interests in justice among political philosophers and social ethicists was mainly focused on the nation state. However, this is no longer feasible. Since economic globalization affects how wealth and power are distributed globally – and the gaps between the global rich and the global poor widens - it has become indispensable to discuss social ethics in a global context and to develop principles of global justice. Global justice, therefore, entails an assessment of the benefits and burdens of the structural relations and institutional arrangements that constitute and govern globalization.

Kant's explanation of the freedom enhancing nature of the law says if freedom means individual autonomy and self-determination, namely, recognizing

[32] https://www.oxfam.org/sites/www.oxfam.org/files /file_attachments/ib-wealth-having-all-wanting-more-190115-en.pdf (accessed 25.02.2018)

only the authority of one's own will, there must be a technique for communicating that will between individuals on the one hand, and between individuals and the public power on the other. Law is needed for legislation to exist, and legislation is needed for self-determination to be possible. Law's virtue does not lie only in law-application. It resides equally in legislation as the expression of a community's self-determining will.

The predictability or stability brought by law is not what made Kant a legalist. Clearly, the ancient regime had been stable and had acted predictably for a long, indeed too long a time. It may have acted arbitrarily too, but that was not the main problem. The problem was its consistent reliance on social hierarchy, and the suppression of freedom from the bulk of the population. This is what resonates in the current experience of globalization, and in the sense in which fragmentation, deformalization and empire seem to undermine individual autonomy and communal self-determination. In fragmentation, law emerges from expert-guided "regimes"; in deformalization, it transforms into administrative compromises between powerful stakeholder groups, and in "empire," it collapses into domination. The worry about new global law reflects concerns about the absence of structures of political representation, contestation, and accountability, of a public sphere institutionally linked to global power. The present concern about freedom spells worries about autonomy, understood as self-legislation. Whatever the managerial mindset has to say about the difficulties of effective governance today fails to address the sense that these difficulties are undermining freedom, in the sense of leading one's life only under the authority of one's own (good) will.

Thousands of people have had their lives destroyed by the activities of multi-national corporations. Oil spills in Nigeria and gas leaks in India have killed, maimed and caused lasting environmental damage. Yet, these people and their families have struggled to hold the perpetrators to account and receive damages to ameliorate their suffering. This lamentable situation could be addressed by consensus between states around the world to develop a treaty that ensures human rights violations do not go unpunished (or, at least uncompensated). In the 21st century such a treaty is both a legal and moral necessity.

After the devastation of the Second World War and the horrors of the Holocaust, the mood was ripe to create an international order with certain basic moral principles at its core. Human rights were the key concept that created a bridge between law and morality. The intrinsic 'dignity' or worth of the human person was seen to give rise to certain entitlements that protect the most basic interests of people: the right to free speech, bodily integrity, food and housing. These protections could only be effective, however, if they created obligations for other actors. The focus at the time was on the obligations of states for realizing human rights.

Since then, the world has changed. Trade has exploded across international borders as have multi-national corporations with a common identity operating in multiple states. The wealth and power of some corporations is said to rival that of states. A legal paradigm of fundamental rights that ignores these significant development will lack the power adequately to protect the rights of individuals. Difficult problems, however, arise in holding corporations to account for rights violations.

First, international law has traditionally been built on the idea that each state is sovereign within its own domain and responsible for holding accountable those who commit wrongs within its domain. It is less well equipped to address wrong-doers who cross borders: where, for instance, an environmentally destructive strategy is planned in one country and executed in another. Suing a corporation in the country where a wrong is committed may thus fail to affect the real center of power or wealth.

This problem is compounded by a second difficulty in that, in law, each corporation is regarded as a separate legal person. As such, a multinational corporation does not in fact exist: it is rather a network of different entities all formed in terms of the laws of different countries. When a corporation in one country commits a wrong, the related corporations in other countries can disavow responsibility for its actions as they are distinct 'persons' in law.

Countries can be ruined economically because some big multinational companies do not like the government. A very vivid example is Palestine which had a democratically elected government that the West did not like. Israel blockaded the country with the support of the West and all the funding was stopped. The Palestinian territory was in a state of war until 2007 when the government co-opted the party that appeared to be acceptable to the West. Israel on the other hand has enjoyed the support of the West, in spite of the many occasions that it did not yield to international law, including numerous United Nations resolutions.

There are many international mergers of companies resulting in more use of technology-based instruments that change the face of assembly lines that produce goods without the benefits going to the workers or local small businesses. High profits and lower production costs usually come at the cost of employee wages and job cuts. In short, the profits of globalization are not necessarily for the benefit of the poor – both as individuals and as nation states.

The so-called developed countries are protectionist when it comes to their national economies and companies. For example, the United States and Western Europe are distorting the agricultural market by subsidizing their farmers. Even amongst themselves they are routing for narrow nationalist interests. For example, the major reason why the British are not using the Euro is because they have been arguing that it is not in their national interest – thus, whatever is not in their

national interest must give way even if it is in the interest of the European Union.

One other evil brought about by globalization is the faith in privatization, whereby public institutions have to be auctioned off to the highest bidders, who in many cases do not pay the due rate for it. The companies can then decide to reduce or increase the workforce, increase or reduce production, depending on whether they will get the maximum profit. Went[33] gives the example of a company that reduced production in France, Holland and Belgium where laws were more favourable to employees, and increased production in China, Vietnam and Czech Republic where laws were unfavourable to employees. For example, they would pay an employee in these countries $1 per day when they could pay $31 in Japan. In poor countries, companies can just threaten to shut down production to force workers to accept slave wages, whilst they themselves make huge profits.

Globalization has also increased migration of millions of poor people who get exploited in the industrialized countries. Mexicans and people from other nations are exploited in the United States. They are illegal aliens who work for slave wages and can be dispensed with without any hassle. Of course this situation is experienced in developing countries, where one country is worse off economically than its neighbours.

The industrial West is currently experiencing shortages in medical personnel. It has now embarked upon a campaign to price away medical personnel from the developing world. We find nurses, doctors and other important medical personnel being recruited to work in the West. The poor countries where these personnel originate are not in a position to match the salaries offered by the rich north. The devastation of malaria, HIV/AIDS inevitably follow in places like Africa. This, of course, is not a new phenomenon, as a lot of brain drain has been going on from Africa and other third world societies to the Western world – the best professors in many academic fields have been transplanted to the West leaving their countries barren, without good academic leadership.

The above account shows the unjust nature of globalization as practised today. Our argument is that even though in many cases the West can point to the fact that they are not violating any international treaty or law, they are, all the same, behaving unjustly. It is the task of ethics to show not only that such injustice is immoral but also to agitate for change in the positive direction.

The possibility of justice for victims of human rights violations diminishes even further when we consider that multi-nationals often commit violations in countries with weak legal systems and where the independence of the judiciary is in doubt. The likelihood of successful prosecutions or claims for compensation is very limited in these jurisdictions.

Taken together, these three challenges create opportunities for multinationals to evade responsibility for wrongs they commit. To address them, it is necessary to devise an international solution which requires the collective action of states.

The second and most ambitious solution would be to establish an international court that could adjudicate cases where corporations violate fundamental rights across international borders. Such a court would be truly global in nature and be able to address the lacunae that arise in international law from the challenges discussed above. It would allow for the development of specific case law in this area and enable a deeper understanding of the obligations corporations owe in relation to fundamental rights. Its construction would need to be thought about carefully to ensure that it is not swamped by cases and that it does not replace the role of national courts.

There are many good reasons for a global treaty on business and human rights: one of the most significant is its ability to ensure that a remedy is found for victims of human rights violations by corporations. The current initiatives at the global level – such as the United Nations Guiding Principles on Business and Human rights[34] – lack the necessary legal status to offer a clear solution.

Objections thus far have been largely pragmatic, recognising significant division between developed and developing states on the need for such an international instrument. In June 2014, the Human Rights Council, in an initiative spearheaded by Ecuador and South Africa, agreed to commence discussions surrounding the possibility of such a treaty. The **first meeting of this inter-governmental working group** occurred in July in Geneva and drew in a range of experts from across the world. The treaty initiative has also stimulated many NGO initiatives across the world which are engaging directly with the people are affected by human rights violations of corporations. It is a great shame, however, that the United States and European Union countries – which profess to take human rights seriously – oppose this initiative. Their opposition increasingly strikes one as simply based on the self-interested expediency of their business interests and displays a callous disregard for the very real suffering of individuals that arises from inadequate regulation at the international level.

In the face of such strong division, it is necessary to stand up quietly and forcefully for why such a treaty is needed. Many visionary international developments – such as the formation of an international criminal court – have emerged in the face of initial division between states because they fill a clear moral and legal vacuum. A new global consensus needs to be forged too on business and human rights: the starting point is to recognize the moral and legal necessity for a treaty in this area. Expediency of the powerful should not be allowed to trump the basic principle of justice: anyone

[33] Robert Went, *Globalization. Neoliberal Challenge, Radical Responses* (London & Stirling Virginia: Pluto Press, 2000), 28-29

[34] http://www.un.org/millenniumgoals/ (accessed 25.02.2018)

whose fundamental rights are violated by the effects of the globalization must be able to ensure the perpetrator is punished and compensates them for their loss.

Conclusions

Taken as a whole, these contributions show that when it comes to the globalization of law, the conventional questions and oppositions are rapidly becoming obsolete. And that legal knowledge is indeed a constellation of theories and practices far more complex and nuanced than legal theorists and practitioners may have acknowledged up to now. If there is any "global legal theory" to look for, it should be understood not as a new grand, single and uniform theory on global law, but as a theory made global through its common objects and new methods. From the above, we can conclude that globalization, philosophy and justice are related. There are possible mutual benefits from globalization for all concerned. Justice demands that globalization be pursued for the benefit of all, rather than being used as a tool to perpetuate the hegemony of the strong North. Justice seen from a moral point of view, rather than a legal, one is based on ethics of human action. The moral philosophical view of justice does call for certain behaviours, some of which are attested to in the many indigenous philosophies which have to be taken seriously at a global level, as competent and useful tools of philosophizing and understanding globalization.

In other areas of law, the incidence of supra-state or transnational regulations derives, simply, from what is demanded by the nature of things. International trade, the internet, migratory flows, ecology or terrorism are phenomena which cannot be regulated (or, at least, not efficiently) in the national scope and which are also not covered by international law understood in its classic sense. It is not, therefore, a question of whether law has ceased to be a state phenomenon but rather one of accepting the fact that juridicity does not only exist in this scope; there is also a suprastate (and infra-estate) juridicity, whose importance is becoming greater every day. Yet, also, insofar as the contract constitutes the typical form taken by juridicity in the scope of globalization, law, logically, tends to be seen less as a product of a political will and, instead, what takes on more importance is a vision of law as a means for obtaining certain ends, as a mechanism of social construction.

The impact of this paper is aimed at any person, academically or not, interested in the evolution of societies worldwide from a moral, economic or legislative point of view. For further research work, we propose to analyze the legitimacy of the law in democratic societies, and especially the legally paradigms as a contemporary way of studying and understanding the law.

References

- Boylan Michael, The Future of Affirmative Actio Upper Saddle River, New Jersey: Business Ethics. Prentice-Hall, 2001
- Capella Juan Ramón, La globalización: ante una encrucijada político-jurídica, Granada: Anales de la Cátedra Francisco Suárez, 2005
- Dicţionar enciclopedic român, Vol. III. K-P. Bucureşti: Editura politică, 1965
- Djuvara Mircea, Teoria generală a dreptului (enciclopedia juridică): Drept rațional, izvoare și drept pozitiv, București: Editura All, 1995
- Ferrarese Maria Rosaria, Le istituzioni della globalizzazione, Bolonia: Mulino, 2000
- Ferrajoli Luigi, La crisis de la democracia en la era de la globalización, Granada: Anales de la Cátedra Francisco Suárez, 2005
- Hart Herbert Lionel, The Concept of Law, Oxford: The Clarendon Press, 1978
- Kant Immanuel, Critica rațiunii pure, București: Editura Univers Enciclopedic Gold, 2009
- Laporta Francisco, Law and justice in a global society, Granada: Anales de la Cátedra Francisco Suárez, 2005
- Mînzală Traian. Studiu asupra principiilor dreptului, Constanța: Editura Muntenia, 1996
- Platon. Legile, Bucureşti: Editura IRI, 1995
- Simon Robert, Preferential Hiring: A Reply to Judith Jarvis Thomson in M. Boylan Upper Saddle River, New Jersey: Business Ethics. Prentice-Hall, 2001
- Steger Manfred B., Globalization: A Very Short Introduction, Oxford: University Press, 2003
- Thomson Judith Jarvis, Preferential Hiring in M. Boylan Upper Saddle River, New Jersey: Business Ethics, Prentice-Hall, 2001
- Velarde Caridad, Hayek. Una teoría de la justicia, la moral y el derecho, Madrid Civitas, 1994
- Went Robert, Globalization. Neoliberal Challenge, Radical Responses, London & Stirling Virginia: Pluto Press, 2000
- http://www.worldbank.org/en/topic/poverty (accessed 25.02.2018)
- http://www.unicef.org/mdg/index_childmortality.htm (accessed 25.02.2018)
- http://www.un.org/millenniumgoals/ (accessed 25.02.2018)
- https://www.oxfam.org/sites/www.oxfam.org/files /file_attachments/ib-wealth-having-all-wanting-more-190115-en.pdf (accessed 25.02.2018)
- https://philosophynow.org/issues/90/Platos_Just_State (accessed 24.02.2018)
- https://plato.stanford.edu/entries/moral-character/ (accessed 24.02.2018)
- https://www.britannica.com/topic/Marxism (accessed 24.02.2018)

PARALLEL BETWEEN THE REFUGEE CONCEPT ACCORDING TO THE CONVENTION RELATING TO THE STATUS OF REFUGEES FROM 1951 AND ITS PROTOCOL FROM 1967 AND THE REFUGEE CONCEPT ACCORDING TO EUROPEAN LAW

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Abstract

In this study our aim is to make a comparison between the refugee concept according to the Convention Relating to the Status of Refugees from 1951 and its Protocol from 1967 which represent the international approach and the refugee concept according to European Law (the EU Treaties, EU Directives, the Dublin Regulation).

This parallel will present first of all the similarities between the international approach and the European approach such as : the definition of a refugee; the conditions required to obtain refugee status; the definition of the term injury; same request for international protection; same parameteres used to verify the existence of persecution; the conditions of cessation and the non refoulement principle.

Second of all the we will present the differences between the international approach and the European approach. European law completes the Convention and introduces new principles such as: subsidiary protection; temporary protection; different degrees of protection offered to refugees; the term persectution is defined ; the motivation behind persecution is defined ; recognising as persecution also the acts toward gender and children. Furthermore the cessation clause and the exclusion clause are defined differently in European law in comparison to the definition given by the Convention Relating to the Status of Refugees from 1951 and its Protocol from 1967.

Lastly we will conclude with a set of recommendations for both the Convention Relating to the Status of Refugees as well as for the European asylum system.

Keywords: *refugees, the Convention Relating to the Status of Refugees, asylum law, persecution, international protection.*

Introduction

"Refugees represent an anomaly in a world where human population is coordinated by the principle of each individual ' s belonging to a nation, to a sovereign state. The refugee status is probably proof of breach of the social contract concluded between the state and its citizens".[1]

In this article we propose to make a parallel between the refugee concept according to the Convention relating to the status of refugees from 1951 and its Protocol from 1967 and the refugee concept according to European law. *"The Convention represents the starting point in the field of asylum, which has inspired and has created various normative acts with international and european coverage."*[2] The Convention represents the international approach agreed by the members states of the UN. European law has the same definition for refugees as international law, but it has also extended the area of protection for refugees, including numerous provisions through which the principles from the Convention are implemented, allowing thus asylum seekers to claim their rights in European courts if those rights have been violated. Therefore European law completes the Convention, either by explaining certain terms, or by introducing new ones.

Before analysing the refugee concept from these two perspectives listed above, -the international approach and the european one- we will briefly present the notion of international protection, a widely discussed concept in the sphere of international relations, without which there would be no possibility of obtaining refugee status.

The concept of international protection has emerged as a result of the exile of millions of people forced by various circumstances to leave their country of origin. This migration represents essentially the inability or lack of interest of the authorities in that state to protect fundamental human rights.

These rights and freedoms of people are normally protected by their country of origin but the lack of protection in these countries determines the need for international protection: the concept that characterizes the forced exile of people and explains their motivation to seek asylum in another country.

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[1] Vergatti, Cristina Narcisa, Statutul juridic al refugiaților, Institutul Român Pentru Drepturilor Omului, Bucharest, publishing house IRDO, Bucharest, 2009, www.irdo.ro

[2] Negură, Spătaru, Laura-Cristina, Papuc, Patricia, Scurta analiza a legislatiei europene si romane in materia azilului. Pozitia diplomatiei romane in fata crizei refugiatilor, publishing house The International Public Law Journal, ed The Legal Universe, 4/2016, October-December, Bucharest, pag 114

Unlike other categories of people, refugees are bound by extreme circumstances to leave their country of origin because their lives and freedoms are under threat and because these threats are not taken into account by the authorities, they do not benefit from the necessary protection they are entitled to. This can be caused by many reasons, either the authorities do not know how to react, whether if they should react or simply they do not want to react.

This requirement for protection that refugees need is the key element that distinguishes them from other foreigners. They can be perceived as outsideres, often with limited material resources, traumatized , having no identification documents, people guided by the single impulse of becoming part of another community where they can continue their lives without having their freedoms and rights under constant threat.

They are vulnerable because of the precarious situation that they are in. Besides their motivation to leave their country of origin; a motivation that varies from case to case; also the journey that they take to reach a new country is often paved with trauma and numerous negative experiences.

After they arrive to the new country, they have to undergo a very lengthy legal procedure in order to receive refugee status, a status which only some of them receive. This waiting period differes from state to state, but it is a hard time for the asylum seeker who has just reached that country, probably does not speak its language and where there are many cultural differences etc. In addition in this period of time the asylum seeker needs resources to cover his subsistence needs, access to medical services.

In light of these considerations, the concept of refugee will be defined and explained through a comparative presentation, namely the similarities and the differences between the concept of refugee from the perspective of the Convention Relating to the Status of Refugees from 1951, its Protocol from 1967 and the European law perspective.

1. Similarities between the refugee concept according to the Convention relating to the Status of Refugees from 1951 and its Protocol from 1967 and the refugee concept according to European law

The legal basis for asylum is primarly the Universal Declaration of Human Rights adopted by the United Nations Organization on the 10th of December 1948 which in Article 14 states the following principle: ”*Everyone has the right to seek asylum and to enjoy asylum in other coutries, in case of persecution”*[3]. The first ressemblance that we want to present concerns the definition of the refugee concept.

1.1. The definition of refugees is the same in the Convention as in European law

According to the Convention, the term refugee applies to any person who: ”1) owed to well founded fear of being persecuted; (2) for reasons of race, religion, nationality, membership of a particular social group or political opinion; (3) 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; (5) or who not having a nationality and being outside the country of his former habitual residence as a result of such events is unwilling to return to it”.[4]

In our view, the quintessence of this definition is given by the concept of *fear of being persecuted*. This fear consists of two parts, on one hand there is an objective element, namely the fear must be justified, must be real and on the other hand there is a subjective element, the feelings that the person has about the persecution.

There may be a variety of fears that cause a person to leave his country, such as natural disasters, famine, poverty, war, but only a *well-founded fear* is vital in recognizing a person as a refugee. Reasons such as poverty, natural disasters or global warming are not reasons for obtaining asylum.

Every asylum seeker is required to demonstrate the existence of a well-founded fear, the fear of being persecuted by at least one of the reasons given in the definition - race, religion, nationality, belonging to a particular social group, or political opinion. Often the fear of persecution is caused by more then just one element.

The common denominator of this definition, which is also the common denominator of the five reasons for persecution, is the concept of belonging. Affiliation, according to the dictionary, is: "*dependence or bondage of someone or something"; "belonging*" or "*relationship between an individual and the social class, the community, the party, etc of which he is a part*[5]".

Affiliation is therefore the identification with a particular group of that community, a group that is defined by an essential feature of race, ethnicity, religious or political beliefs or another characteristic that differentiates that group from the rest of society.

After a more thorough analysis it can be noticed that the penultimate reason, namely belonging to a certain social group, essentially overlaps the other four reasons, but at the same time includes them, because all the facts imply an affiliation, namely the identification with a certain social group, having a certain dimension, race, religion, nationality or political opinion.

[3] Declaraţia Universală a Drepturilor Omului, from 10 December 1948 (http://www.monitoruljuridic.ro/act/declaratie-universala-a-drepturilor-omului-din-10-decembrie-1948-emitent-organizatia-natiunilor-unite-publicat-n-brosura-din-22751.html)

[4] Convention relating to the Status of Refugees, signed in Geneva on the 28th of July 1951 (http://www.unhcr.org/ro/wp-content/uploads/sites/23/2016/12/1951_Convention_ROM.pdf)

[5] https://dexonline.net/definitie-refugiat

History has demonstrated that the coexistence at state borders of various religious, linguistic, ethnic, political and non-political groups, with different interests, leads sooner or later to conflicts as a result of the struggle for supremacy, resources, etc.

As a general rule, the asylum seeker must be outside of his country of nationality because international protection cannot be enforced as long as the person is under the territorial jurisdiction of his or her country of origin

This well-founded fear of persecution must be related to the country of which he is a citizen otherwise there would be no need for international protection and no basis for asylum either. At the same time, there may also be the hypothesis that a certain person was not a refugee when he left his country, but subsequently became a victim of incidents in his country of origin. These incidents occurred in his absence and created an undesirable situation that has a direct impact on the person's return to his country of origin. As an example, we can take the situation of students or immigrant workers who live in other countries. In antithesis with this example, we also have the situation of stateless persons, who are often refused the protection of their country of habitual residence.

Following a more detailed analysis of the refugee definition, namely, aspect five of the definition, which states that the person can not or because of this fear does not want to be under the protection of that country, this idea essentially reinforces the concept that the refugee is in all these cases the person who can not benefit from the protection of his state of origin

In the 60 years since the adoption of the Convention Relating to the Status of Refugees, it has proved to be an instrument that can be used to provide international protection for refugees. As any legal instrument it has certain limits, and despite the relevant definition given by the Convention, there is still a clear disproportion between the refugees recognized by it and the great mass of persons in need of international protection who are not recognized as refugees.

For example, people who leave their country of origin following armed conflict, violence; or atrocities are still outside the definition of the Convention, even though they do not actually benefit from the protection of their country of origin. They flee their country because of the effects of war, disorder and fear of war, global warming, lack of livelihood, etc. But these people do not fulfill the imperative requirement imposed by the Convention, namely the fear of persecution.

The same definition of refugees is also found in European law. European law is made up of primary sources, namely the Treaty of the European Union and the Treaty on the Functioning of the European Union, on one hand, and secondary sources, ie directives, regulations, etc., on the other hand.

The legal basis for the protection of refugees is primarily found in the Treaty on the Functioning of the European Union, Article 78 which clearly and explicitly states the following*: "The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to grant a status corresponding to any third-country national in need of international protection and to ensure compliance with the principle of non-refoulement. This policy must be consistent with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 on the Status of refugees, as well as other treaties in the field.* " .[6]

Another similarity between the two legislative frameworks refers to the conditions that have to be fulfilled cumulatively in order to obtain refugee status.

1.2. The conditions required in order to obtain refugee status in the Convention are the same as those in European law

The 1951 Convention defines the elements that must be fulfilled in order for an asylum seeker to obtain refugee status and there have been no changes made in EU law on this topic. The three conditions to be met are the following:

- the asylum seeker has to face a fear of persecution;
- the basis for this persecution must be related to race, religion, nationality, membership of a particular social group/ expressing a political opinion;
- the existence of a causal link between the fear of persecution on one of these grounds (race, religion, nationality, belonging to a particular social group, political opinion) and the act of persecution.[7]

Once these elements have been established, the state must grant international protection to the asylum seeker who has been the victim of an injury, a concept that we will develop later in this paper.

1.3. The term injury has the same definition in the Convention as in European law

Article 15 from the Convention explains which types of serious injuries are taken into account:

- death penalty;
- torture or inhuman, degrading treatment that an asylum seeker may have in his / her country of origin;
- serious and individual threats to a civilian's life as a consequence of escalated violence, both in the event of armed conflict at the domestic and international level[8];

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[6] Tratatul privind Uniunea Europeana, http://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0001.02/DOC_1&format=PDF

[7] Convention relating to the Status of Refugees, signed in Geneva on the 28th of July 1951 http://www.unhcr.org/ro/wp-content/uploads/sites/23/2016/12/1951_Convention_ROM.pdf)

[8] Convention relating to the Status of Refugees, signed in Geneva on the 28th of July 1951 http://www.unhcr.org/ro/wp-content/uploads/sites/23/2016/12/1951_Convention_ROM.pdf)

European law does not come up with additions to the concept of injuries, a concept which is otherwise relative, leaving states with a great margin of appreciation, so in essence, the analysis of injuries is on a case by case basis. In order to claim the existence of an injury, the person concerned must draw up an application for international protection which has the same characteristics both in the Convention and in European law

1.4. The request for international protection under the Convention is identical to that in European law

The applications for international protection must be assessed in the same way and several elements are taken into account, such as for example all facts of interest concerning the country of origin at the time of the decision on the application, including the laws and regulations of the country of origin and how they apply. All information and documents provided by the applicant are necessary to determine whether the asylum seeker is being persecuted or seriously injured.

The status of the individual and his / her personal situation, such as gender, past experiences or age, are also necessary to understand his situation. This makes it possible to determine whether he or she may be exposed to any kind of injury.

In addition, it is checked whether the asylum seeker could benefit from the protection of another state, ie whether he can apply for international protection in another state.

Other elements are also considered such as: has the applicant already been persecuted, has he suffered serious harm or has he been the subject of the direct threat of such persecution or harm. It is also relevant if there is a serious indication of the applicant's fear of being persecuted, or a real risk of suffering serious harm.

If there are issues related to the applicant's statements that are not supported by evidence, those issues do not need to be confirmed if the following conditions are met:

- the applicant has taken all diligence and has made a real effort to support his application for international protection;
- the applicant has provided all relevant elements and has given satisfactory explanations regarding the absence of some evidence;
- the declarations of the applicant are considered to be both consistent and plausible and such statements are not contradicted by any general or specific information that is known and that is relevant to his application;
- the request for international protection was filed by the applicant as soon as he was given this opportunity, the exception to this rule being the case where the applicant pleads a good reason for failling to fulfill this obligation;
- an overall credibility of the applicant was established;[9]

Any application for international protection must in essence be able to prove that the person concerned meets the conditions necessary to be granted refugee status.

1.5. Same parameters used to verify the existence of persecution

As we have shown the existence of fear is esential in order to be granted refugee status. Often fear is connected to acts of persecutions against refugees. The acts of persecution are not explicitly defined in the Convention, there are only some parameters introduced by the legislator. The acts of persecution must be:

- of a sufficiently serious nature or of a repetitive nature to constitute a serious violation of human rights, particularly those rights from which there is no derogation on the basis of Article 15 of the European Court of Human Rights;
- represent a multitude of actions, including human rights violations, that are sufficiently serious to impact on the individual;

Because the legislator's intention was to provide a more comprehensive framework, he introduced some possible ways in which acts of persecution can manifest:

- violence that can be of a physical, mental, sexual nature;
- taking different types of measures, such as legal, judicial, administrative measures that may be discriminatory in themselves or implemented in a discriminatory manner,
- prosecution or other sanctions that are discriminatory and disproportionate;
- criminal prosecution or other sanctions in the event of a refusal to perform military service in conflict situations, where the military service would involve the commission of offenses or the inclusion of acts falling within the exclusion clauses set out in Article 12, paragraph 2;
- acts against persons on grounds of sex, even acts against children;[10]

Not only the conditions for receiving refugee status are identical in international law to European law, but also the conditions for the cessation of refugee status, conditions that we will briefly outline below.

1.6. The conditions of cessation of the refugee status are the same in the Convention as in European law

Refugee status may be lost in the following situations:

- if the person concerned voluntarily lost the

[9] Convention relating to the Status of Refugees, signed in Geneva on the 28th of July 1951 http://www.unhcr.org/ro/wp-content/uploads/sites/23/2016/12/1951_Convention_ROM.pdf)

[10] Convention relating to the Status of Refugees, signed in Geneva on the 28th of July 1951 http://www.unhcr.org/ro/wp-content/uploads/sites/23/2016/12/1951_Convention_ROM.pdf)

protection of the country of which he is a national;

- if the person lost his nationality and voluntarily regained it;
- if he has received a new nationality and he benefits from the protection of the country of nationality he acquired,
- if he has returned voluntarily to the country from which he came;
- if the circumstances underlying his recognition as a refugee have disappeared, he may no longer continue to refuse the protection of the country of his or her nationality;
- in the case of a person without citizenship because the circumstances under which he has been recognized as a refugee have disappeared, he may return to the country where he was habitually a resident;[11]

For the applicability of these provisions, Member States shall assess whether the change of circumstances is of sufficient significance and asses whether the refugee's fear of being persecuted can no longer be considered as founded.

1.7. The non-refoulement principle is defined in the same way in the Convention as in European law

The most important principle when considering the protection of refugees is the principle of non-refoulement (Article 33 of the Convention). The signatory States of the Convention are bound to respect the principle of non-refoulement on the basis of the international obligations they have assumed. States have the possibility to return a refugee only if this is not forbidden by international commitments. The situations in which a refugee can be returned to the state of origin are defined by the Convention:

- where there are good reasons to believe that that person presents a danger to the safety of the state in question;
- where the person concerned has been convicted by a final court decision for committing an offense of particular gravity which constitutes a threat to that state;
- if there are serious grounds for believing that this person poses a threat to the safety of his state;
- if that person has been convicted by a final court decision following a particularly serious crime that constitutes a threat to that state.[12]

The elements described above are the common elements that we have identified between the concept of refugee according to international law and European Law .

In the next part of the study, we will draw on the differences between the concept of refugee under the Convention and the concept of refugee under European law.

2. Differences between the refugee concept according to the Convention relating to the Status of Refugees from 1951 and its Protocol from 1967 and the refugee concept according to European law

Although the concept of refugee has the same definition in European law as in international law the protection afforded by European legislation is more extensive. The first newly introduced principle that completes the Convention is the principle of subsidiary protection.

2.1. Subsidiary protection is a new principle introduced by European law

Subsidiary protection is granted to any third-country national or stateless person who can not be considered a refugee , but only in those cases where there are valid grounds to believe that if the person is sent to his/her country he/ she would be subject to would be subject to a real risk of suffering serious harm.

If in the case of refugees the main characteristic is the fear of persecution in the case of people who obtain subsidiary protection the main characteristic is the exposure to a real risk in the event of return to their country of origin. European law complements the Convention and also introduces a new type of protection, namely the temporary protection**.**

2.2. Temporary protection is a new principle introduced by European law

Due to the situation caused by the division of Yugoslavia, the European Union saw itself facing a difficult situation, namely a huge wave of non-European citizens seeking asylum in the European Union. Therefore, the Member States of the EU collaborated and agreed that there was a need for a new legislation that could cope with the crisis. This is how Directive 2001/55 on minimum standards for giving temporary protection was created, to cope in the event of a large flow of displaced persons and to prepare measures that promote a balance of efforts between Member States in receiving such persons and bearing the consequences of these actions.

This directive defines temporary protection as an exceptional measure meant to ensure that displaced persons from outside the European fUnion who can not return to their country of origin are offered immediate and temporary protection. This legislation is particularly applicable in situations where there is a risk that the country's asylum system will not be able to cope with a large influx of people, and asylum claims would not be resolved in a timely manner.

This directive was necessary for various reasons. Firstly in order to improve the reception conditions for asylum seekers, Member States set minimum conditions in order to receive them. Secondly the directive promotes the idea of solidarity and shared

[11] idem
[12] idem

responsibility between Member States. Thirdly it is depriving Member States of the inability to deal with the lack of a legal framework that can be used in emergency situations.

This Directive defines the stages of decision-making in order to trigger the temporary protection procedure, which can be extended or terminated. At the same time the Directive defines the rights of beneficiaries, which have been harmonized, such as duration of temporary protection, which may be between one and three years.

In addition it also contains information on access to employment, accommodation, social protection, subsistence methods, access to the medical system and juvenile education.

Council Directive 2001/55 also includes provisions for the return of displaced persons to their country of origin and for the exclusion of individuals who have committed crimes or who have threatened the security of the state and as such are not eligible for subsidiary protection. Some provisions have also been added to protect unaccompanied minors, especially for those who have been subjected to various traumas (mental, physical violence, etc.)[13].

Another principle reiterated in this Directive is the principle of solidarity and there is a mechanism established between Member States that allows the transfer of asylum seekers from one state to another.

2.3. Different degrees of protection granted to refugees by European law

From our perspective, the Convention can be divided into the following levels, which we will set out below. The first is that refugees are treated in the same way as other foreigners, the exception to this rule being the situation when the Convention provides refugees with more favorable conditions than to other foreigners.

The second level includes a variety of rights; rights that are granted by the parties to the Convention to refugees on their territory and rights that they would grant to their own citizens as well.

The third level concerns granting similar conditions to refugees as would be granted to their own citizens in terms of exercising their freedom of religion.

The fourth level of protection refers to granting refugees conditions no less appropriate than they would offer to other foreigners.

At a European level, these principles have been assimilated and have been complemented by the following , more explicit legal documents which are defining relevant aspects of the rights granted to refugees. Thus, the European Union has implemented:

- a common asylum regime in favor of third-country nationals valid throughout the European Union;
- a common subsidiary protection regime for all third-country nationals who, without receiving European asylum, still need international protection;
- a unitary temporary protection mechanism for displaced persons in cases of mass influx;
- other common procedures through which the unitary asylum and subsidiary protection regimes are granted and withdrawn;
- the mechanisms and rules for determining the Member State responsible for examining an application for asylum or an application for subsidiary protection,
- rules defining the conditions for the reception of asylum seekers and of applicants for subsidiary protection;
- the partnership between Member States and third countries in coordinating the flow of people claiming asylum, whether it is subsidiary protection or temporary protection for the above-mentioned causes.

Where an individual is in serious danger, the European Union has the possibility of adopting interim measures as well.

Thus a Common European Asylum System has been set up containing five essential documents:

1. *A revised Directive on Asylum Procedures*: refers to decisions which are better in terms of asylum applications.
2. *A revised Reception Conditions Directive*: guarantees the availability of appropriate reception conditions (eg accommodation) for asylum seekers in all EU countries.
3. *A revised Minimum Standards Directive*: refers to the reasons necessary in order to grant international protection, thus contributing to strengthening asylum decisions at a European level.
4. *A revised Dublin Regulation*: strengthens the protection granted to asylum seekers throughout the process of determining the State responsible for examining the application and clarifies the rules governing inter state relations.
5. *A revised EURODAC Regulation:* allows law enforcement authorities to access the EU database containing the fingerprints of asylum seekers under restrictive conditions in order to combat the detection or investigation of the most serious offenses, such as crimes and acts of terrorism.[14]

Since the concept of persecution is the defining element in obtaining refugee status and since the Convention does not contain a definition of persecution, the European Union adopted a definition of persecution and an explanation with the motivation which we will further analyze in our paper.

[13] Directiva 2001/55 s Consiliului UE cu privire la standardele minime pentru a oferi protecţie temporară în eventualitatea unui flux mare a persoanelor deplasate şi măsurile care promovează un echilibru al eforturilor între statele membre în a primi aceste persoane şi a suporta consecinţele acesteia http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:212:0012:0023:EN:PDF

[14] Migration and Home Affairs, Temporary Protection, https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/temporary-protection_en

2.4. The term persecution is only defined by European law

The Council of the European Union defines acts of persecution as follows (this list is exemplary and not exhaustive), "*any acts of a physical or mental nature, including acts of sexual violence; legal, administrative, police, and / or judicial remedies that are discriminatory or implemented in a discriminatory manner; prosecution or punishment, which are disproportionate or discriminatory; denial of access to justice resulting in disproportionate or discriminatory punishment; prosecution or punishment for the refusal to perform military service in the event of a conflict where the military service would also include crimes or acts falling within the scope of the clauses set out in Article 12; acts directed against a certain gender, or against children*".[15]

Article 2 (2) of Directive 2011/95 / EU states that the acts of persecution do not have to be commmited only by the state in question, but also acts of persecution committed by non-state actors may qualify under the 1951 Convention as acts of persecution where the state does not want or cannot protect the person requesting refugee status.

In the following, we will enumerate the elements that characterize the concept of persecution, elements not defined by the Convention

2.5. The motivation behind persecution is defined only by European law

The elements of persecution can be caused by the following particularities of the individual: race, religion, nationality, political opinion, or belonging to a particular social group. Any of these elements must be related to the act of persecution. The asylum seeker must prove the existence of at least one of the grounds presented in this section: race, religion, nationality, political opinion and affiliation to a particular social group.

Race: In this situation, elements such as the colour of the skin, the person's ascendancy or the ethnic group to which he belongs apply.

Religion: Elements such as the beliefs of that person, which may be of a theistic, non-theistic or even atheistic nature, are analyzed. It is also checked whether the person has participated in various events, such as worship ceremonies, whether private or public, irrelevant if those people have participated in these events alone or with a bigger group. Elements such as non-participation in certain events, free expressions of religious views, religious acts based on confessional reasons are also taken into account.

Nationality: This concept is not limited to the idea of citizenship or the lack of it, but rather it includes the aspect of belonging that we will detail below.

Political opinion may also be a basis for obtaining asylum. The term political opinion consists of elements such as ideas, beliefs, opinions in a certain area.

Affiliation to a particular social group is another element. The definition of this concept was made by the Council of the European Union which states that "*individuals can be considered as belonging to a particular social group when sharing an immutable common feature, that is, something inherent in their being or so fundamental to their being that they can not expect to change it, and who have a distinct identity in their country of nationality or the country they live in because they are considered to be different from society.* "[16]

2.6. Recognising as persecution also the acts directed toward gender and children exist only in European law

A principle that has completed the concept of persecution in the Convention is that which recognizes persecution against a particular gender or against children. This principle (Article 9 (2) (f) was defined in Council Directive 2004/83 / EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons or people who, for other reasons, need international protection.[17]

The Convention and EU law have also created a legal framework through which a refugee can lose his right of residence, which we will present in the next part of the study.

2.7. The cessation clause is defined differently in European law

Council Directive 2004/83 / EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals is subject to a change in the exclusion clause. The Convention specifies that it will apply to "*any person*" who meets one of the following conditions:

- urges once again, without being forced, the protection of their country of nationality;
- if the person has lost his / her nationality but still benefits from the protection of the country that granted his / her nationality;
- in the event of unreasonably returning to the state he/she left or outside of which he/she experienced the fear of persecution;
- where the circumstances giving rise to the recognition of that person as a refugee have ceased to

[15] Directiva 2011/95/UE a Parlamentului European şi a Consiliului din 13 Decembrie 2011 privind standardele referitoare la condiţiile pe care trebuie să le îndeplinească resortisanţii ţărilor terţe sau apatrizii pentru a putea beneficia de protecţie internaţională, la un statut uniform pentru refugiaţi sau pentru persoanele eligibile pentru obţinerea de protecţie subsidiară şi la conţinutul protecţiei acordate (reformare) (http://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32011L0095&from=RO)

[16] International Justice Resource Center, Asylum and the Rights of Refugees, Overview, http://www.ijrcenter.org/refugee-law/

[17] Directiva 2004/83/CE a Consiliului din 29 Aprilie 2004 privind standardele minime referitoare la condiţiile pe care trebuie să le îndeplinească resortisanţii ţărilor terţe sau apatrizii pentru a putea beneficia de statutul de refugiat sau persoanele care, din alte motive, au nevoie de protecţia internaţională şi referitoare la conţinutul protecţiei acordate, Jurnalul Oficial al Uniunii Europene , http://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32004L0083&from=RO

exist, the person concerned may no longer refuse the protection of the country of which he is a national;

On the other hand, European law maintains all the criteria outlined above, but changes the starting formula, meaning the beneficiary of the cessation clause. Thus, Article 11 of Directive 2004/83 / EC states in Article 11 that the termination of refugee status occurs for any "*third-country national or stateless person".*[18]

2.8. The exclusion clause is defined differently in European law

The Convention defines the exclusion clause in Article 1 F. The legislator explains what type of people are subject to this exclusion clause. Thus, the Convention specifies that these provisions apply to persons where there are good reasons to believe that:

- they have committed crimes against peace, crimes against humanity, war crimes;
- they have committed a serious common law crime, the crime has been committed outside the host country, this being the case before they were admitted as refugees ;
- they are guilty of activities that are committed against the purposes and principles for which the United Nations militates[19];

Council Directive 2004/83 / EC of 29 April 2004 on minimum standards comes with the following additions. Thus, at the first paragraph (*who committed crimes against peace, crimes against humanity, war crimes)* there is a new sentence added to the original text of the Convention : *" in the sense of the international instruments developed to provide for such offenses*[20]*"*.

The second paragraph (committed a serious common law crime, the offense was committed outside the host country, this being the case before accepting as a refugee the person concerned[21]) has a new phrase added "the actions particularly cruel, even if they are committed for an allegedly political purpose, can qualify as serious offenses of common law".[22] This paragraph also includes the concept of very serious actions, irrelevant of whether they were committed for a political purpose, they are still likely to qualify as serious offenses of common law.

The third paragraph only has one addition to the original text. It is stated here that acts contrary to the purposes and principles of the UN are also provided in the preamble to the UN Charter and are also found in Articles 1 and 2 of the UN Charter.[23]

A new paragraph has been added stating that the paragraph described above also applies to instigators and accomplices: " Paragraph 2 applies to persons who instigate or participate in any way in the offenses or acts referred to in that paragraph"[24].

3. Instead of a conclusion

In the present study we have analyzed the concept of refugee from the perspective of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, as well as from the European law perspective: the European Union's Treaties, the Dublin Regulation and numerous directives.

The definition of refugees from the Convention Relating to the Status of Refugees may be supplemented. In our view, other elements could be introduced in the definition given to a refugee and include more reasons which determine a person to flee his country such as: armed conflicts, natural disasters, global warming, genetic mutilation.

We believe that the principle of subsidiarity and temporary protection were needed in order to offer a wider international protections, since not all asylum seekers are eligible for refugee status, but they are eligible for international protection because their country of origin can not protect them.

The principle of non-refoulement is an essential principle for all asylum seekers who can not return to their country of origin. From our point of view, this principle is the basis of the international protection that a state must offer to the person concerned, it is a vital right, according to all international documents, from the Universal Declaration of Human Rights, to the

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[18] *Directiva 2004/83/CE a Consiliului din 29 Aprilie 2004 privind standardele minime referitoare la condiţiile pe care trebuie* să le îndeplinească resortisanţii ţărilor terţe sau apatrizii pentru a putea beneficia de statutul de refugiat sau persoanele care, din alte motive, au nevoie de protecţia internaţională şi referitoare la conţinutul protecţiei acordate, Jurnalul Oficial al Uniunii Europene , http://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32004L0083&from=RO

[19] Convention relating to the Status of Refugees, http://www.unhcr.org/ro/wp-content/uploads/sites/23/2016/12/1951_Convention_ROM.pdf)

[20] Directiva 2004/83/CE a Consiliului din 29 Aprilie 2004 privind standardele minime referitoare la condiţiile pe care trebuie să le îndeplinească resortisanţii ţărilor terţe sau apatrizii pentru a putea beneficia de statutul de refugiat sau persoanele care, din alte motive, au nevoie de protecţia internaţională şi referitoare la conţinutul protecţiei acordate, Jurnalul Oficial al Uniunii Europene , (http://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32004L0083&from=RO

[21] *Directiva 2004/83/CE a Consiliului din 29 Aprilie 2004 privind standardele minime referitoare la condiţiile pe care trebuie* să le îndeplinească resortisanţii ţărilor terţe sau apatrizii pentru a putea beneficia de statutul de refugiat sau persoanele care, din alte motive, au nevoie de protecţia internaţională şi referitoare la conţinutul protecţiei acordate, Jurnalul Oficial al Uniunii Europene , http://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32004L0083&from=RO

[22] idem

[23] idem

[24] Directiva 2004/83/CE a Consiliului din 29 Aprilie 2004 privind standardele minime referitoare la condiţiile pe care trebuie să le îndeplinească resortisanţii ţărilor terţe sau apatrizii pentru a putea beneficia de statutul de refugiat sau persoanele care, din alte motive, au nevoie de protecţia internaţională şi referitoare la conţinutul protecţiei acordate, Jurnalul Oficial al Uniunii Europene, http://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32004L0083&from=RO

Treaties of the European Union, the European Convention on Human Rights, etc.

We applaud the introduction of the definition of persecution in European law as well as the recognition of specific acts towards gender or children as a form of persecution.

In our view people who receive requests for international protection and who have the capacity to decide on asylum applications must meet certain conditions. These people need to know both the Convention and the European legislation on asylum, they must be people of good faith, tolerant and they should not discriminate in any way.

We conclude by stating that although the 1951 Convention and its 1967 Protocol were visionary treaties for the era in which they were adopted, times have changed and they are barely able to respond now to current needs. Although European law comes with additions, it still does not offer a complete and homogeneous vision, determined inter alia by the lack of interstate solidarity. And with regard to the applicable sanctions for non-compliance with the legislation , the sanctioning regime has proven to be sometimes ineffective.

References

- Actul final al conferinţei pentru Securitate şi Cooperare în Europa, Helsinki, 1st of August 1975 (*http://www.dri.gov.ro/actul-final-de-la-helsinki/*)
- Benitez, Daniel, Refugee concept in the international context http://www.academia.edu/11623350/Refugee_concept_in_the_international_context
- Chirtoaca, Natalia, Spînu, Veronica, Evoluţia şi relevanţa actuală a Convenţiei din 1951 privind Statutul refugiaţilor https://ibn.idsi.md/sites/default/files/imag_file/4.Evolutia%20si%20Relevanta%20actuala%20a% 20conventiei%20din%201951%20privind%20statutul%20refugiatilor.pdf
- Convention relating to the Status of Refugees, 1951 (http://www.unhcr.org/ro/wp-content/uploads/ sites/23/2016/12/1951_Convention_ROM.pdf)
- The European Convention on Human Rights signed on the 4th of November 1950 in Rome, which came into force on the 3rd of September 1953 (*http://www.echr.coe.int/Documents/Convention_RON.pdf*)
- OAU Convention governing the specific aspects of refugee problems in Africa, signed in 1968 in Addis Ababa, which came into force in 1974 *http://www.unhcr.org/about-us/background/45dc1a682/oau-convention-governing-specific-aspects-refugee-problems-africa-adopted.html*
- Declaraţia Universală a Drepturilor Omului, from 10 December 1948 (http://www.monitoruljuridic.ro/act/declaratie-universala-a-drepturilor-omului-din-10-decembrie-1948-emitent-organizatia-natiunilor-unite-publicat-n-brosura-din-22751.html)
- Cartagena Declaration on Refugees, adopted by the Colloquy regarding the International Protection of Refugees from Central America, Mexico and Panama, signed on the 22nd of November 1974 in Cartagena de Indias Columbia *http://www.unhcr.org/about-us/background/45dc19084/cartagena-declaration-refugees-adopted-colloquium-international-protection.html*
- Directiva 2004/83/CE a Consiliului din 29 Aprilie 2004 privind standardele minime referitoare la condiţiile pe care trebuie să le îndeplinească resortisanţii ţărilor terţe sau apatrizii pentru a putea beneficia de statutul de refugiat sau persoanele care, din alte motive, au nevoie de protecţia internaţională şi referitoare la conţinutul protecţiei acordate, Jurnalul Oficial al Uniunii Europene (*http://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32004L0083&from=RO*)
- Directiva 2011/95/UE a Parlamentului European şi a Consiliului din 13 Decembrie 2011 privind standardele referitoare la condiţiile pe care trebuie să le îndeplinească resortisanţii ţărilor terţe sau apatrizii pentru a putea beneficia de protecţie internaţională, la un statut uniform pentru refugiaţi sau pentru persoanele eligibile pentru obţinerea de protecţie subsidiară şi la conţinutul protecţiei acordate (reformare) (*http://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32011L0095&from=RO*)
- Directiva 2013/32/UE a Parlamentului European şi a Consiliului din 26 Iunie 2013 privind procedurile comune de acordare şi retragere a protecţiei internaţionale (reformare) (*http://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32013L0033&from=RO*)
- Directiva 2013/33/UE a Parlamentului European şi a Consiliului din 26 Iunie 2013, de stabilire a standardelor pentru primirea solicitanţilor de protecţie internaţională (reformare) *http://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32013L0033&from=EN*
- https://dexonline.net/definitie-refugiat
- Directiva 2001/55 s Consiliului UE cu privire la standardele minime pentru a oferi protecţie temporară în eventualitatea unui flux mare a persoanelor deplasate şi măsurile care promovează un echilibru al eforturilor între statele membre în a primi aceste persoane şi a suporta consecinţele acesteia
- http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:212:0012:0023:EN:PDF
- Fondul European pentru Refugiaţi, European solidarity, 19th of December 2016 http://www.unhcr.org/ro/152-rogeneralparteneriuniunea-europeanafondul-european-pentru-refugiati-html.html
- Gill-Bazo, Maria Theresa, New issue in refugee research, Refugee status, subsidiary protection and the right to be granted asylum under EC law, Refugee studies Centre, Oxford University, United Kingdom, Research paper no 136, November 2006 *http://www.unhcr.org/research/working/455993882/refugee-status-subsidiary-protection-right-granted-asylum-under-ec-law.html*

- Guidelines on International Protection, Cessation of Refugee Status under Article 1 C (5) and (6) of the 1951 Convention relating to the Status of Refugees, 10 th of February 2003, UNHCR, *http://www.unhcr.org/3e637a202.pdf*
- Handbook on European law relating to asylum, borders and immigration, European Union Agency for Fundamental Rights, 2014 *file:///C:/Users/User/Downloads/handbook-law-asylum-migration-borders-2nded_en.pdf*
- International Justice Resource Center, Asylum and the Rights of Refugees, Overview, *http://www.ijrcenter.org/refugee-law/*
- Manual referitor la proceduri şi criterii de determinare a statutului de refugiat în baza Convenţiei din 1951 şi a Protocolului din 1967 privind statutul refugiaţilor, The Office of the United Nations High Commissioner for Refugees *http://cdom.rau.ro/download/Concurs/Manual%20UNHCR%20selectie.pdf*
- Migration and Home Affairs, Temporary Protection, https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/temporary-protection_en
- Madureira, Andre de Lima, International Refugee Law: Definitions and Limitations of the 1951 Refugee Convention http://blogs.lse.ac.uk/humanrights/2016/02/08/international-refugee-law-definitions-and-limitations-of-the-1951-refugee-convention/
- Course notes, Dreptul Refugiaţilor, Cycle 1 , Stela Litra, The University of European Studies from Moldova, Law Faculty *http://www.usem.md/uploads//files/Note_de_curs_drept_ciclul_1/039_-_Dreptul_refugiatilor.pdf*
- Necula, Cătălin, Mircea, Radu, Manual de pregătire în domeniul integrării refugiaţilor în România, publishing house the Ministry of Administration and Interior Affairs, 2009, (*http://www.editura.mai.gov.ro/documente/biblioteca/2009/Manual%20ORI/Manual%20refugiati%20ORI.pdf*)
- Note on the Exclusion Clause, EC-47- SC-CRP 29, UNHCR Standing Committe, 30 May 1997, *http://www.unhcr.org/excom/standcom/3ae68cf68/note-exclusion-clauses.html*
- Negură, Spătaru, Laura-Cristina, Papuc, Patricia, Scurta analiza a legislatiei europene si romane in materia azilului. Pozitia diplomatiei romane in fata crizei refugiatilor, publishing house The International Public Law Journal, ed The Legal Universe, 4/2016, October-December, Bucharest
- http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0040.xml
- Protocolul privind statutul refugiaţilor signed in New York on the 31st of January 1967 (*http://www.cdep.ro/pls/legis/legis_pck.htp_act_text?idt=32365*)
- Paraschiv, Ramona, Gabriela, Protecţia refugiaţilor potrivit reglementărilor internaţionale, Acta Universitatis George Bacovia, Legal, Volum 4, Issue 1/2015, *http://www.ugb.ro/Juridica/Issue7RO/3._Protectia_refugiatilor_potrivit_reglementarilor_internationale.Ramona_Paraschiv.RO.pdf*
- Papademetrio, Theresa, Refugee Law and Policy: European Union, March 2016, *https://www.loc.gov/law/help/refugee-law/europeanunion.php*
- Politica Uniunii Europene în materie de azil, Azilul în Uniunea Europeană, 19th of December 2016 *http://www.unhcr.org/ro/150-politica-uniunii-europene-in-materie-de-azil.html*
- Regulamentul UE nr 604/2013 al Parlamentului European şi al Consiliului din 26 Iunie 2013 de stabilire a criteriilor şi mecanismelor de determinare a statutului membru responsabil de examinarea unei cereri de protecţie internaţională prezentate într-unul dintre statele membre de către un resortisant al unei ţări terţe sau de către un apatrid (reformare), *http://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32013R0604&from=EN*
- Protocolul privind statutul refugiaţilor, signed in New York on the 31st of January 1967
- http://www.unhcr.org/ro/wp-content/uploads/sites/23/2016/12/1967_Protocol_ROM.pdf
- Russel, Stanton, Sharon, Refugees Risks and Challenges Worldwide, 1st of November, 2012, Migration Policy Institute *https://www.migrationpolicy.org/article/refugees-risks-and-challenges-worldwide*
- Regulamentul UE nr 603/2013 al Parlamentului European şi al Consiliului din 26 Iunie 2013 privind instituirea sistemului Eurodac pentru compararea amprentelor digitale în scopul aplicării eficiente a Regulamentului UE nr 604/2013 de stabilire a criteriilor şi mecanismelor de determinare a statutului membru responsabil de examinarea unei cereri de protecţie internaţională prezentate într-unul dintre statele membre de către un resortisant al unei ţări terţe sau de către un apatrid şi privind cererile autorităţilor de aplicare a legii din statele membre şi a Europol de comparare a datelor Eurodac în scopul asigurării respectării aplicării legii şi de modificare a Regulamentului UE nr 1077-2011 de instituire a Agenţiei Europene pentru gestionarea operaţională a sistemelor informatice la scara largă, în spaţiul de libertate, securitate şi justiţie (reformare) *http://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32013R0603&from=RO*
- The Cessation Clause, Guidelines on their application, UNHCR, Geneva, April 1999, Office of the High Commissioner for Refugees *http://www.refworld.org/pdfid/3c06138c4.pdf*
- Vergatti, Cristina Narcisa, Statutul juridic al refugiaţilor, The Romanian Institute for Human Rights, Bucharest, publishing house IRDO, Bucharest, 2009
- Webber, Frances, Exclusion from Refugee Status under Article 1F of the Convention *http://www.refugeelegalaidinformation.org/exclusion-clause*

IDENTIFYING THE RIGHT OF A PERSON AGGRIEVED BY A PUBLIC AUTHORITY IN THE ROMANIAN CONSTITUTION AND IN COMPARATIVE LAW

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Abstract

The purpose of the present study is to analyze the development and the evolution of the right of a person aggrieved by a public authority in the Romanian Constitutions and in comparative law. The objectives of the study were to analyze the Romanian Constitutions in order to identify the provisions regarding the fundamental right of a person aggrieved by a public authority and to analyze the provisions of this fundamental right in the constitutions of other states: the Constitution of the French Republic, the constitutional Acts of the United Kingdom of Great Britain and Northern Ireland, the Fundamental Law for the Federal Republic of Germany, the Constitution of the Republic of Italy, and the Constitution of Spain. By granting the fundamental right of a person aggrieved by a public authority is ensuring a good administration of the state by giving the citizens a compliance with their legitimate rights.

The citizen may be aggrieved in his legitimate rights and interests by a public authority, by means of an administrative act or by failure of a public authority to solve his application within the lawful time limit. The Romanian organic law that stipulates and protect this right is the administrative litigation law number 554/2004. Also, the Romanian state is liable for any prejudice caused as a result of judicial errors.

Keywords: *the right of a person aggrieved by a public authority, Romanian Constitution, comparative law, citizens legitimate rights, granting a good administration by ensuring the guarantee rights.*

1. Introduction

The purpose of this study is to analyse and identify the development and the evolution of the right of a person aggrieved by a public authority in the Romanian Constitutions and in comparative law.

The study is structured as follows: several selective aspects have been analysed with regard to the right of a person aggrieved by a public authority in Romania and the evolution of the right of a person aggrieved by a public authority in the Romanian Constitutions, and the selection from comparative law included for analysis the Constitutions of the following states: the Constitution of the French Republic, the constitutional Acts of the United Kingdom of Great Britain and Northern Ireland, the Fundamental Law for the Federal Republic of Germany, the Constitution of the Republic of Italy, and the Constitution of Spain.

The studied matter is important because granting the right of a person aggrieved by a public authority at constitutional level ensures the protection of the manifestations of the citizens' will in relation to public authorities and also to other rights, liberties and citizen interests, thus ensuring the good governance of the State to the benefit of its citizens.

The present paper intended to answer to the matter studied by analysing both the evolution, the development and the improvement of the fundamental right of a person aggrieved by a public authority in time, beginning with the first Romanian Constitution and up to the present days, and the comparative law by identifying this right also in the Constitutions of other states.

As regards the relation between this paper and the already existent specialized literature, the analyses conducted so far have dealt less frequently with the topic approached here, which is the analysis of the fundamental right of a person aggrieved by a public authority in the Romanian Constitutions, from the Development Statute of the Paris Convention of 7/9 August 1858[1] and until the Draft Law on the review of the Constitution of Romania of 2014[2]. Furthermore, the author of this study has analysed this fundamental right in comparative law, in the Constitutions of other states, providing an overview of its application over the years and at international level.

In the current context, the author of this study considered the aspects approached by this research as having been especially important in view of the societal predispositions for a continuous improvement of its forms of governance, the citizens' aspirations, both of individuals and legal entities, for the development of social sciences, of the relations between public institutions and citizens, ensuring the good governance of the constitutional state.

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[1] I. Muraru, M.L. Pucheanu, G. Iancu, C.L. Popescu, *Constituțiile Române Texte. Note. Prezentare Comparativă (The Romanian Constitutions. Texts. Notes. A Comparative Presentation)*, Regia Autonomă „Monitorul Oficial" Publishing House, Bucharest, 1993, p. 7-14.

[2] The Draft Law on the review of the Constitution of Romania of 2014 was published in Monitorul Oficial (Official Gazette) no. 100 of 10th of February 2014.

2. Selective aspects about the right of a person aggrieved by a public authority in Romania

The right of a person aggrieved by a public authority is regulated at constitutional level by Article 52 of the Constitution of Romania. This article grants the right of a citizen who was prejudiced by a Romanian public institution to obtain the recognition of the claimed right, the annulment of the unlawful deed which caused the prejudice and the reparation of the suffered damage.

With the adoption of the law reviewing the Constitution of Romania[3] in 2003, the Article 48 of the 1991 Constitution[4] was amended, and paragraphs 1 and 3 were modified. Paragraph (1) which in the 1991 Constitution read: *"A person aggrieved with regard to a right by a public authority, through an administrative deed or by the non-settlement of a request within the time limit provided by law, is entitled to obtain the recognition of the claimed right, the annulment of the deed and the reparation of damage."* was changed into *"A person aggrieved with regard to a right or a legitimate interest, by a public authority, through an administrative deed or by the non-settlement of a request within the time limit provided by law, is entitled to obtain the recognition of the claimed right or legitimate interest, the annulment of the deed and the reparation of damage."* Paragraph (3) which in the 1991 Constitution was: *"The State has patrimonial liability, under the law, for any prejudice caused by miscarriages of justice in criminal trials."* was changed to its current wording, which is: *"The State has patrimonial liability for any prejudice caused by miscarriages of justice. The liability of the State is determined under the law and does not eliminate the liability of the magistrates who acted in bad faith or serious neglect."*

This fundamental citizen right was "*traditionally considered as falling into the broad category of rights that are guarantees, together with the right of petition, with which, as a matter of fact, it is closely correlated*"[5].

Therefore, in the doctrine, the right of petition, granted by Article 51 of the Constitution of Romania, together with the right of a person aggrieved by a public authority, form the class of rights that are guarantees, which are as a matter of fact a guarantee for all fundamental rights and freedoms.

The right of a person aggrieved by a public authority was brought under regulation by the provisions of Article 52 of the Constitution of Romania: *"(1) A person aggrieved with regard to a right or a legitimate interest, by a public authority, through an administrative deed or by the non-settlement of a request within the time limit provided by law is entitled to obtain the recognition of the claimed right or legitimate interest, the annulment of the deed and the reparation of damage. (2) The conditions and limitations related to the exercise of this right are provided for by an organic law. (3) The State has patrimonial liability for any prejudice caused by miscarriages of justice. The liability of the State is determined under the law and does not eliminate the liability of the magistrates who acted in bad faith or serious neglect."*

In our opinion, the rights that are guarantees have ensured the protection of the manifestations of the citizens' will in relation to public authorities and also to other rights, liberties and citizen interests, thus ensuring the good governance of the State to the benefit of its citizens.

Article 52 of the fundamental law represents the constitutional legal ground for the assumption of responsibility by public authorities in relation with the citizens, and in relation with a person aggrieved with regard to a right or a legitimate interest, which consequently provides legal protection for the latter through the annulment of the deed and the reparation of damage.

All rights and guarantees which concern the person aggrieved with regard to a right or a legitimate interest have been governed in Romania by an organic law, namely the Law of Administrative Dispute 554/2004[6].

One first author[7], with regard to the right of a person aggrieved by a public authority, said that "the changes brought to paragraph (1) by the reviewing law pursued a correlation with the other constitutional provisions and first of all with Article 21 which brings under regulation the free access to justice, meaning that any person may appeal to justice for defending their rights, freedoms and legitimate interests, and no law may restrict the exercise of this right. In line with this constitutional provision, the text was completed, meaning that not only the person aggrieved with regard to a right acknowledged by law is entitled to an action before a court of administrative dispute, but also a person aggrieved with regard to a legitimate interest (direct and personal)."

A second author[8] held that "*for a definition of the concept of "fundamental rights", the following have*

[3] Law 429/2003 on the review of the Constitution of Romania, effective as from 29th October 2003, published in Monitorul Oficial, Part I no. 758 of 29th October 2003.

[4] The *1991 Constitution of Romania* was published in "Monitorul Oficial" (Official Gazette) no. 233 of 21st of November 1991.

[5] M. Constantinescu, A. Iorgovan, I. Muraru, E.S. Tănăsescu, Constituția României revizuită – comentarii și explicații (*The Romanian Constitution Reviewed – Comments and* Explanations), All Beck Publishing House, Bucharest, 2004, p. 120.

[6] Law of Administrative Dispute 554/2004, effective as from 06th of January 2005, with its subsequent changes and additions, based on its publication in "Monitorul Oficial al României (Official Gazette of Romania), Part I, no. 1154 of 07.12.2004.

[7] Coordinators I. Muraru, E.S. Tănăsescu, Constituția României, Comentariu pe articole (*Constitution of Romania. Articles Commented*), C.H. Beck Publishing House, Bucharest, 2008, p. 517.

[8] N. Pavel, Drept constituțional și instituții politice, Teoria Generală (*Constitutional Law and Political Institutions. General Theory*), Publishing House Fundația România de Mâine, 2004, p. 70.

been considered: (a) the fundamental rights are subjective rights of the citizens; b) these subjective rights are essential to citizens' life, freedom and dignity, and indispensable to the free development of human personality; c) the fundamental rights are established by the Constitution and granted by the Constitution and by law."

A third author[9] stated with regard to the right of a person aggrieved by a public authority that "*Article 52 of the Constitution of Romania is the constitutional ground for the liability of public authorities for grievances caused to individuals through the violation of their rights or freedoms or legitimate interests, which means that all other dispositions referring to rights and freedoms must be correlated with this constitutional text*."

A fourth author[10] concluded that the right of a person aggrieved by a public authority is "the constitutional ground for the liability of public authorities for grievances caused to citizens through the violation or disregard of their rights and freedoms."

The Universal Declaration of Human Rights of 10 December 1948[11] provided for the right of a person aggrieved by a public authority in Article 8: *"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."*

The Universal Declaration of Human Rights[12] is the source of the concept of fundamental human right. In the Preamble of the Declaration, the Member States of the United Nations Organisation assumed the responsibility of recognising the Declaration "*as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.*"[13]

In our opinion, the citizen who was aggrieved with regard with a right has no legal obligation to prove the guilt of the civil servant; they only have to prove the prejudice brought to their right by an adverse administrative act. Consequently, the citizen has the responsibility to prove the causality link between the adverse administrative act and the actual prejudice which was caused.

3. The evolution of the right of a person aggrieved by a public authority in the Romanian Constitutions

With regard to the evolution and development of the right of a person aggrieved by a public authority in the Romanian Constitutions, this study has analysed the Development Statute of the Paris Convention, the Constitution of Romania of 28 February 1938, the Constitution of 24 September 1952, the Romanian Constitution adopted on 29 June 1866, the Constitution of 29 March 1923, the Constitution of 13 April 1948, the Constitution of 21 August 1965, the Constitution of Romania of 8 December 1991, the Constitution of Romania reviewed in 2003, as well as the 2014 Draft Law on the review of the Constitution of Romania.

Therefore, the Development Statute of the Paris Convention, a statute which stood as a constitution, was the first Romanian Constitution. The Statute was adopted by the Prince of the Romanian United Principalities, Alexandru Ioan I, in May 1864.

No provisions referring to the right of a person aggrieved by a public authority have been identified in the Statute. Similarly, no provisions related to the right of a person aggrieved by a public authority have been identified in the Constitution of Romania of 28 February 1938[14], and neither in the Constitution of 24 September 1952[15].

As regards the Romanian Constitution adopted on 29 June 1866[16], it brought under regulation the fundamental citizen rights. Therefore, Article 29 has been identified, which provided that: *"No prior authorisation is necessary for the aggrieved parties to take action against public servants for the acts of their administration; however, the special rules established with regard to ministers shall remain unchanged. The cases and the type of actions to be taken shall be regulated by a specific law. Special dispositions in the Criminal Code shall determine the penalties of the denunciated*[17]*."*

These were among the first fundamental dispositions identified by this study with reference to the action taken by aggrieved parties against public servants for acts of their administration.

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[9] G. Iancu, Drept constituţional şi instituţii politice, Ediţia 3 (*Constitutional Law and Political Institutions, 3rd edition*), C.H. Beck Publishing House, Bucharest, 2014, p. 294-295.

[10] I. Muraru, E.S. Tănăsescu, Drept constituțional și instituții politice, Ediția 15, Volumul I (*Constitutional Law and Political Institutions), 15th edition, Volume I*), C.H. Beck Publishing House, Bucharest, 2016.

[11] The Universal Declaration of Human Rights was adopted and proclaimed by the United Nations General Assembly on 10th of December 1948.

[12] Ibidem.

[13] The Preamble of the Universal Declaration of Human Rights adopted and proclaimed by the United Nations General Assembly on 10th of December 1948.

[14] Ibidem, p. 97-117.

[15] Ibidem,p. 141-159.

[16] I. Muraru, M.L. Pucheanu, G. Iancu, C.L. Popescu, Constituțiile Române Texte. Note. Prezentare Comparativă (*The Romanian Constitutions. Texts. Notes. A Comparative Presentation*), Regia Autonomă „Monitorul Oficial" Publishing House, Bucharest, 1993, p. 33-66.

[17] Ibidem, p. 40.

The Constitution of 29 March 1923[18] consecrated equal rights and freedoms for all. The following provisions of Article 31 have been identified in the content of this fundamental law: *"No prior authorisation is necessary for the aggrieved parties to take action against public servants for the acts of their administration, while the special rules established with regard to ministers shall remain unchanged. The cases and the type of actions to be taken shall be regulated by a specific law."*[19] The formulation of these fundamental provisions remained that of the 1866 Romanian Constitution.

With regard to the Constitution of 13 April 1948[20], Article 34 has been identified with the following provisions: "Every citizen has a right of petition, as well as the right to request the bodies stipulated by law to arraign any public servant for the offences committed during their service[21]."

As concerns these fundamental provisions, we found that with the promulgation of the 1948 Constitution the right of petition was brought under regulation too and a right was granted to request the bodies provided by law to arraign any public servant for offences committed in the course of their service.

The Constitution of 21 August 1965[22], which was adopted by the Great National Assembly at its meeting on 21 August 1965 and published in "Buletinul Oficial al R.S.R." no. 1 of 21 August 1965, stipulated in Article 35 that: *"The individual aggrieved with regard to a right by an unlawful act of a body of the State may request to the competent bodies, under the law, the annulment of the act and the reparation of the damage*[23]*."*

With regard to the analysis of the Romanian Constitution of 8 December 1991[24], it came into force on 8 December 1991, when it was approved by the national referendum organised to this end and was published in "Monitorul Oficial al României" no. 223 of 21 November 1991.

The following provisions of Article 48 have been analysed: "*The right of a person aggrieved by a public authority (1) A person aggrieved with regard to a right by a public authority, through an administrative deed or by the non-settlement of a request within the time limit provided by law, is entitled to obtain the recognition of the claimed right, the annulment of the deed and the reparation of damage. (2) The conditions and limitations related to the exercise of this right are provided for by an organic law. (3) The State has patrimonial liability, according to the law, for any prejudice caused by miscarriage of justice in criminal trials.*"

The conclusion was that the 1991 Constitution stipulated that the State was liable for miscarriages of justice, limiting them to those committed in criminal trials. At the same time, the first ever, this right is named the right of a person aggrieved by a public authority and the Constitution requires that its limits and conditions are provided for by an organic law.

In the contemporary legal system, which is the Constitution of Romania reviewed in 2003[25], the right of a person aggrieved by a public authority, as a fundamental right in Romania, was provided for by Article 52 of the Constitution of Romania, republished in 2003: *„(1) A person aggrieved with regard to a right or a legitimate interest, by a public authority, through an administrative deed or by the non-settlement of a request within the time limit provided by law is entitled to obtain the recognition of the claimed right or legitimate interest, the annulment of the deed and the reparation of damage. (2) The conditions and limitations related to the exercise of this right are provided for by an organic law. (3) The State has patrimonial liability for any prejudice caused by miscarriages of justice. The liability of the State is determined under the law and does not eliminate the liability of the magistrates who acted in bad faith or serious neglect."*

As regards the 2014 Draft Law on the review of the Constitution of Romania, the analysis has identified the changes proposed in order to review the Article 52 of the Constitution in force. Therefore, in the reviewing proposal, Article 52 should be changed and complemented as follows: "*Paragraph (2) shall have the following content: « (2) The conditions and limitations related to the exercise of this right are provided for by law. » Paragraph (3) shall have the following content: « (3) The State has patrimonial liability, integral and non-discriminating, for any prejudice caused by miscarriages of justice or administrative errors. The liability of the State is determined under the law and does not eliminate the liability of the magistrates or the officials who are the authors of the miscarriages of justice or administrative errors. » After paragraph (3), a new paragraph is inserted, with the following content: « (3.1) The State has the obligation to initiate, immediately, an action for recourse against the authors of the miscarriages of justice or administrative errors that caused prejudices*[26]*. »"*

[18] Ibidem, p. 71-92.
[19] Ibidem, p. 77.
[20] Ibidem, p. 121-138.
[21] Ibidem, p. 126.
[22] Ibidem, p. 165-187.
[23] Ibidem, p. 171.
[24] The *1991 Constitution of Romania* was published in "Monitorul Oficial" (Official Gazette) no. 233 of 21st of November 1991.
[25] Ibidem.
[26] Citizens' legislative initiatives according to Law 189/1999 Rationale of the draft law on the review of the Constitution of Romania – a citizen legislative initiative, 10 December 2013; published in Monitorul Oficial (Official Gazette), Part I, no. 100 of 10th of February 2014.

Following the analysis of the Romanian Constitutions, beginning with the Development Statute of the Paris Convention, a Statute which stood as the Constitution of Romania, and until the 2014 Draft Law on the review of the Constitution of Romania, we could see the evolution and the changes of the right of a person aggrieved by a public authority at fundamental level, the forms taken by this right over the years, the time when it acquired its name, which has been kept up to the contemporary period, as well as the changes proposed for the next review of the Constitution of Romania.

4. Selective aspects about the provisions related to the right of a person aggrieved by a public authority in the constitutions of other states

The following constitutions have been selected from comparative law for analysis: the Constitution of the French Republic, the constitutional Acts of the United Kingdom of Great Britain and Northern Ireland, the Fundamental Law for the Federal Republic of Germany, the Constitution of the Republic of Italy, and the Constitution of Spain.

The provisions of the fundamental laws of the aforesaid states have been analysed in respect of the form consecrated by each state to the right of a person aggrieved by a public authority.

4.1. In the Constitution of the French Republic[27]

Provisions have been identified with regard to the right of society to call to account any public agent in Article 15 of the Declaration of Human and Citizen Rights[28] of 26 August 1789: *"Society has the right to call to account any public agent of its administration."*

The Preamble of the Constitution of the French Republic of 4 October 1958 shows that the French nation proclaims: "*solemnly its dedication to Human Rights and the principles of national sovereignty as set out in the 1789 Declaration confirmed by the Preamble of the 1946 Constitution*[29]."

No provisions have been identified with regard to the right of a person aggrieved by a public authority in the Constitution of the French Republic of 4 October 1958, this being provided for in the Declaration of Human and Citizen Rights, a declaration which is part of the so-called French *"constitutional block"*, being an integral part of the Constitution.

An author[30] of the doctrine stated with regard to Article 15 that: "*this formulation, which today seems a little embarrassing and rough to us, underlay the "invention" of the jurisdictional function of the Council of State in France and allowed the creation of the rich case law of this prestigious court with regard to administrative liability (subjective and objective). Indeed, this is the source of the specific traits proper to administrative liability, which differentiate it from the liability under civil or criminal law. Based on the "exorbitant" legal regime (as Napoleon would call it later on) benefitting the public administration, it needs to exercise its competence within the limits which the law pre-set for it; however, as soon as it produces a prejudice, its liability is engaged based on the simple fact of proving the prejudice and the administrative deed which caused it, while the aggrieved individual has no longer the duty of proving the causality link between the administrative deed and the prejudice or the guilt of the administrative authority. A legal regime of liability is therefore consecrated for the public administration which is tougher than for individual subjects of the law, precisely in consideration of the authority attributes of which it benefits*."

4.2. In the constitutional Acts of the United Kingdom of Great Britain and Northern Ireland[31]

Although the United Kingdom of Great Britain and Northern Ireland has not a written constitution, given its tradition, the constitutional Acts have been taken into consideration.

The analysis of the constitutional Acts of the United Kingdom of Great Britain and Northern Ireland has identified in the document called the *Bill of Rights" (1689)*[32], point 1, the sub-point 13, the following provisions: *"And that for redress of all grievances and for the amending, strengthening and preserving of the laws, parliaments ought to be held frequently. And they do claim, demand and insist upon all and singular the premises, as their undoubted rights and liberties; and that no declarations, judgements, doings or proceedings, to the prejudice of the people in any of the said premises ought in any wise to be draw hereafter into consequence or example. To which demand of their rights they are particularly encouraged by the declaration of this highness the Prince of Orange as being the only means for obtaining a full redress and remedy therein. Having therefore an entire confidence,*

[27] Ș. Deaconu, I. Muraru, E.S. Tănăsescu, S. G. Barbu, Codex Constituțional Constituțiile statelor membre ale Uniunii Europene, Volumul I (*Constitutional Codex. The Constitutions of the Member States of the European Union. Volume I*), Monitorul Oficial Publishing House, Bucharest, 2015, p. 637-667.

[28] Ibidem, p. 668-670.

[29] Ibidem, p. 637.

[30] E.S. Tănăsescu, Prezentarea comparativă a abordărilor constituționale din alte state cu privire la răspunderea autorităților publice fată de cetățeni și relativ la integrarea în Uniunea Europeană (*A Comparative Presentation of Constitutional Approaches in other States with regard to the Liability of Public Authorities towards the Citizens and in relation to the integration into the European Union*), Revista de drept public (Public Law Magazine) no. 2/2002, p. 16-23.

[31] E.S Tănăsescu, N. Pavel, Actele constituționale ale Regatului Unit al Marii Britanii și Irlandei de Nord (The Constitutional Acts of the United Kingdom of Great Britain and Northern Ireland), Publishing House All Beck, Bucharest, 2003, p. 36-100.

[32] Ibidem, p. 82-83.

That his said highness the Prince of Orange will perfect the deliverance so far advanced by him, and will still preserve them from the violation of their rights, which they have here asserted, and from all other attempts upon their religion rights and liberties."

In the constitutional Acts of the United Kingdom of Great Britain and Northern Ireland, in the 1998 Human Rights Act[33], provisions have been identified with reference to *"8. Judicial remedies 1. In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate. 2. But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings. 3. No award of damages is to be made unless, taking account of all the circumstances of the case, including: a. any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and b. the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made. 4. In determining a. whether to award damages, or b. the amount of an award, the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention. 5. A public authority against which damages are awarded is to be treated: a. in Scotland, for the purposes of section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 as if the award were made in an action of damages in which the authority has been found liable in respect of loss or damage to the person to whom the award is made; b. for the purposes of the Civil Liability (Contribution) Act 1978 as liable in respect of damage suffered by the person to whom the award is made. 6. In this section "court" includes a tribunal, "damages" means damages for an unlawful act of a public authority; and "unlawful" means unlawful under section 6(1)."*[34]

4.3. In the Fundamental Law for the Federal Republic of Germany[35]

The analysis of the Fundamental Law for the Federal Republic of Germany has identified the provisions of Article 34: "*[Liability for breaching the duties associated with the service] If anyone, in the exercise of a public position that is entrusted to them breaches their duty in relation to a third party, then the liability lies, in principle, with the State or with the established body within which they serve. In case of premeditation or serious neglect, the possibility for an action for recourse remains open. For compensation claims and for recourse, the possibility of ordinary legal proceedings cannot be closed*[36]."

The conclusion is that there are provisions concerning the liability for breaching the duties associated with the service in the exercise of a public function in the Fundamental Law for the Federal Republic of Germany too.

4.4. In the Constitution of the Republic of Italy[37]

The analysis of the Constitution of Italy has identified the provisions of Article 28: "*Officials and employees of the State and of public institutions are directly liable, under the criminal, civil and administrative laws, for their action violating the citizens' rights. In such cases, civil liability falls on the State and the public institutions*."*[38]*

Other provisions have also been identified in the Constitution of Italy with regard to liability in case of miscarriages of justice, in Article 24 paragraph 4: *"The law defines the conditions and the forms of remedy in case of miscarriages of justice*[39]*."*

4.5. In the Constitution of Spain[40]

The analysis of the Constitution of Spain has identified the provisions of Article 106: *"(1) The tribunals control the regulatory power and the lawfulness of the administrative action, as well as its abidance by the purposes justifying it. (2) Individuals have the right, under the law, to receive compensation for any grievance in relation to their rights and goods, except for force majeure cases, any time these prejudices are the consequence of the operation of public services*[41]."

Also in the Constitution of Spain, the provisions of Article 121 have been identified: "*The damages caused by miscarriages of justice, as well as those that are the consequence of an abnormal administration of justice give a right to a compensation which is incumbent on the State, under the law*."*[42]*

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[33] Ș. Deaconu, I. Muraru, E.S. Tanasescu, S. G. Barbu, Codex Constitțtional - Constitutiile statelor membre ale Uniunii Europene,Volumul II (*Constitutional Codex. The Constitutions of the Member States of the European Union. Volume II*), Monitorul Oficial Publishing House, Bucharest, 2015, p. 232.

[34] Ibidem, p. 238-239.

[35] E. Focșeneanu, Legea Fundamentală pentru Republica Federală Germania (*The Fundamental Law for the Federal Republic of Germany*), All Educațional S.A. Publishing House, Bucharest, 1998, p. 29-140.

[36] Ibidem, p. 51.

[37] Ș. Deaconu, I. Muraru, E.S. Tănăsescu, S. G. Barbu, Codex Constituțional. Constituțiile statelor membre ale Uniunii Europene, Volumul I (*Constitutional Codex. The Constitutions of the Member States of the European Union. Volume I*), Monitorul Oficial Publishing House, Bucharest, 2015, p. 637-667.

[38] Ibidem, pp. 815.

[39] Ibidem, pp. 815.

[40] E. Focșeneanu, Constituția Spaniei (*Constitution of Spain*), C.H. Beck Publishing House, Bucharest, 2006, p. 13-97.

[41] Ibidem, p. 57.

[42] Ibidem, p. 63.

The regulations and the constitutional principles granting the right of a person aggrieved by a public authority in the Constitutions analysed in the study of comparative law have regulatory aspects which are similar to the Constitution of Romania.

5. Conclusions

5.1. Granting the right of a person aggrieved by a public authority at constitutional level ensures the protection of the manifestations of the citizens' will in relation to public authorities and also to other rights, liberties and citizen interests, thus ensuring the good governance of the State to the benefit of its citizens.

5.2. The right of a person aggrieved by a public authority is brought under regulation at constitutional level by Article 52 of the Constitution of Romania. The Article grants to the citizens who have been prejudiced by a Romanian public institution the right to obtain the recognition of the claimed right, the annulment of the unlawful act which caused the prejudice and the reparation for the suffered damage.

5.3. We could see that the interest at constitutional level has been ever since old times to protect the rights of a person aggrieved by a public authority at a fundamental level, so that, at social level, this right which is a guarantee has pursued to defend citizens' rights and interests.

5.4. A citizen who was prejudiced with regard to a right has no legal obligation to prove the guilt of the public servant; they only have to prove the prejudice brought to their right by an adverse administrative act. Consequently, the citizen has the responsibility to prove the causality link between the adverse administrative act and the actual prejudice which was caused.

5.5. Beginning with the Development Statute of the Paris Convention, a Statute which stood as the Constitution of Romania, and until the 2014 Draft Law on the review of the Constitution of Romania, we could see the evolution and the changes of the right of a person aggrieved by a public authority at fundamental level, the forms taken by this right over the years, the time when it acquired its name, which has been kept up to the contemporary period, as well as the changes proposed for the next review of the Constitution.

5.6. The following constitutions have been selected from comparative law for analysis: the Constitution of the French Republic, the constitutional Acts of the United Kingdom of Great Britain and Northern Ireland, the Fundamental Law for the Federal Republic of Germany, the Constitution of the Republic of Italy, and the Constitution of Spain. The provisions of the fundamental laws of the aforesaid states have been examined in respect of the form consecrated by each state to the right of a person aggrieved by a public authority.

5.7. The topics for future research will include the right of petition, which together with the right of a person aggrieved by a public authority make the class of rights that are guarantees and ensure the good governance of the constitutional state to the benefit of its citizens.

References

- I. Muraru, M.L. Pucheanu, G. Iancu, C.L. Popescu, Constituțiile Române Texte. Note. Prezentare Comparativă (*The Romanian Constitutions. Texts. Notes. A Comparative Presentation*), Regia Autonomă „Monitorul Oficial" Publishing House, Bucharest, 1993, p. 7-14
- The Draft Law on the review of the Constitution of Romania of 2014 was published in "Monitorul Oficial" (Official Gazette) no. 100 of 10th of February 2014
- Law 429/2003 on the review of the Constitution of Romania, effective as from 29th October 2003, published in Monitorul Oficial, Part I no. 758 of 29th October 2003
- The *1991 Constitution of Romania* was published in "Monitorul Oficial" (Official Gazette) no. 233 of 21st of November 1991
- M. Constantinescu, A. Iorgovan, I. Muraru, E.S. Tănăsescu, Constituția României revizuită – comentarii și explicații (*The Romanian Constitution Reviewed – Comments and Explanations*), All Beck Publishing House, Bucharest, 2004, p. 120
- Law of Administrative Dispute 554/2004, effective as from 06th of January 2005, with its subsequent changes and additions, based on its publication in "Monitorul Oficial al României (Official Gazette of Romania), Part I, no. 1154 of 07.12.2004
- Coordinators I. Muraru, E.S. Tănăsescu, Constituția României, Comentariu pe articole (*Constitution of Romania. Articles Commented*), C.H. Beck Publishing House, Bucharest, 2008, p. 517
- N. Pavel, Drept constituţional şi instituţii politice, Teoria Generală (*Constitutional Law and Political Institutions. General Theory*), Publishing House Fundaţia România de Mâine, 2004, p. 70
- G. Iancu, Drept constituţional şi instituţii politice, Ediția 3 *(Constitutional Law and Political Institutions, 3rd edition)*, C.H. Beck Publishing House, Bucharest, 2014, p. 294-295
- I. Muraru, E.S. Tănăsescu, Drept constituțional și instituții politice, Ediția 15, Volumul I (*Constitutional Law and Political Institutions), 15th edition, Volume I*), C.H. Beck Publishing House, Bucharest, 2016
- The Universal Declaration of Human Rights was adopted and proclaimed by the United Nations General Assembly on 10th of December 1948
- The Preamble of the Universal Declaration of Human Rights adopted and proclaimed by the United Nations General Assembly on 10th of December 1948

- Citizens' legislative initiatives according to Law 189/1999 Rationale of the draft law on the review of the Constitution of Romania – a citizen legislative initiative, 10 December 2013; published in Monitorul Oficial (Official Gazette), Part I, no. 100 of 10th of February 2014
- Ș. Deaconu, I. Muraru, E.S. Tănăsescu, S. G. Barbu, Codex Constituțional Constituțiile statelor membre ale Uniunii Europene, Volumul I (*Constitutional Codex. The Constitutions of the Member States of the European Union. Volume I*), Monitorul Oficial Publishing House, Bucharest, 2015, p. 637-667
- E.S. Tănăsescu, Prezentarea comparativă a abordărilor constituționale din alte state cu privire la răspunderea autorităților publice fată de cetățeni și relativ la integrarea în Uniunea Europeană (*A Comparative Presentation of Constitutional Approaches in other States with regard to the Liability of Public Authorities towards the Citizens and in relation to the integration into the European Union*), Revista de drept public (Public Law Magazine) no. 2/2002, p. 16-23
- E.S Tănăsescu, N. Pavel, Actele constituționale ale Regatului Unit al Marii Britanii și Irlandei de Nord (The Constitutional Acts of the United Kingdom of Great Britain and Northern Ireland), Publishing House All Beck, Bucharest, 2003, p. 36-100
- Ș. Deaconu, I. Muraru, E.S. Tanasescu, S. G. Barbu, Codex Constitțtional - Constitutiile statelor membre ale Uniunii Europene,Volumul II (*Constitutional Codex. The Constitutions of the Member States of the European Union. Volume II*), Monitorul Oficial Publishing House, Bucharest, 2015, p. 232
- E. Focșeneanu, Legea Fundamentală pentru Republica Federală Germania (*The Fundamental Law for the Federal Republic of Germany*), All Educațional S.A. Publishing House, Bucharest, 1998, p. 29-140
- E. Focșeneanu, Constituția Spaniei (*Constitution of Spain*), C.H. Beck Publishing House, Bucharest, 2006, p. 13-97

REFLECTIONS ON THE REGULATION OF THE PRINCIPLE OF NON-DISCRIMINATION IN THE ROMANIAN CONSTITUTIONS AND IN THE INTERNATIONAL BILL OF RIGHTS – SELECTIVE ASPECTS

Nicolae PAVEL[*]

Abstract

At the onset of the study it is necessary to mention that its topic will be circumscribed to "Reflections on the regulation of the principle of non-discrimination in the Romanian Constitutions and in the International Bill of Human Rights - Selective aspects". By this approach, the proposed study opens a complex and complete vision, but not exhaustive, on the "Reflections on the regulation of non-discrimination in the Romanian Constitutions and in the International Bill of Human Rights - Selective aspects". In the analysis of the International Bill of Human Rights, we will keep a symmetrical approach to identifying regulations concerning non-discrimination. The subject of the scientific endeavour will be circumscribed to the scientific analysis of its parts, as follows: 1. Preliminary considerations. 2. Identification of constitutional rules on the principle of non-discrimination in the Romanian Constitutions. 3. Identification of rules on the non-discrimination in the International Bill of Human Rights. 4. The highlights of Romanian doctrine on the non-discrimination. 5. Jurisprudence of the Constitutional Court regarding non-discrimination (Selective aspects) 6. Conclusions.

Keywords: *regulation of non-discrimination, Romanian constitutions, International Bill of Human Rights.*

1. Introduction

The object of study of the scientific approach will be circumscribed to the scientific analysis of its five great parts, i.e.: 1. Identifying the constitutional norms regarding non-discrimination in the Romanian Constitutions. 2. Identifying the norms regarding non-discrimination in the International Bill of Human Rights. 3. Romanian doctrinal landmarks on non-discrimination. 4. Jurisprudence of the Constitutional Court regarding non-discrimination (Selective aspects) 5. Conclusions.

At the onset of this study, it is imperative to specify that in its contents, the International Charter of Human Rights gathers the following set of five documents:[1] a) the Universal Declaration of Human Rights. b) the International Covenant on Economic, Social and Political Rights. c) the International Covenant on Civil and Political Rights. d) the Optional Protocol to the International Covenant on Civil and Political Rights. e) the second Protocol to the International Covenant on Civil and Political Rights, aimed at abolishing the death penalty.

As concerns the evolution of ideas regarding the elaboration of an International Bill of Human Rights, we specify as follows:

1. The idea of the elaboration of a Declaration of human fundamental rights, (Bill of Rights) was brought up at the Conference of the United Nations regarding the International Organization, held in San Francisco, between April-June 1945, at 26 June 1945 when the UN Charter was adopted.
2. The Economic and Social Council set up the Commission on Human Rights, under art. 68 of the Charter, by resolution 5(1) of 16 February 1946, and authorized it to present proposals, recommendations and reports on *an international declaration of human rights.*
3. At the second session, held in Geneva, between 2-17 December 1947, the Commission on Human Rights decided that the expression *International Bill of Human Rights* should apply to all the documents in preparation, i.e. to one declaration on human rights, a convention or a covenant on human rights and enforcement measures.

For this study, we will mention the following documents of the Charter, which contain regulations on non discrimination, respectively, *Universal Declaration of Human Rights*, *The International Covenant of Civil and Political Rights and the International Covenant of Economic, Social and Cultural Rights*.

The two Covenants in the UN system are called *Covenants of Human Rights.*

In our opinion, the study is important for the constitutional doctrine in the matter, for the doctrine of human rights and for the doctrine of international law of human rights, because by this scientific approach, we intend to determine, in a diachronic and selective approach a complex and complete but not exhaustive reflection, of the current sphere regarding non discrimination in the area of study.

For this study, we will mention the following documents of the Charter, which contain regulations on non discrimination, respectively, *Universal*

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[1] See, *Activités de l'ONU dans le domaine des droits de L'homme*, Nations Unies, New York, 1986, pp. 8-10. (author's translation)

Declaration of Human Rights, *The International Covenant of Civil and Political Rights and the International Covenant of Economic, Social and Cultural Rights*.

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From the point of view of full but not exhaustive coverage, of the sphere regarding non discrimination, a diachronic and selective approach of the current trends on non discrimination.

Even if the regulation and theorization of *non discriminations* goes back in time, *to the first UN documents and to the first Romanian constitutions*, the theoretical interest for resuming it is determined by the fact that in the exiting specialized literature not enough attention has always been given at least to the three aspects, normative, theoretical and jurisprudential regarding *the regulation of non discrimination*, analyzed in this study.

2. Identifying the constitutional norms on non discrimination in the Romanian Constitutions

In this paragraph, we intend to identify the constitutional norms in the area of the study because, in our opinion, these norms in the Romanian constitutions set the constitutional principles referring to non discrimination, which will be later developed into the laws adopted by the parliament in various fields, where the observance of the constitutional principle of non discrimination is imperative.

2.1. From the systematic analysis of the normative contents of the Developer Status of the Convention of 7/9 August 1858[2] which in our opinion, subject to art. XVII, may be considered a Constitution, contains no provision on non discrimination.

2.2. The systematic analysis of the normative contents of the Romanian Constitution of 1866[3] shows that it sets no criterion of non discrimination.

2.3. The systematic analysis of the normative contents of the Constitution of Romania of 1923[4] shows that this is the first Romanian Constitution which regulates the following criteria of non discrimination, in the contents of art. 5 of Title II entitled On the Rights of the Romanians: "The Romanians, regardless of ethnic origin, of language or of religion, enjoy freedom of conscience, freedom of education, freedom of the press, freedom of meetings, freedom of association and all the liberties and rights set by the laws".

2.4. The systematic analysis of the normative contents of the Constitution of Romania of 1938[5] shows that it regulates the following criteria of non discrimination, in the contents of art. 4, art. 5 and art. 6 of Chapter I, Title II, entitled "On the Debts of the Romanians" having the following contents:

2.4.1. art. 4. "All Romanians, regardless of ethnic origin and religion, are liable to: deem Homeland as the most important ground of their meaning in life, to sacrifice for defending its integrity, independence and dignity; to contribute by their work to its moral ascension and economic growth; to fulfil faithfully public task sunder the laws and willingly contribute to completion of the public tasks, without which being of the State cannot live".

2.4.2. art. 5. "All Romanian citizens, regardless of ethnic origin and religion, are equal before the law, owing respect and obedience. Nobody can deem to be free of his/her civil or military, public or private, duties on the grounds of his/her religious beliefs or of any other kind.

2.4.3. art. 6. "In the Romanian State no distinction of social class is admitted. The privileges in setting the taxes are stopped. Tax decrease or increase cannot be general and established by laws ".

The systematic analysis of the normative contents of the three above-mentioned articles shows the nomination of the following criteria of non discrimination: ethnic origin, religion and social class.

2.5. The systematic analysis of the normative contents of the Constitution of 1948[6] shows that it regulates the following criteria of non discrimination, in the contents of art. 16 of Title III, entitled "Fundamental rights and duties of citizens " having the following phrasing: "All citizens of the People's Republic of Romania, regardless of sex, nationality, race, religion or level of culture, are equal before the law".

The criteria of non discrimination set by the mentioned text are the following: sex, nationality, race, religion or level of culture.

2.6. The systematic analysis of the normative contents of the Constitution of 1952[7] shows that it regulates to following criteria of non discrimination, in the contents of art. 81 Chapter VII, entitled "Fundamental rights and duties of citizens " having the following phrasing:

2.6.1. Art. 81 par. (1): "The working people, citizens of the People's Republic of Romania,

[2] See, Ioan Muraru., Gheorghe Iancu., Constituţiile române (The Romanian Constitutions), Texte (Texts), Note. Prezentare comparativă (A Comparative Presentation), Ed. Actami, Bucharest, 2000, pp. 7-27.
[3] *Ibidem*, pp. 31 - 80.
[4] *Ibidem*, pp. 63 - 92.
[5] *Ibidem*, pp. 95 - 119.
[6] *Ibidem*, pp. 123 - 139.
[7] *Ibidem*, pp. 143 - 166.

regardless of nationality or race are assured full equality of rights in all domains of economic, political and cultural life".

2.6.2. Art. 81 par. (2): "Any direct or indirect restriction of the rights of the working people, citizens of the People's Republic of Romania, setting direct or indirect privileges on the gorunds of race or nationality to whom citizens belong, any manifestation of chauvinism, racial hatred, national hatred or nationalist chauvinist propaganda shall be punishable by law".

The criteria of non discrimination set by the mentioned texts are the following: nationality and race.

2.7. The systematic analysis of the normative contents of the Constitution of 1965, as republished[8] shows that it regulates the following criteria of non discrimination, in the contents of art. 17 of Title II, entitled " Fundamental rights and duties of citizens " having the following phrasing:

2.7.1. Art. 17 par. (1): "The citizens of the People's Republic of Romania, regardless of nationality, race, sex or religion, are equal in rights in all domains of economic, political, legal, social and cultural life ".

2.7.2. Art. 17 par. (2): "The State guarantees equality of rights of all citizens. No restriction of such rights and no distinction in exercising such rights on the grounds of nationality, race, sex or religion are allowed".

2.7.3. Art. 17 pr. (3): "Any manifestation with the purpose of establishing such constraints, the nationalist chauvinist propaganda, incitement of race or national hatred, shall be punishable by law".

The criteria of non discrimination set by the mentioned texts are the following: nationality, race, sex, religion.

2.8. The systematic analysis of the normative contents of the Constitution of Romania of 1991[9] shows that it regulates the following criteria of non discrimination, in the contents of art. 4 par. (2) having the marginal phrasing People's unity and equality between citizens, in the contents of Title I, entitled "General principles" having the following phrasing: "Romania is the common and indivisible homeland of all its citizens, regardless of race, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, wealth or social origin".

The criteria of non discrimination set by the above-mentioned text is, in our opinion the most complete and includes all the criteria of non discrimination phrased in the international and European documents in the line of human rights, existing at the time of elaborating the Constitution.

2.9. The systematic analysis of the normative contents of the Constitution of Romania of 2003[10], the republished edition of the Constitution of Romania of 1991, shows that it regulates the same criteria of non discrimination in the contents of the Constitution of Romania in the contents of the Constitution of Romania of 1991, in the contents of art. 4 par. (2) also, having the marginal phrasing People's unity and equality between citizens, in the contents of Title I, entitled "General principles" with the following phrasing: "Romania is the common and indivisible homeland of all its citizens, regardless of race, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, wealth or social origin ".

The criteria of non discrimination set by the above-mentioned text is, in our opinion, the most complete and includes all the criteria of non discrimination phrased in the international and European documents in the line of human rights, existing at the time of the revision of the Constitution.

2.10. The systematic analysis of the normative contents of the Draft Law for the revision of the Constitution of Romania,11 sets forth at point 5 the following: article 4, par. (2) is amended and has the following contents: (2) "Romania is the common and indivisible homeland of all its citizens. Any discrimination based on sex, colour, ethnic or social origin, genetic feature, language, faith or religion, political or any other opinion, belonging to a national minority, wealth, birth, disabilities, age or any other situation is forbidden".

We find that art. 4 par. (2) was rephrased and new criteria of non discrimination were introduced, among which: colour, genetic feature, creed, political opinion or of any other kind,any other situation, which in our opinion will be discussed in the Constituent Assembly.

3. Identifying the norms regarding non discrimination in the International Bill of Human Rights

As mentioned in the introductory part of this study, we will indicate only the following documents of the Bill which include regulations regarding non discrimination, i.e., *Universal Declaration of Human Rights, The International Covenant of Civil and Political Rights and the International Covenant of Economic, Social and Cultural Rights.*

Romania signed the two covenants on 27 June 1968. These covenants were ratified by the Decree of the State Council nr. 212 of 31 October 1974, as published in the Official Journal nr. 146 of 20 November 1974.

3.1. Identifying the norms regardin non discrimination in the contents of the *Universal Declaration of Human Rights*[12]

[8] *Ibidem*, pp. 169 - 198.
[9] See, the Constitution of Romania of 1991, published in the Official Journal of Romania, Part I, nr. 233 of 21 March 1991.
[10] See, the Constitution of Romania of 2003, published in the Official Journal of Romania, Part I, nr. 767 of 31 October 2003.
[11] See, The draft law on the revision of the Constitution of Romania (Proiectul de Lege privind revizuirea Constituției României), was published in the Official Journal of Romania, Part I, no. 100 of 10 February 2014.
[12] Access:http://www.anr.gov.ro/docs/legislatie/internationala/Declaratia_Universala_a_Drepturilor_Omului.pdf

The systematic analysis of the normative contents of the *Universal Declaration of Human Rights* shows that it regulates the following criteria of non discrimination, in the contents of art. 2 par. (1), with the following phrasing: "Every human may avail himself/herself of all the rights and liberties proclaimed in this declaration with no distinction whatsoever, such as the distinction of *race, colour, sex, language, religion, political or any other opinion, national or social origin, wealth, birth or any other circumstances.* Moreover, no distinction is made for political, legal or international status of the country or territory to which the person belongs, either this country or territory is independent, under guardianship, non autonomous or subject to any other limitation of sovereignty".

The criteria on non discrimination set forth by the mentioned text are the following: *race, colour, sex, language, religion, political or any other opinion, of national or social origin, wealth, birth or any other circumstances*.

3.2. Identifying the norms regardin non discrimination in the normative contents of the *International Covenant of Civil and Political Rights* [13]

The systematic analysis of the normative contents of the *International Covenant of Civil and Political Rights* shows that it regulates the following criteria of non discrimination, in the contents of art. 2 par. (1), under the following phrasing: "The State Parties to this covenant hereby undertake to observe and guarantee to all individuals who are on their territory and the rights recognized by this covenant are within their competence, *without any distinction, in particular of race, colour, sex, language, religion, political or any other opinion, of national or social origin, wealth, birth or based on any other circumstance* ".

The criteria of non discrimination set by the mentioned text are the following: race, colour, sex, language, religion, political or any other opinion, of national or social origin, wealth, birth or based on any other circumstance.

3.2. Identifying the norms regardin non discrimination in the normative contents of the International Covenant of Civil and Political Rights [14]

The systematic analysis of the normative contents of the International Covenant of Civil and Political Rights shows that it regulates the following criteria of non discrimination, in the contents of art. 2 par. (1), under the following phrasing: "The State Parties to this covenant hereby undertake to observe and guarantee to all individuals who are on their territory and the rights recognized by this covenant are within their competence, without any distinction, in particular of race, colour, sex, language, religion, political or any other opinion, of national or social origin, wealth, birth or based on any other circumstance ".

The criteria of non discrimination set by the mentioned text are the following: race, colour, sex, language, religion, political or any other opinion, of national or social origin, wealth, birth or based on any other circumstance.

3.3. Identifying the norms regardin non discrimination in the normative contents of the International Covenant of Economic, Social and Cultural Rights [15]

The systematic analysis of the normative contents of the International Covenant of Economic, Social and Cultural Rights shows that it regulates the following criteria of non discrimination, in the contents of art. 2 par. (2), under the following phrasing: "The State Parties to this covenant hereby undertake to guarantee that the rights set forth in therein shall be exercised without any distinction, in particular of race, colour, sex, language, religion, political or any other opinion, of national or social origin, wealth, birth or any other circumstance ".

The criteria of non discrimination set forth by the above-mentioned text are the following: race, colour, sex, language, religion, political or any other opinion, of national or social origin, wealth, birth or any other circumstance.

4. Romanian doctrinal landmarx on non discrimination.

Even from the debut of subparagraph it is imperative to specify that the study of the bibliography in the line of constitutional law shows that insufficient attention was paid to the theorization of the *principle of non discrimination*.

4.1. A first opinion[16] mentioned for this study refers to the *concept of non discrimination.*

The author makes the following remarks on the concept of non discrimination:

1. Due to the close relationship between equality and non discrimination, practically there is no equality in pure form and non discrimination in pure form. We are considering here the specifications made by the working group which elaborated the Universal Declaration of Human Rights and according to which „*art. 2 sets forth the fundamental principle of equality and non discrimination*".

In the case of strict equality, *equality is identified with non discrimination*, but in the case of relative equality not any discrimination is an inequality and vice versa, not any inequality is discrimination.

2. Once identified the non discrimination as a constitutional value which guarantees the citizens equality before the law and public authorities it

[13] Access: http://www.cdep.ro/pls/legis/legis_pck.htp_act_text?idt=63815
[14] Access: http://www.cdep.ro/pls/legis/legis_pck.htp_act_text?idt=63815
[15] Ibidem.
[16] See, Nicolae Pavel, Egalitatea în drepturi a cetățenilor și nediscriminarea (Equality of rights of citizens and non discrimination), Ed. Universul Juridic, Bucharest, 2010, pp. 251-255.

results that its breach may be petitioned both before the courts, directly, and the normative act has an inferior legal force to the law,as well as under the form of exception of unconstitutionality, before the Constitutional Court, when forbidden or arbitrary discrimination is included in the law.

3. Non discrimination represents also *an additional guaranteed under the form of prohibition of arbitrary discriminations*, which is binding both for the legislator and for public administration. Thus, it is up to the Constitutional Court to investigate and find the arbitrary discriminations.
4. The constitutional text itself contains discriminations which are prohibited and discriminations that should be considered in the law-making process. The jurisprudence of the Constitutional Court shows that the text of art. 16 is sufficient for the relative variant of the principle of equality.

4.2. The second opinion[17] mentioned for this study refers to the *concept of non discrimination.*

The author makes the following remarks referring to the concept of non discrimination:

1. There is only one reference in Romanian doctrine to this issue, where it is mentioned that „concerning the constitutional principle of equality, it may take two forms: *either a principle of non discrimination* or the requirement of relative equality, of treatment".
2. Art. 4 par. (2) of the Constitution *sets the criteria of non discrimination, thus guaranteeing a strict equality between citizens.* In this respect, certain authors say that, „the principle of non discrimination appears as an improved form and, certainly, more realistic of the principle of equality"
3. In Romanian legal literature there is only one doctrinal reference where non discrimination is considered as a limit of the constitutional principle of equality. „We either consider it under the form of an objective principle as of right, or we analyse it in the context of fundamental rights, the constitutional principle of equality is not absolute. It has limits which **give him a particular configuration."**

5. Jurisprudence of the Constitutional Court on non discrimination. (Selective aspects)

5.1. The Decision of the Constitutional Court nr. 408/2016 regarding exception of unconstitutionality of the provisions of art. 850 par. (2) Code of civil procedure, as republished in the Official Journal of Romania, Part I, nr. 683 of 2 September 2016.

The Constitutional Court was notified by the Chişineu-Criş County Court of the exception of unconstitutionality of the provisions of art. 850 par. (2) Code of civil procedure, an exception raised by the company Cosmo-Rom - S.R.L. of Socodor, Arad county, in a matter having as object the settlement of an appeal against enforcement requesting the cancellation of the adjudication act, of the minutes of the real estate public auction and continued prosecution from the cancelled act.

As for the criticism of unconstitutionality phrased in the relation with art. 16 of the Constitution, referring to the equality before the law, the Court finds that the criticized legal texts bring no prejudice to this constitutional principle, as they apply to all in the situation provided by the hypothesis of the legal norm, with no discrimination on arbitrary grounds, while any of the chirographic creditors may deposit their debt in the account of the price.

The Constitutional Court dismisses as unfounded the exception of unconstitutionality raised by the company Societatea Cosmo-Rom - S.R.L. of Socodor, Arad county, in the Case file no. 368/210/2015 of Chişineu-Criş County Court and finds that the provisions of art. 850 par. (2) Code of civil procedure are constitutional in relation with the criticism.

5.2. Decision of the Constitutional Court no. 47/1994 regarding the constitutionality of certain provisions of Law on war veterans, as well as certain rights of the disabled and war widows on the unconstitutionality of the specification "if they did not fight against the Romanian army" in art. 2 (b) of Law on war veterans, as well as certain rights of the disabled and war widows ", as published in the Official Journal of Romania, Part I, no. 139 of 2 June 1994.

The Constitutional Court was notified on 7 April 1994, by 55 deputies on the unconstitutionality of the specification "if they did not fight against the Romanian army "in art. 2 (b) of Law on the war veterans, as well as certain rights of the disabled and war widows".

Art. 4 par. (2) of the Constitution is less frequently met in the jurisprudence of the Court due to the fact that its intervention is actually not necessary.

But the Constitutional Court cannot pronounce on the proposals of amending the law, its review jurisdiction being determined exclusively by the notifications received under art. 144 (a) of the Romanian Constitution.

Finally, the Court decides the following:

1. Article 2 (b) of the Law on war veterans, as well as certain rights of the disabled and war widows, referring to those who were necessarily conscripted or called up, in unconstitutional concerning the condition " if they did not fight against the Romanian army ".
2. Article 2 (a) and (c), as well as article 7 (b) thesis 1 of the law are unconstitutional concerning the definition of the capacity of war veterans. During the review procedure, their correlation is required

[17] See, Simina Elena Tănăsescu, Principiul egalității în dreptul românesc (Principle of equality in Romanian law), Ed. ALL BECK, Bucharest, 1999, pp. 28-29, 30.

to assure the observance of the principle of equality of rights of citizens.

6. Conclusions

Considering the above-described, we point out the following ideas:

6.1. The aim of the study referring to Reflections on the regulation of non discrimination in the Constitutions of Romania and in the International Bill of Human Rights - Selective aspects was in our opinion achieved.

6.2. In our opinion, the analyzed domain is important for the constitutional doctrine in the matter, for the doctrine of human rights and for the doctrine of the UN activities in the domain of human rights.

6.3. The regulations on non discrimination in the Romanian constitutional system and in the International Bill of Human Rights were successively identified.

6.4. The four parts of the study may be considered a contribution to the extension of research in the matter of non discrimination, in accordance with the current trend.

6.5. Moreover, we specify that the above study opens a complex and complete view, but not exhaustive, in the analyzed domain.

6.6. The key-scheme proposed, considering the selective approach of the identification of non discrimination may be multiplied and extended for other studies in the matter.

References

- Activités de l'ONU dans le domaine des droits de L'homme, Nations Unies, New York, 1986, pp. 8-10
- Ioan Muraru., Gheorghe Iancu., Constituţiile române Texte, Note. Prezentare comparativă . Ed. Actami,, Bucureşti, 2000, pp. 7-251
- Constituția României din anul 1991, a fost publicată în Monitorul Oficial al României, Partea I, nr. 233, din 21 noiembrie 1991
- Constituția României din anul 2003, a fost publicată în Monitorul Oficial al României, Partea I, nr. 767, din 31 octombrie 2003
  Proiectul de Lege privind revizuirea Constituției României,, a fost publicat în Monitorul Oficial, Partea I, nr.100 din 10. 02. 2014. Accesați site-ul:http://www.anr.gov.ro/docs/legislatie/internationala/Declaratia_Universala_a_ Drepturilor_ Omului.pdf Accesați site-ul: http://www.cdep.ro/pls/legis/legis_pck.htp_act_text?idt=63815 Accesați site-ul: http://www.cdep.ro/pls/legis/legis_pck.htp_act_text?idt=63815
- Nicolae Pavel, Egalitatea în drepturi a cetățenilor și nediscriminarea,. Ed. Universul Juridic, București, 2010, pp. 251-255
- Simina Elena Tănăsescu, Principiul egalității în dreptul românesc, Ed. ALL BECK, București, 1999, pp. 28-29, 30.
- Decizia Curţii Constituţionale nr. 711/2016 referitoare la excepţia de neconstituţionalitate a dispoziţiilor art. XVIII alin. (2) Teza a treia din Legea nr. 2/2013 privind unele măsuri pentru degrevarea instanţelor judecătoreşti, precum şi 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 Curţii Constituţionale nr. 47/1994 cu privire la constituţionalitatea unor prevederi din Legea privind veteranii de eăzboi, precum şi unele drepturi ale invalizilor şi văduveloe de război, a fost publicată în Monitorul Oficial al României, Partea I, nr. 139 din 2 iunie 1994

THE IMPAIRMENT of CITIZEN'S RIGHT TO INFORMATION BY "FAKE NEWS" PUBLICATION

Alina V. POPESCU*

Abstract

In the context of an international society ever-evolving in the rapid development of information technology, there is a need to obtain information in a shorter time, which sometimes can lead to data being taken as real, without further verifying their trustworthiness.

The citizen's right to information, a fundamental one, indissolubly bound to the existence of a democratic society, has been applied in both international documents and the fundamental law. In order for the citizen to be able to make informed decisions and to participate to social life, they need information from various social fields. The need for information has become more and more acute as the surplus of information on the market has become increasingly obvious.

In this social context, the temptation of manipulating information, and more seriously that of breaking false news into the media market, which in the speed of everyday life, the citizen no longer has the time or the patience to check, appears more and more. The development of false information is facilitated by social media, by its barrier-free movement in the context of the information society.

From the point of view of the study, I intend to analyse the manner in which information manipulation and the so-called "fake news" impair the right to information, undermine democracy and which the limits, in this case, of freedom of expression, are or should be.

Keywords: *right to information, freedom of expression, information, democracy, manipulation, fake news.*

1. General Considerations

The topic of fake news has been approached quite recently, so I shall mostly focus on journalistic resources rather than academic ones, and I shall try to harmonise the information with studies on the right to information and freedom of expression.

It is an already recognized truth that a social individual needs information and clarification; they need information from the most diverse fields and, of course, when information is not provided by institutions or business environments, one looks for information from other sources. The development of information technology has allowed individuals to get information from multiple sources, but scientific literature has insisted that the state must be the one to provide the information a citizen needs. Thus, "European citizens must be better informed (a task for which the Union itself must find means and methods, in case the media should be unable or unwilling to provide accurate and comprehensive information)"[1].

The media has an overwhelming influence on society, on democracy or the lack thereof, depending on the government system. Its primary role is to provide information to the social community, to generate progress. In this context, one should also consider the fact that, under the current conditions, information becomes quickly degraded, we can even talk of the moral wear of information in the media ("information in a newspaper gets old quicker than information in a scientific paper"). The attention of professionals is needed here, so as not to provide information which is no longer actual and may create confusion in a society. In 1688, Jean de La Bruyère used to say: "A journalist goes to sleep thinking of a news that becomes old during the night, and he has to give it up in the morning as he wakes up[2]".

However, what happens when the citizens' trust in official information decreases? Analysing the Edelman trust barometers[3], we shall notice that the population's trust in governments, the business environment, the media and even NGOs has decreased in the latest years, depending on the social and

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[1] Koeck H.F. – "Der gegenwärtige Stand des Verfassungsprozesses der Europäischen Union", communication at the conference"Prezent și perspective ale statului și dreptului în contextul integrării europene", 10-12 November 2006, Faculty of Law and Administrative Sciences, University of Craiova. Prof. PhD Dr. h. c. Heribert Franz Koeck is a professor of international public law and European law, Dr. Iur. (Vienna), M.C.L. (Ann Arbor), honorific professor of Pontificia Accademia Ecclesiastica (Rome), a corresponding member of Academia de Ciencias Morales y Políticas (Madrid), the Dean of the Faculty of Law of the Johannes Kepler University of Linz, Austria. http://drept.ucv.ro/RSJ/images/articole/2008/RSJ1/02Koeck.pdf

[2] Bârliba C. – "Informație și competență", Editura Științifică și Enciclopedică, Bucharest, 1986, p. 21

[3] Edelman TRUST BAROMETER ™ is the company's annual survey on trust and reliability, now in its 17th year. What has begun as a survey on 1300 persons in five countries, in 2001, has become a genuine measurement of trust in the entire world. The trust barometer is produced by the integrated division of research, analysis and measurement, Edelman Intelligence. https://www.edelman.com/insights/intellectual-property/edelman-trust-barometer-archive/

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economic periods concerned, followed by small increases, after the economic and financial crises of the last years.

The conclusion of the Edelman Trust Barometer, in 2014, was that "global trust in the media goes back to the 2010 levels; almost 80% of the countries report a lower trust on average, in the last year".[4] The population's rate of distrust in the government, business institutions, media and NGOs has kept on decreasing in 2015 as well. The average of distrust in these institutions, in 2014, was 33% of the surveyed persons and 48% in 2015.[5] Thus, distrust in the media is found in 60% of the states, with the results being approximately equal to 2014.

As for information sources, the Edelman Barometer of 2015 outlined an increased trust of population in online sources, compared to newspapers and television. The growing trend of trust in online sources is maintained on all three analysed levels: the first source of information on general information, the first source of information on breaking news and the most frequently used source to confirm/validate information.

In 2016, the Edelman Barometer[6] emphasizes a slight increase in the population's trust in the government, business institutions, the media and non-governmental organisations, and online information sources still occupy the first position in the population's preferences. "A change in the media landscape" is seen during 2012-2016, i.e. an increased trust in online information sources (search engines +3%, social media +7%, "only online" publications +5%).

The 2017 Edelman Trust Barometer[7] shows a slightly decreasing trend in the population's trust in the government, business institutions, the media and NGOs, compared to the previous years, with the media having the highest decrease, i.e. 5% (governments and the business environment -1%, NGOs -2%). Distrust in the media is seen in 82% of the analysed countries, and in 17 countries distrust reaches an all-time low, while the trust is lower than 48% in most countries.

The barometer shows that traditional media has the highest decline, -5%, and online information sources are increasing: search engines +3%, "only online" publications +5%. Social media, with -3%, is a surprise regarding the decrease of trust, compared to 2016. Another conclusion of the barometer was that official information sources are thought to be less reliable than information received from reliable persons (family, friends, etc.) and the so-called "information from sources" is thought to be more reliable than official press releases/press statements.

The 2018 barometer[8], suggestively titled "The Battle for Truth", shows a crisis of trust at the global level, emphasizing that almost 7 out of 10 interviewed persons are worried about the use of fake news as "weapons".

Such social behaviour has been emphasizes especially in terms of sources of information, so as to understand why propaganda, manipulation and the so-called fake news have managed to catch the audience's attention.

In my opinion, an explanation would be that today's social individuals urgently need information, as quickly as possible, and they are unwilling or even unable to check the information they receive. People have certain predefined sources of information, as shown by Edelman barometers, which they trust, and if information comes from sources they personally consider to be reliable, the more reliable the information becomes.

From a social and human point of view, each individual processes the information they have access to from the perspective of their education, their cultural level, as well as their individualism (filtering information according to their needs and beliefs).

There is a saying that "the tone makes the music". Adapting the idea to the communication of information in the public space, we may notice that, sometimes, "a discourse may incite and convince just for its style and its intelligent structure, not because it would contain truth"[9].

2. Alteration of Information: Censorship, Manipulation and Propaganda

Public perception, which has resulted in a decreased trust of citizens in the media, is that the role of media has transformed, from an objective communication channel, to a channel for conveying information to the benefit of groups of interest.

Altered, shrunk, falsified information from various points of view appears in the public space more and more often. The forms of "processing" information are various: censorship, manipulation, propaganda, disinformation, full falsification.

Information is mainly censored by suppressing some means of communication, by taking control of them and by affecting the essence and form of information, as desired by the censor. Censorship is a

[4] 2014 Edelman Trust Barometer global results, http://www.slideshare.net/EdelmanInsights/2014-edelman-trust-barometer?qid=0682cc6b-2798-43d4-a9ca-fb0302ae0925&v=&b=&from_search=1

[5] 2015 Edelman Trust Barometer global results, http://www.slideshare.net/EdelmanInsights/2015-edelman-trust-barometer-global-results?qid=abe04a31-1394-4f4c-9b0b-d1afaa10b0b0&v=&b=&from_search=1

[6] 2016 Edelman Trust Barometer global results, http://www.slideshare.net/EdelmanInsights/2016-edelman-trust-barometer-global-results?qid=e3fcac3f-5c18-4d41-ae6b-6d24628262c2&v=&b=&from_search=1

[7] 2017 Edelman Trust Barometer global results, http://www.slideshare.net/EdelmanInsights/2017-edelman-trust-barometer-global-results-71035413

[8] 2018 Edelman Trust Barometer global results, http://cms.edelman.com/sites/default/files/2018-02/2018_Edelman_Trust_Barometer_Global_Report_FEB.pdf

[9] Koeck H.F. – op. cit.

form of limiting the right to information and freedom of expression, if applied by authorities, in order to preserve power. However, we may talk of some forms of censorship, not in the bad meaning, but in the sense of protecting the freedoms and rights of other people (an example would be the adoption, by the National Council of Audiovisual, of certain sanctions when the information provided to the public infringes prohibitive rules, such as information of no interest to the public, information affecting private life, etc.).

As for manipulation, it is considered that it actually does not matter what you say, but who you are targeting[10]. We are not discussing the distinction between political and economic manipulation, but the fact that the distortion of genuine information comes to influence the citizen's freedom to make the right decisions, in any field of his life. I consider that the multiple possibilities to disseminate information, which are used today, may result in the spreading of such information, even when it is not fully compliant with the truth. Online content manipulation is harder to detect and fight, which is why it affects more free debate and the access to accurate information, in an environment that is by excellence thought of as free.

In the early days of the press, when the coverage was not so large as now, manipulation occurred, with a focus on political issues, as the journalists or the managers of the concerned publication presented their own views. The evolution of the so-called "penny press" in the 1830s[11] resulted in a wider coverage, in a higher number of readers, as well as a repositioning in terms of editorial content, moving to the sensational area, which led to a different kind of distortion of information.

Propaganda as a form to influence information has a dual situation, like censorship. Propaganda in a positive sense and propaganda in a pejorative sense. Rémy Rieffel[12] outlines that, when it appeared, the term "propaganda" has "no pejorative connotations" (it only meant promoting religious ideas); however, at the beginning of the 20th century, it acquired negative connotations ("the action of convincing public opinion, by using all available means of persuasion"). In Rieffel's opinion[13], persuasion has "stronger" valences (political persuasion, whereby authorities want to maintain the advantage of power and disseminate the ideologies they propagate) and "milder" forms (sociological propaganda, "the complex of procedures by which a certain lifestyle and certain specific values are spread in a society").

As for the falsification of information, the journalist David Uberti[14] speaks of what he names one of the "most memorable fakes in American history", i.e. the fact that, in 1835, the New York Sun published a six-part series titled "Great Astronomical Discoveries Lately Made", talking of the alleged discovery of life on the Moon ("Moon Story"). Of course, the article did not include genuine information, but they cashed in that penny from the readers, drawing upon the target public's thirst for sensation. Though several journalists and writers subsequently criticized the false content of articles regarding the "Moon story" public reaction was not very strong, probably given the lack of actual information.

Other false information was published by the New York Herald in 1874, regarding the fact that animals in the Central Park Zoo had gone free in the streets of Manhattan, resulting in damages and victims. The article was accompanied by a footnote stating "The story above is pure invention. Not a single word is true". However, many readers may not have noticed it.

We can notice that these examples of fake stories were disseminated by publications with great success among the audience, and the following question comes naturally: "what makes journalists publish fake news?" I consider that one of the reasons is the quest for sensation, for publicity or audience. Especially nowadays, paid advertisements/publicity have significant influence on content, and the media is conditioned by audience (radio/tv), by views, shares or likes (online). Financial influence on the disseminated information is strongly seen here.

Another reason I see is the delivery of editorial policies following the wishes of the financer of the source of news or editorial coordinators. Thus, the Romanian public area[15] has lately witnessed statements from political people who admitted to having financed certain press trusts or publications, so that they might control the published information[16].

Several assumptions come to mind here as well: only information favourable to the financer is published (it is genuine, but it has the potential to manipulate public opinion), actual information on the financer, which is not favourable, is not published (a form of censorship, likely to limit the citizen's right to information, especially when talking about information on decision makers), the information is fake, but it refers to competitors of the finances (completely fake news, disinforming public opinion and damaging a competitor), actual information on a competitor, not favourable to the latter, which is persistently

[10] "In manipulation it almost never counts what you say, but, rather how you say it". Noam Chomsky, American linguist and professor.

[11] Cohen A.R. – "*Relatarea obiectivă în media, între religie şi panaceu*", Journal Jurnalism şi comunicare, issue 3/2003, p. 3.

[12] Rieffel R. – "*Sociologia mass media*", Editura Polirom, Iaşi, 2008, p. 62

[13] Rieffel R. – op. cit., p. 59-60

[14] Uberti D. – "The real history of fake news", Columbia Journalism Review, https://www.cjr.org/special_report/fake_news_history.php?link

[15] Roșca Stănescu R. – "Ziariști cumpărați la bucată. Sau în vrac / ANALIZĂ", https://www.stiripesurse.ro/ziari-ti-cumpara-i-la-bucata-sau-in-vrac-analiza_1241106.html

[16] Hendrik A. – "*Elena Udrea: Există situaţii în care UNII jurnalişti au fost PLĂTIŢI în campaniile electorale*", http://evz.ro/elena-udrea-jurnalisti-platiti.html

disseminated (so as to create an impression of guilt of the competitor among public opinion), etc.

Another cause determining the publication of fake news is manipulation at a high, state, international level, with the international press focusing on the fake news disseminated in the United States during the 2016 electoral campaign, the ones on the Crimean War, as well as older ones, on the political situations in Cuba or Venezuela. Studies undertaken by Freedom House[17] have outlined an alarming increase in the number of governments manipulating their citizens by means of online information sources.

The 2017 Freedom House report on online freedom, "Manipulating Social Media to Undermine Democracy"[18], outlines how governments manipulate information shared on the social media and how disturbances in the supply of internet services increase. Even when the online environment has remained generally free, information has been altered by fake news, manipulation, propaganda, the use of technical algorithms to increase the visibility of the concerned content, aggressive harassment of journalists, etc. (the example of the US was provided). Thus, the report identified five other trends which are considered to have had a significant contribution to the global decline of internet freedom in the last year: state censorship regarding mobile connectivity; restrictions on live videos applied by several governments; an increased number of technical attacks on news networks, the opposition and rights defenders; new restrictions on virtual private networks (VPN) and the concerning increase of physical attacks on internet users and online journalists.

The authors of the report state that: "Successfully countering content manipulation and restoring trust in social media—without undermining internet and media freedom—will take time, resources, and creativity. The first steps in this effort should include public education aimed at teaching citizens how to detect fake or misleading news and commentary."

As for freedom press, the 2017 Freedom House report – "Press Freedom's Dark Horizon"[19]shows that press freedom deteriorated to its lowest point in 13 years in 2016, not only in states with authoritarian regimes, but also in countries with a long-standing recognized democracy. State leaders attacked media reliability in certain countries, and telecommunication services failed in certain states at times of political or social turmoils. The authors of the report state that there is a grim outlook for the future, since, as shown in the content, also in major democracies where such intrusions had not been witnessed before, one can see an interference with freedom of expression (in various ways: delegitimizing sources of information, editorial pressure, selling or even closing hostile publications, etc.).

In the words of Dan Swislow[20], "online repression tactics (...) erode democratic dialogue". I would add that all these methods to alter information endanger institutional transparency and good governance, the role of civil society and human rights in particular.

3. Fake news

This term is more and more frequently used in the public setting and more and more people express their concern on how fake news affect social life.

The American journalist Brooke Borel[21] considers that "(...) fake news is worrying media folks Stories meant to intentionally mislead are an affront to journalism, which is supposed to rely on facts, reality and trust."

At a social and human level, communication today takes place "in real time"[22], and information has become actual or contemporary in the information society. The evolution of limitless online communication is an important step for society, as a "new space" is practically discovered. The current environment of information society needs uninterrupted flows of information, highly quick exchange of information, with the key words of current communication being: "immediate, instantaneous and interactive" [23]. Interactivity implies an exchange of information between individuals, as all are part of the communication society, with no exception. Social experience results to an ever quicker, immediate change, and an individual needs new information, faster and faster, to be able to adapt to such changes.

Some[24] argue that the internet is the means to transmit information that suppresses all other means. In my opinion, sending information online only helps increase the speed of information. Other means to disseminate information are still used, but their share is decreasing, given the social need to obtain information in "real time". However, this "real time" does not leave enough time to check the accuracy of the data we are provided.

We can notice that, in the online environment especially, the most important source of information (as

[17] On Freedom House, https://freedomhouse.org/about-us. Romania was not included in the Freedom House research.

[18] Manipulating Social Media to Undermine Democracy, November 2017, https://freedomhouse.org/report/freedom-net/freedom-net-2017#

[19] Press Freedom's Dark Horizon, April 2017, https://freedomhouse.org/report/freedom-press/freedom-press-2017#

[20] Swislow D.– "The distributed denial of democracy. Coming together to address anti-democratic trolling and disinformation online", https://medium.com/@dswis/the-distributed-denial-of-democracy-23ce8a3ad3d8

[21] Borel B. – *"Fact-Checking Won't Save Us From Fake News"*, https://fivethirtyeight.com/features/fact-checking-wont-save-us-from-fake-news/

[22] Bourque B. – "Temps et communication: trois moments historiques. Mémoire présenté comme exigence partielle de la maîtrise en communication.", Université du Québec à Montréal, January 2009. Le «temps réel», p. 2

[23] Bourque B. – op. cit., p. 78-79

[24] Bourque B. – op. cit., p. 78

shown by surveys), there is an amalgamation of information, with actual one being combined with fake one, so that a distinction is rendered more and more difficult. The source of information is more difficult to identify in the online environment, and the temptation to share information (apparently interesting or attractive, at a first sight) to one's virtual friends is high. The recipients, in turn, tend to believe that the information is real, since it has been provided by a reliable person.

In his 2016 article, David Uberti shows the risk of amplifying the "fake news" phenomenon for freedom of expression. He proposes that more accurate terms should be used: "disinformation, mislead, lie", considering that the generic term "fake news" discredits the entire press as a whole, which is a danger for a citizen's right to information. The author tries to show that, along the times, unreal information has appeared in prestigious publications, so that blaming the online environment nowadays only generates a dispute for the power to generate and disseminate news, a fight that, as shown before, has already been lost by the traditional media in the content of IT development.

Claire Wardle[25] also claims that the term "fake news" is "unhelpful", as no substitute term has been found. The journalist also states that the content of information, the motivation of people creating such information and the means to disseminate "fake news" must be subject to analysis. The author suggests a definition of information that may be included in the analysed category, i.e.:

1. "satire or parody (no intention to cause harm but has potential to fool);
2. false connection (when headlines, visuals or captions don't support the content);
3. misleading content (misleading use of information to frame an issue or individual);
4. false context (when genuine content is shared with false contextual information);
5. imposter content (when genuine sources are impersonated);
6. manipulated content (when genuine information or imagery is manipulated to deceive);
7. fabricated content (new content is nearly entirely false, designed to deceive and do harm)."

Analysing the typologies and hierarchy identified by Wade, we find that all previously mentioned forms of altering information may be included in the fake news category. We are fighting a genuine "information war", and causes generating fake news are multiple. In Wardle's opinion, these are: poor journalism, to parody, to provoke, passion, partisanship, profit, political influence or power and propaganda.

I consider that Wardle accurately states the causes of propagation of fake news, which affect the citizen's right to information. All identified reasons affect the integrity of information to a lesser or higher extent, so that the beneficiary no longer is certain of making informed decisions; s/he makes such decisions based on the information s/he receives which, hence, may not be fully accurate.

Authorities should be involved to prevent the spreading of fake news; such involvement could be shown with greater transparency, a better information on the adopted measures (be it the government, be it the legislative process) and the adoption of measures to regulate the virtual environment. Of course, regulating an area recognized as dedicated to the free circulation of information may result in controversy regarding the restricted right to information and freedom of expression.

Germany may be an example on the adoption of legislative measures. A draft law for improving law enforcement in social media was proposed in the spring of 2017. Criticisms to its content appeared in the public area presently, but the law[26] passed on September 1, 2017 and came into force on October 1, 2017. Its provisions mostly regard social media networks, as well as platforms for individual communication or specific content distribution. The provider of a social network is exempt from the obligations stipulated in this legislative act if the social network has less than two million registered users in Germany. The illegal content targeted by the text of the law is represented by facts sanctioned according to the German Criminal Code, which are not justified. The law stipulates some reporting requirements for providers, regarding complaints for illegal content, as well as the obligation to adopt an efficient and transparent procedure to manage such claims.

Italy has also passed measures against fake news, administrative action[27], as the police created a website where citizens may report information that seem to be fake, which shall be checked by specialised police officers. If the information is proved to be fake, this shall be publicly informed, and in case the information is denigrating in a criminal sense, the court will be notified.

The French President, Emanuel Macron[28] takes into consideration amending French legislation so that more transparency is requested from online platforms.

The European Commission [29] also is concerned to fight such fake news, as a High Level Group (HLG)[30] to advise on policy initiatives to counter fake news and the spread of disinformation online, including 39 experts, academics, media organisations, journalists, social media platforms, as well as civil society

[25] Wardle C. – "*Fake news. It's complicated*", https://firstdraftnews.com/fake-news-complicated/

[26] Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz – NetzDG), https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/BGBl_NetzDG.pdf?__blob=publicationFile&v=2

[27] http://www.poliziadistato.it/articolo/155a6077fdb05e3865595940

[28] https://www.agerpres.ro/politica-externa/2018/01/04/emmanuel-macron-anunta-o-lege-impotriva-fake-news--30782

[29] https://ec.europa.eu/digital-single-market/en/fake-news

[30] https://ec.europa.eu/digital-single-market/en/news/commission-appoints-members-high-level-expert-group-fake-news-and-online-disinformation

representatives, was set up on January 15, 2018. Mariya Gabriel, European Commissioner for Digital Economy and Society, considers that "a European approach" is needed to the fake news phenomenon, with a public consultation being organized on such aspects. A conference was to be held with all stakeholders, with a view to establishing course of action and effectively protecting European citizens.

Conclusions

Information provided to citizens must be genuine, provided in due time, and drawn up in good faith. Hans Hellmut Kirst[31] states that the "so-called truth is a constantly moving swing - what matters is the moment when you sit on it". Of course, as shown in the first part, every individual filters the received information through his/her own mind, and s/he understands it according to his/her level of knowledge and understanding. However, it is essential for a citizen to be provided with diverse and reliable information, so that it may help him/her and so that s/he may choose.

Rieffel defines manipulation as "an organized lie, depriving the audience from freedom and an instrument to defeat its resistance"[32]. We may conclude that the citizen's right to information is affected by any of the techniques of altering information that were exposed above.

The professional deontology of those who disseminate information in the public space (journalists), as well as the self-censorship of non-professionals (bloggers, influencers), are very important. In the first case, of the professional, traditional or "only online" media, one should go back to the recognized values of the profession, to its primary role, to accurately inform public opinion. In the second case, of persons distributing online informative content, self-censorship is important when they have no guarantee that the information they spread is genuine.

The truth always comes out, but what do we do, as a society, when fake news only satisfy the thirst for sensation, for panic, for denigrating people, etc.? In this case, I would support the idea that "a fake news maker may be a social hazard".[33]

As shown by Borel[34] in his article, "fact-checking is key to journalism — it's a skill and a service that's instrumental in providing the information to the public".

The contribution of each of us to stopping fake news, by refusing to reproduce and possibly share information, with no minimum checking, is important. Our right to information can only be defended by engaging everyone, by refusing to propagate information whose accuracy is not guaranteed. A reader should have the same degree of attention in the online and in the actual environment, and s/he should manage clicks responsibly, as they legitimze information.

Authorities also play an important part, which is, in my opinion, a guarantee of the right to information, i.e. to communicate publicly, in a transparent manner, to clarify their decisions for citizens, so as to discourage the publication and dissemination of fake news. The state's regulatory role should be carefully analysed, since such measures could limit freedom of expression and, as in the case of any other right, a balance must be struck between guarantees and limitations.

Moreover, companies specialising in information technology should show some concern to identify new ways of recognizing fake accounts that disseminate fake news and affect the information environment.

Journalism professionals should re-focus on information, leave entertainment aside, accurately check news and try to recover the trust of information recipients, by reducing partisanship. For a good information of citizens, especially regarding public issues, information should aim at an objective presentation of facts, not public or political persons.

References

- Bârliba C. – "Informaţie şi competenţă", Editura Ştiinţifică şi Enciclopedică, Bucharest, 1986
- Kirst H.H. – "*Preţul succesului*", Editura Univers, Bucharest, 1976
- Rieffel R.– "*Sociologia mass media*", Editura Polirom, Iaşi, 2008
- Bourque B. – "Temps et communication: trois moments historiques. Mémoire présenté comme exigence partielle de la maîtrise en communication.", Université du Québec à Montréal, January 2009.
- Cohen A.R.– "*Relatarea obiectivă în media, între religie şi panaceu*", Journal Jurnalism şi comunicare, issue 3/2003
- Koeck H.F. – "Der gegenwärtige Stand des Verfassungsprozesses der Europäischen Union", communication at the conference"Prezent şi perspective ale statului şi dreptului în contextul integrării europene", 10-12 November 2006, Faculty of Law and Administrative Sciences, University of Craiova. http://drept.ucv.ro/RSJ/images/articole/2008/RSJ1/02Koeck.pdf
- Borel B. – *"Fact-Checking Won't Save Us From Fake News",* https://fivethirtyeight.com/features/fact-checking-wont-save-us-from-fake-news/
- Hendrik A. – "Elena Udrea: Există situaţii în care UNII jurnalişti au fost PLĂTIŢI în campaniile electorale", http://evz.ro/elena-udrea-jurnalisti-platiti.html

[31] Kirst H.H. "*Preţul succesului*", Editura Univers, Bucharest, 1976, p. 5
[32] Rieffel R.– op. cit., p. 60, quoting Philippe Breton – "*Manipularea cuvântului*", Editura Institutul European, Iaşi, 2006
[33] Bârliba C. – "Informaţie şi competenţă", Editura Ştiinţifică şi Enciclopedică, Bucharest, 1986, p. 98 – quoting La Bruyère
[34] Brooke Borel – idem.

- Roșca Stănescu S. – "Ziariști cumpărați la bucată. Sau în vrac / ANALIZĂ", https://www.stiripesurse.ro/ziari-ti-cumpara-i-la-bucata-sau-in-vrac-analiza_1241106.html
- Swislow D. – "The distributed denial of democracy. Coming together to address anti-democratic trolling and disinformation online", https://medium.com/@dswis/the-distributed-denial-of-democracy-23ce8a3ad3d8
- Uberti D. – "The real history of fake news", Columbia Journalism Review, https://www.cjr.org/special_report/fake_news_history.php?link
- Wardle C. – "*Fake news. It's complicated*", https://firstdraftnews.com/fake-news-complicated/
- Manipulating Social Media to Undermine Democracy, November 2017, https://freedomhouse.org/report/freedom-net/freedom-net-2017#
- Press Freedom's Dark Horizon, April 2017, https://freedomhouse.org/report/freedom-press/freedom-press-2017#
- 2014 Edelman Trust Barometer global results, http://www.slideshare.net/EdelmanInsights/2014-edelman-trust-barometer?qid=0682cc6b-2798-43d4-a9ca-fb0302ae0925&v=&b=&from_search=1
- 2015 Edelman Trust Barometer global results, http://www.slideshare.net/EdelmanInsights/2015-edelman-trust-barometer-global-results?qid=abe04a31-1394-4f4c-9b0b-d1afaa10b0b0&v=&b=&from_search=1
- 2016 Edelman Trust Barometer global results, http://www.slideshare.net/EdelmanInsights/2016-edelman-trust-barometer-global-results?qid=e3fcac3f-5c18-4d41-ae6b-6d24628262c2&v=&b=&from_search=1
- 2017 Edelman Trust Barometer global results, http://www.slideshare.net/EdelmanInsights/2017-edelman-trust-barometer-global-results-71035413
- 2017 Edelman Trust Barometer global results, http://cms.edelman.com/sites/default/files/2018-02/2018_Edelman_Trust_Barometer_Global_Report_FEB.pdf
- Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz – NetzDG), https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/BGBl_NetzDG.pdf?__blob=publicationFile&v=2
- http://www.poliziadistato.it/articolo/155a6077fdb05e3865595940
- https://www.agerpres.ro/politica-externa/2018/01/04/emmanuel-macron-anunta-o-lege-impotriva-fake-news-30782
- https://ec.europa.eu/digital-single-market/en/fake-news
- https://ec.europa.eu/digital-single-market/en/news/commission-appoints-members-high-level-expert-group-fake-news-and-online-disinformation

THE ROLE OF EU'S CONTROL MECHANISMS IN THE CONSOLIDATION OF THE RULE OF LAW IN ROMANIA. MECHANISM OF COOPERATION AND VERIFICATION

Bianca Elena RADU*

Abstract

Post-communist societies tend to function in a manner which contradicts the European integration model, placing the respect for democratic norms and values on a secondary position. The democratization process requires a functional and independent judiciary branch, the shaping of a justice culture, the internalization of justice laws and principles, both individual and collective levels. In other words, the consolidation of a democratic society could be achieved on fundamental principle of the rule of law. The present paper aims to highlight the European Mechanism of Cooperation and Verification' potential and its influence on the implementation of the rule of law during Romania's post-accession period. Methodologically, this paper employs content analysis of legislation and official European and Romanian documents.

Keywords: *rule of law, justice culture, Mechanism of Cooperation and Verification, democratization process, European Union, Romania.*

1. Introduction

In the initial treaties regarding the European community there is no mention regarding the rule of law, democracy and human rights. The change occurs along with the Maastricht Treaty also known as European Union'Treaty signed by the European Council in February of 1992. This treaty founds the EU has the role of inserting rule of law, democracy and human rights as a key reference to EU Development Policy as well as the Common Foreign and Security Policy (CFSP). The end of the Cold War is thus linked to the EU change in perspective which concentrated the attention on the political documents looking at this trio of values (rule of law, democracy and human rights) but highly important in a political construction such as the European one. Rule of law stands for a governing principle where entities, institutions and individuals including the state itself obey the law which have to be applied independently and in accordance to the international standards of legal and human rights. Amongs the indicators of the rule of law one may find: independence of justice including the nomination and the system of career progress, the right to obtain repairing warrantees in case of a legal error, correct trials, the access to law, recognition by legal institutions of treaties and conventions at an international level include the ones concerning human rights. The theoretical model chosen within this paper stands to show that a state under the rule of law represents a basisis for one democratic system. As Zillur Khan (2011) states:

"Democracy, without a sincere devotion of political leaders for the legal consolidation of justice, has a tendency to be lost in the sphere of low political interests. The most important values for a sustainable democracy and institutional welfare are the legal rules of justice."[1]

John Rawls also outlines that justice is a fundamental pattern and without it, social norms cannot exist these leading to an equal distribution of power and resources[2]. The concept of Europeanizing stands as a process through which the states, depending on its competencies and structures, adapt to EU rules which are conceived as a set of political, judicial, economical, social criteria[3]. The domestic intrastate changes are the result of the transposition of communitarian to intra state law, the reorganizing of internal institutional structures in relation to EU legislation, internalizing of a series of international conventions regarding human rights and the protection of minorities, jurisdictional acceptance of courts above national standards and policies for technical aid in more other important sectors.

This work aims to frame the way in which the EU along with its mechanisms has contributed to the consolidation of rule of law in Romania. In the first part of the article it will be looking at contextual aspects, as well as conceptual and theoretical for in the second part it will outline the Mechanism of Cooperation and Verification'influence on rule of law consolidation in Romania as the starting key point for a democratic society which follows the path asked by the model of European standardization. The theme of work itself asks for a synthetic and holistic view, the changes from

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[1] Zillur R. Khan, *The Concept of Justice and Democracy*, IPSA Prepared for Presentation at the AIBS, (Dhaka, Bangladesh, March 15, 2011), http://rc37.ipsa.org/post/2011/03/29/The-Concept-of-Justice-and-Democracy, consulted march 2018.

[2] John Rawls, "Distributive Justice: Some Addenda," in Samuel Freeman (ed), *John Rawls. Collected Papers*, (Cambridge, Mass.: Harvard University Press, 1999), 154-175.

[3] Tanja Börzel & Thomas Risse, "From Europeanisation to Diffusion: Introduction", *West European Politics*, 35 (1) (2012): 1-19.

the law sphere being treated in link to the social and political values of Romanian society under EU influence.

2. Theoritical approaches in promoting of EU values

The attempts to insert the EU capacity in theory as well as to Europeanize member states has become concrete in various paradigms which try to describe and explain the mechanisms through which the European values are promoted and internalized by states actors.

Rationalist Institutionalism approach[4] is one that shows external rewarding and rational negotiation. It is a model centered on actors and based on logic of consequences. The EU invests the states actors with responsibilities, offering them legal and political resources in order to keep up and implement changes within their internal systems. Formal internal institutions thus become the main factors which set a barrier/facilitate changes as an answer to EU adjustment pressures. Within the negotiation process actors exchange information, threats and promise according to their own preferences the final result depending on the negotiation capacity of actors. According to the model of external rewards, the EU establishes a set of rules as conditions which the states have to respect in order to get rewarded[5].

As a contrast, *the social institutionalism*[6] stresses on the fact that such an answer follows logic of what is adequate. The internal impact of the EU results from a socializing process in which states institutions internalize EU rules which they consider lawful. The internal rule carriers as well as internal cultural representations, the informal institutions are key factors which allow states institutions to engage in a process of social learning through which the EU rules redefine their interests and identities. Internalizing democratic principles stands as an assimilation process of some values, codes and norms of constructing and deconstructing some models, both at a normative and at a practical level. A socializing agent such as the EU promotes these models and values in democracy so that states actors assume and integrals them thus in the end they shall consider them norms and values which guide their behaviors.

The *responsible relation* concept is part of the institutionalism literature. According Robert Keohane, responsibility has both external and internal dimensions[7]. Not in few mentions, both practitioners as well as researchers have concentrated on the dimension of internal responsibility which stands for the key to the existence of a formal relationship, institutionalized between the EU and states, the states offering a delegate authority and resources to the Union, so that in the end the latter may take responsibility for them[8]. Responsibility also has an external dimension. Once an agent such as the EU consolidates its aim and power, the number of vulnerable actors to its policies is in growth. This growing vulnerability is due to the fact that the EU grows its capacity of producing consequences which matter for the state actors. The concept of responsibility asks for a holistic view as it demands for a by dimensional relation and reflection which combines both the rationalist institutionalism as well as the sociological one (the social institutionalism). Responsibility frames at a theoretical level the capacity of taking consequences for all actions, aftermath realities and the choices which the EU/a state actor takes for one 's self[9].

3. Rule of law - An EU priority

Each human community regalements the behavior of its members. Fuller[10] points out that the law, in order to establish a behavior, must be in rule with a set of conditions: to be a public and known law for the ones whom it is directed to, to be comprehensible, non contradictory, permanent or everlasting and the conditions for it to be followed are to be applied. If we admit that the rule of law is an instrument aimed to protect the liberties of individuals, normative functions will be given to different powers. Montesquieu (1958)[11] states that:

"If within the same person or the same body of jurisdictional staff the legislative power is reunited together with the executive there shall be no freedom ... There is no freedom if the power of judgment is not separated from the legislative and executive one. If the power of judgment or the law would unite with the legislative the criteria concerning the lives and liberties of citizens would be arbitrary as the judge would also be the legislator. If the power of justice

[4] Henry Farell & Adrienne Héritier, "A rationalist-institutionalist explanation of endogenous regional integration", *Journal of European Public Policy*, 12 (2) (2005): 273-290.

[5] Frank Schimmelfennig & Ulrich Sedelmeier, *The Europeanization of Central and Eastern Europe*, (Ithaca: Cornell University Press, 2005), 10.

[6] Jane Jenson & Frédéric Mérand, "Sociology, institutionalism and the European Union", *Comparative European Politics*, 8(1) (2010): 74-92.

[7] Robert Keohane, "The Concept of Accountability in World Politics and the Use of Force", *Michigan Journal of International Law*, 24 (4) (2003): 1–21.

[8] Robert Dahl, "Can international organizations be democratic? A skeptic's view", in David Held & Anthony McGrew, *The Global Transformation Reader*, (Boston: Polity Press, 2003), 530-541.

[9] Robert E. Goodin, *Protecting the Vulnerable: A Re-analysis of Our Social Responsibilities*, (Chicago Illionos: Chicago University Press, 1985), 114.

[10] Lon L. Fuller, *The Morality of Law*, (New Haven, Yale University Press, 1969), 201.

[11] Montesquieu, *Œuvres complètes*, tome II, (Paris: Bibliothèque de la Pléiade, 1958), 397.

would unite with the executive the conditions created would make the power of justice turn into a torturer[12]*."*

Rule of law imposes the existence of institutional mechanisms meaning the possibility to control the hierarchy of norms and to sanction any rule breaking. Rule of law is more than anything a jurisdictional concept and it has a normative and institutional format. The jurisdictional perspective offers a formal view of the rule of law. Apart from this formal perspective it finds its lack of substantiality when it asks about the usefulness of the rule of law within the societal structures. Thus the rule of law stands as a meaningful instrument for the implementation of some values which individuals have no liberty to act upon and to consolidate their belonging to a society.

Positive liberty as in collective autonomy is the possibility for a community to decide upon its future[13]. It gives the possibility to directly or indirectly take part in determining the norms of common living. Rule of law and democracy both have consolidation links as well as those of potential competitively[14].

The present paper focuses on the perspective which states that the rule of law offers democracy establishment and more legitimacy. *Firstly*, the arguments are based on the existence of the link between the rule of justice as an instrument of governing (the law is an instrument and a guide to governing) and the rule of justice which imposes that every social actor has to be protected by the system of law, including by governors within a specified society. It hereby understands that the constitutional limitations of power (an essential element of democracy) can be possible only by using the rules of justice. *Secondly*, the rules of justice may be translated through various elements such as a solid constitution, an efficient election system, and consensus regarding gender equality, laws destined to protect minorities and other vulnerable groups, a strong civil society. From this perspective, the jurisdictional rules aided by an independent justice could offer a guarantee of the fact that the set of civil rights and liberties as well as political can be followed. Citizens could thus understand that their dignity and equality are not at risk.

Following this logical set, the principle of an attentive rule by government concerning the interests and needs of the citizen majority is strictly associated with the functioning of institutions and their capacity to act for the interest of citizens. As mentioned by the Secretary General (2004):

"The rule of justice is the main key for governing in which all people, institutions and public or private entities, including the state itself are responsible in front of the law which is publically announced, consolidated and independently pronounced and which is consequent with the norms and international standards of human rights[15]*".*

The nineties represent a period in time when the relations between central European candidates, the easterners and the EU had been characterized by the euphoria off returning to Europe. There had been an inoculated hope that democracy would follow its normal course without having major difficulties[16].

This euphoria faded once the first Accession Treaty appeared in 1991 which mentioned the member quality as an aim for union ship. At the Copenhagen Conference of 1993 the EU state leaders came to terms about the fact that countries in Central and Eastern Europe could become members. It is important to mention that the fact of the promise of belonging to the EU was for the first time accompanied by a pack which also contained formal conditions of membership meaning that it obliged for democracy, rule of law, a functioning market and the implementation of communitarian acquis. The EU passed on from an indirect influence to direct pressure once the European Council of Luxemburg in 1997.[17]

The EU offered and is still offering mainly institutional relations and financial aid to the states in Central and Eastern Europe. The institutional relations having associative or belonging main objectives incorporate contract and non-contract based relations established between the EU and national actors.

In the interval between 1999 and 2006 the main sectors of EU aid policies towards Romania have been economical and social cohesion followed by obligation regarding the acquis, the political criteria, community based programs, financial criteria and administrative capacity. The aid for political criteria for example has registered a significant growth in the year 2003, reaching as a point of reference at 57.90 millions of Euros in the year 2006[18].

In 1993 at the Copenhagen European Council[19] political conditions have been stated as well as economic and legal ones so that a state could become a member. Thus it had been covered that candidate

[12] Montesquieu, p. 395.

[13] Drieu Godefridi, "État de droit, liberté et démocratie ", *Politique et Sociétés*, 23(1) (2004): 143-169.

[14] Idem.

[15] "The rule of law and transitional justice in conflict and post-conflict societies", 23.08.2004, S/2004/616, http://archive.ipu.org/splz-e/unga07/law.pdf, accessed March 2018.

[16] Sharon Wolchik & Jane Curry, *Central and East European Politics from communist to Democracy*, (Landham Maryland: Rowman & Littlefield Publishers, INC. , 2008), 4.

[17] *Presidency Conclusions. Luxembourg European Council*, 12-13. 12. 1997, http://www.europarl.europa.eu/summits/lux1_en.htm, accessed March 2018.

[18] Elena Baracani, "EU Democratic Rules of Law Promotion" in Amichai Magen & Leonardo Morlino, *International Actors, Democratization and the Rules of Law, Anchoring Democracy?*, (New York: Routledge Edition, 2009), 63.

[19] *Conclusions of the Presidency. European Council in Copenhagen*, 21-22. 06. 1993, 180/1/93 REV 1, https://www.consilium.europa.eu/media/21225/72921.pdf,
accessed March 2018.

countries had to follow a criteria of institutional stability without which they could not guarantee their own democracy, the rule of law and human rights. Romania had been asked to follow a better functioning and efficiency of the internal justice system, its independency, to consolidate its fight against corruption.

Following the case of Romania the projects linked to the rule of law had been set in the aid sectors looking at political criteria and administrative capacity. In 2004 regarding the aid for political criteria, the analysis shows that the most important projects have been linked to the jurisdictional system, the public administration restructuring and the fight against corruption. The institution that benefited from the highest aid for political criteria can be the Ministry of Justice[20].

4. The Mechanism for Cooperation and Verification and its role in Romania

Romanian accession to UE at the first of January 2007 was accompanied by an alarm signal which the European Commission marked upon the vulnerabilities of the domestic legal and legislative system. The lacks and malfunctions that they have shown in the development of an internal market, and also of a space of freedom as well as the liberties and individual security values in Romania. The EU did no longer have the monitoring instruments which it could use in the pre-adhering period. Thus being constrained to create a new mechanism, which could rearrange the difficulties and regalement solutions in gaining the consolidation of Romania as a fundamental state with rule of law, applied principles. The Commission had decided to find a mechanism in order to solve the unpleasant situations that had been left unstable in the reforming of the legal system as well as in terms of fighting corruption and organized crime. Thus the MCV (the Mechanism for Cooperation and Verification) was applied in the month of December of the year 2006. For the first time in EU history new member states had been committed to stand to accept monitoring after becoming part of the Union. What did the monitoring mean? The Commission would evaluate the vulnerabilities and malfunctioning of the essential legal and legislative domains of action. The evaluation conclusions would be stated in a final annual progress report. Each year the report would be published containing a detailed evaluation of progress as well as realistic recommendations regarding the reform continuity. Each month the Commission would publish a separate report offering practical and technical details of the work for development that had been done over the past six months.

According to the decision of the Commission the main reason for the implementing of MCV was Romania's insufficient progress during the pre adhering period. The Commission desired to state that the progresses in the legislative as well as legal field stand as a necessary condition. Without such progress Romania would not be able to apply a clear legal pattern in regard to European rights and legislation. A better legal reform as well as the fight against corruption would allow Romanian citizens and enterprises to enjoy their legal rights as an integral part of the European Union.[21] In order to implement the MCV, the European Commission used article 37 of the Adhesion Act as a starting point. It gives the Commission full power to apply sanctions if Romania fails to accomplish the engagements set upon agreement. Thus the MCV incorporates a mixture of objectives and obligations among which Romania's task of reporting a constant progress. Within the number of MCV proposed objectives[22] we may remind: the adding of constitutional amendments which have to deny any ambiguities regarding the independence and clear responsibilities of the legal system, the ensuring of a more transparent and efficient legal trial through the adopting and implementation of a new system legislation as well as the reediting of new civil and criminal procedure codes, a continuous reforming evolution with the aim of consolidating professionalism, assumed responsibilities and efficiency upon acting, the accomplishment of clear and professional investigation in determining the cases of high level corruption accusations, the publishing of personal fortune records of high class officials, taking measures against corruption especially at the borders and concerning authorities of local areas, the implementation of an organized crime and infraction combat strategy, combating money robberies as well as taking the fortunes of corrupt officials into legal custody. However, within the annual reports, there are true and clear activities imposed on Romania. If Romania would not have respected the pressured rules imposed by the MCV, saving causes would have been applied as sanctions for the lack of professional conformism upon agreement. In the Adhesion Treaty[23], three such causes are stated: Amongst the mentions in the field of economics (see art 36) or the field concerning the internal market (see art 37) article 38 refers to the field of internal affairs and legal justice. It

[20] Leonardo Morlino & Amichai Magen, *EU Rule of Law Promotion in Romania, Turkey and Serbia-Montenegro: Domestic Elites and Responsiveness to Differentiated External Influence*, Workshop on "Promoting Democracy and the Rule of Law: American and European Strategies and Instruments", CDDRL, (SIIS Stanford, 2004).

[21] *Comunicare a Comisiei către Consiliu și Parlamentul European, Raport privind evoluția măsurilor de acompaniere în România după aderare,* Bruxelles, 27.06.2007, p.2, https://eur-lex.europa.eu/legalcontent/RO/TXT/?uri=CELEX%3A52007DC0378, accessed February 2018.

[22] Dimitar Markov, *The Cooperation and Verification Mechanism Three Years Later: What Has Been Done and What Is Yet to Come* ,(Sofia: Friedrich Ebert Foundation, Office Bulgaria, 2010), 2-3.

[23] Institutul European din România, *Acte privind aderarea Republicii Bulgaria și a României la Uniunea Europeană,* (București, 2006), http://beta.ier.ro/documente/Tratate/DCT_Tratat_aderare_Bg_Ro.pd, accessed February 2018.

clearly points out the measures which can be taken if there are serious deficit or factors that lessen the effect of creating and implementing a good practice standard in criminal and civil law. The causes were clearly aimed at the progress of Romania in the MCV.

The Commission decision of 13 January 2006 clearly establishes the following criteria:

"Should Romania fail in accomplishing the stated objectives sanctions based on article 37 and 38 will be applied as mentioned in the Adhesion Treaty including the suspending obligation of member states to recognize and exercised, in the legal conditions of European law, exemplified trial decision such as the European placement under arrest mandates[24]*."*

The previously mentioned clauses can be applied as negative sanctions when the situation is out of hand, when the progress registered by the MCV in the action calendar is undetectable. The sole existence of these clauses stands as a method of imposing a rational behavior on Romania. There are also other kinds of instruments with the role of ensuring an adequate behavior of Romania. One of them consists in the Commission 's right to suspend or cancel the EU funding, having as a main reason the state s incapacity of correctly administering the given funds. If there are deficits without progress in terms of combating corruption and organized crime, the Commission finds this as a clear answer which can be understood through the fact that Romania is unable of administrating the European funds as to offer transparency and good practice in the previously stated fields.

Entering the Schengen zone is another controlling tool towards becoming fully European, a tool strongly linked to the MCV. The lack of responsibility shown towards accomplishing the tasks stated in the MCV could be an indicator showing general state vulnerability in terms of entering Schengen.

Both the Council and other member states fulfill the Commission's role in the MCV implementation process. The Council, as an EU legislator, may analyze the given reports and also state recommendations according to the information given by research in the case of Romania. Member states can also be considered real live agents as they can give suggestions after the careful study of each report.

4.1. Some examples of EU influence despite the Romanian resistance attitude

According to the theoretical model of rational institutionalism presented above, right after a substantial reward (EU integration in 2007) Romania should have assumed its role as a member state of the Union and should have consequently followed the path to becoming an European actor in full terms. In another manner of explaining, the Commission, the Council and the former member states expected that Romania made efforts in order to consolidate a state following the rule of law principles with an independent and clear legal system combating the incoming internal previous wrong deeds. Thus the role of the MCV was to follow and supervise a couple of institutions in order to help fighting against corruption. It was to be expected that after EU integration the pressures set on Romania would diminish, however, the adopting rhythm is way superior to the one Romania had in the period after 2004[25].

Willem de Pauw wrote a report for the European Commission in 2007 named *Expert Report on the Fight against Corruption/Cooperation and Verification Mechanism*,[26] which was published in the Economist magazine in July 2008. In the report, the author points out how a set of measures taken prior to the integration which had proven their former efficiency, had been abandoned rather than consolidated after the integration, although abandoning was not the adequate path to take:

"Many of the measures that were presented, before Accession, to be instrumental in the fight against corruption, have been deliberately blunted by Parliament or the Government immediately after Accession, while other factors have been instrumental in repulsing ongoing attempts to address high level corruption ... If the Romanian anti-corruption effort keeps evaporating at the present pace, in an estimated six months time Romania will be back were it was in 2003[27]*".*

Romanian Center for European Policies edited also in 2010 a Raport concerning the efficiency of of MCV Mechanism. The first example presented in this report is related to the blocking of *amendments of the Legal Code of Criminal Procedure*. The Criminal Procedure Code is the nucleus in the fight against corruption and criminality. The political elite had proposed one year after accession, a set of amendments which would have limited the power of prosecutors to find and justify the cases of high level corruption. The set proposed by the Parliament was stating that telephone signal interception should be canceled by the services after six months for any suspect official, the telephone interceptive listening had to be banned before the initiation of criminal investigations, there was also an interdiction in using intercepted

[24] *Decizia 2006/928/CE a Comisiei din 13 decembrie 2006 de stabilire a unui mecanism de cooperare și de verificare a progresului realizat de România în vederea atingerii anumitor obiective de referință specifice în domeniul reformei sistemului judiciar și al luptei împotriva corupției*, https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex%3A32006D0928, accessed March 2018.

[25] Centrul Român pentru Politici europene, *Eficiența Mecanismului de Cooperare şi Verificare pentru România,* Policy Memo (16) (2010): 9, http://www.crpe.ro/wp-content/uploads/2012/09/CRPE-Policy-Memo-nr.16-Merită-păstrat.-Eficiența-Mecanismului-de-Cooperare -și-Verificare-pentru-România.pdf, accessed April 2018.

[26] Willem de Pauw, *Expert Report on the Fight Against Corruption/Cooperation and Verification Mechanism*, Bucharest, November 12-15, 2007. The report was published on July 3, 2008 to the online edition of The Economist, "The European Union conceals Romania's backsliding on corruption", https://www.economist.com/node/11670671, accessed March 2018.

[27] Idem.

discussions of other individuals as evidence, and also banned intercepted conversations for more than 48 hours length from being brought as proof to the prosecutor and afterwards set to be examined by the judge. All stated amendments would have limited the investigations in cases of high level financial corruption, as well as economic and organizational. Having voted the above mentioned would have meant not respecting the procedures that other European member states adopted in the fight against corruption. Moreover it would have meant a undermining of independence of judiciary in relation to political aspects. The European Commission, interfered with the help of its experts signaling that a positive vote would not had been in favor of Romania and thus consolidated its position as an actor which corrected the mistakes of Romania regarding legal justice independence.

The second example of prudent vigilance and behavioral EU correction towards political leaders had been observed regarding the *National Integrity Agency*. This Agency has the task of analyzing incompatibilities, conflicts of interests, has to register fortunes and emit decisions with a compulsory value, decisions based on which sanctions can be applied. The law regarding these sanctions had been seen as unconstitutional. The Constitutional High Court stated that taking into legal custody of fortunes as well as transparently declaring the gained and published profits and investments would violate the right to privacy according to the National guideline laws. The cause that leads to such statements was a real case of taking an amount of money by law from a former member of the Parliament. The Court suspended the prerogatives of the Agency and labeled them as jurisdictional. Debates had been organized between the president and the Parliament members in terms of procedural aspects, the commissions of fortune control, and the aspects of declared fortunes... After long talks and a maize structured path (Parliament Senate Room of Deputies-Constitutional Court), the law had been set into action starting with the 31st of August 2010.

The report on legal justice in 2010[28] mentioned irregularities in the new legal procedures adopted by the National Integrity Agency. The critical approaches were also followed by negative reactions from EU ambassadors in Bucharest, as well as the reactions of the civil society which asked the president not to approve of the law.

Another example of EU pressures could be observed in 2010 where aspects about the *exception of constitutionalism* were taken into discussion. The guilty, in their grand intention of covering their guilt in cases of high level corruption, would address the Constitutional Court stating that some legal aspects of their trials were not covered by the National Constitution. The 2010 Report criticizes this method of practice considering it as inadequate for a state which agreed to respect EU principles. "The Unconstitutional exceptions, keep on delaying the process of trial for high level corruption cases, while a legal project which banned the obliged denial of suspending the trial when such statements are made is currently in pending for legislative approval"[29].

4. 2. Old and new considerations. MCV Reports over the years

The status as an EU Member State also implied a commitment on behalf of Romania to adapt measures that would guarantee Romanian citizens that the internal administrative and judicial decisions, norms and practices are in accordance with those from the EU. The final purpose of the application of the CVM in Romania is for the progress regarding the reforms in the judicial system and in the fight against corruption to be irreversible.[30] The moment when Romania will possess the instruments, institutions, and practices to correctly apply Community law, the final purpose of the CVM will be fulfilled. The irreversible progress depends on a series of variables such as respecting and strictly applying the principles of the separation of powers, a political will that would support the reforms and the fight against corruption, clear and long-term commitments phased into objectives that are found in an interdependent relation, the fulfilment of one contributing to the fulfilment of the other objectives. The CVM reports are made based on the information obtained from a series of institutions such as: the Romanian Government, the EC Representation, diplomatic missions of Member States in Romania, civil society organizations. Furthermore, in certain situations reports from independent experts from EU Member States who undertook various missions in Bucharest were taken into account as well.

The 2007 Report[31] presented the directions to follow in order to continue the judicial reform and the fight against corruption. Thus, the recommendations are focused on the following aspects (p. 20): "the adoption of a new Code of Civil Procedure, of a new Code of Criminal Procedure"; "the resolution of organizational and personnel problems from the judicial system, the establishment of certain performance indexes"; "the attainment of clear and efficient results from the National Integrity Agency"; "the insurance of the judicial and institutional stability

[28] Raport al Comisiei către Parlamentul European și privind progresele realizate de România în cadrul mecanismului de cooperare și verificare, COM(2010) 401 final https://ec.europa.eu/transparency/regdoc/rep/1/2010/RO/1-2010-401-RO-F1-1.Pdf, accessed April 2018.

[29] idem.

[30] Report from the Commission to the European Parliament and the Council on Romania's Progress on Accompanying Measures following Accession, COM(2007) 378 final, p.3. Http://Eur-Lex.Europa.Eu/Legal-Content/Ro/Txt/Pdf/?Uri=Celex:52007dc0378&From=Ro, accessed March 2018.

[31] Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism, COM(2007) 378 final, Http://Eur-Lex.Europa.Eu/Legal-Content/Ro/Txt/Pdf/?Uri=Celex:52007dc0378&From=Ro, accessed March 2018.

of the anti-corruption frame, including key-institutions such as the DNA"; "the promotion of dissuasive measures in high-level corruption cases"; "the articulation of a coherent anti-corruption strategy at the national level that is focused on the most vulnerable sectors and on the local administration"; "the promotion of an open dialogue with citizens and instilling social responsibility in them"; "the transparent presentation of reforms that have been initiated". The European Commission has engaged taken upon itself to offer expertise, logistical and financial support in order to sustain the reforms from the judicial system.

The recommendations from the 2008 CVM Report[32] are not very different from those from 2007. The Commission recognises Romania's commitment in accomplishing the reforms but it also underlines the fact that the efforts put into fulfilling the objectives do not measure up. The report emphasizes as well the link between the reform of the judicial system and the progress in combating corruption. Among the report's recommendations (p. 7) one can retain: "the need for the Superior Council of Magistracy to adopt an unequivocal position in regards to the fight against high-level corruption in the context of the controversial political debates that took place in Parliament"; "the need for the Government to finalize the new Code of Criminal Procedure and to make progress regarding the Criminal Code project"; "giving up controversial emergency ordinances that aim at changing the Criminal Code and the Code of Criminal Procedure"; "the continuation of independent investigations of those guilty of high-level corruption"; "regaining the trust of the public opinion in the fight against corruption and in respecting the rule of law". The Commission reiterates that it is a partner that offers financial support and adequate programmes with the purpose of continuing Romanian reforms.

The 2009 CVM Report[33] mentions that the numerous emergency ordinances and the legislative changes are the result of the fact that the two Codes, civil and criminal, have never been completely revised (p. 7). Another aspect underlined is that of the lack of consensus among political parties for the large scale support of reforms in favour of the beneficiaries, meaning of Romanian citizens (p. 7). The report offers a series of recommendations as well. In regards to the *new Codes* (Criminal, Civil, of Criminal Procedure, of Civil Procedure) what is recommended is (p. 7) the adoption of laws in order to put them into practice, after a public consultation and a minute analysis of their impact on the judicial system. In regards to the *judicial reform*, the report recommends (p. 8) an increased focus on the human resource, a redistribution of administrative tasks towards the auxiliary personnel, coherent personnel diagrams, the transfer of vacant positions where there's the greatest need. The recommendations regarding *high-level and local corruption* concentrate on the legal frame for fighting against them, including in the context of the new Codes (p. 8). In the cases of high-level corruption it is considered that it would be indicated to adopt a law that "would foresee the elimination of judging cases when exceptions of unconstitutionality are invoked" (p. 8), while in case of corruption at the local level it is recommended to "undertake measures to prevent corruption in vulnerable sectors" (p. 9).

The 2010 Report[34] presents "important deficiencies in making progress under the CVM" (p. 2), deficiencies that deter the reform process. "Limited" progress (p. 3) is ascertained in regards to the efficiency of the judicial system and the consistency of the jurisprudence. In this context, the recommendations refer to the adoption of "immediate measures" (p.8). In the field of the *judicial system reform*, we find, besides the recommendations from the 2009 Report, the following (p. 9): "the initiation of an independent analysis of the performance of the judicial system and the operate the necessary changes, including the transfer of magistrates"; "an easy and correct transaction from a legal point of view towards a new Superior Council of Magistracy", the consolidation of "the capacity of the National Institute of Magistracy in regards to the initial and continuous formation", "the revision of the competence of the High Court of Cassation and Justice", "a thorough reform in the disciplinary system". In regards to the recommendations related to the *fight against corruption*, the ones from the previous Report are maintained, to which are added (p. 10): "the correction of the law of the National Integrity Agency in accordance to the commitments assumed by Romania at the moment of accession", "the evaluation of the efficiency of the legislative code and of the assigning of responsibility in regards to public acquisitions".

The 2011 Report[35] presents a series of recorded process but it also emphasizes the deficiencies in regards to the fight against corruption, by mentioning among others the lack of a global and solid anti-corruption strategy (p. 3). The recommendations related to *the reform of the judicial system* target: "the adaptation of active measures that would accompany the coming into effect of the Civil Code and the adaptation of a comprehensive plan for the

[32] Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism, COM(2008) 494 final, http://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX: 52008DC0494& from=RO , accessed March 2018.

[33] Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism, COM(2009) 401 final https://ec.europa.eu/transparency/regdoc/rep/1/2009/RO/1-2009-401-RO-F1-1.Pdf, accessed April 2018.

[34] Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism, COM(2010) 401 final https://ec.europa.eu/transparency/regdoc/rep/1/2010/RO/1-2010-401-RO-F1-1.Pdf, accessed April 2018.

[35] Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism, COM(2011) 460 final https://ec.europa.eu/transparency/regdoc/rep/1/2011/RO/1-2011-460-RO-F1-1.Pdf, accessed April 2018.

implementation of the other three codes" (The Criminal Code, that of Criminal Procedure and of Civil Procedure), "the allocation of sufficient resources for the reorganization of courts and prosecutors' offices", "the increase of the scope of the National Institute of Magistracy", "detailed analyses related to the work load within the judicial system" (p. 9). The series of recommendations in regards to *the fight against corruption* aims at: "the elaboration of a new solid multi-annual strategy for the prevention and punishment of acts of corruption", "the creation of a monitoring group, together with the civil society, in order to supervise the implementation of a anti-corruption strategy"; "proving convincing results in recovering criminal assets"; "the elaboration of norms for the prevention of conflicts of interest in managing public funds".

The 2012 Report[36], which was adopted in a tense moment marked by "important questions related to respecting the rule of law and the independence of the judicial system in Romania" (p. 2), marks 5 years from Romania's accession to the EU. The EU has supported, since 2007, the *fight against corruption and the reform of the judicial system* in Romania, by means of structural funds, with 12 million Euros (p. 3). Furthermore, the financial and logistic help was offered by Member States as well, through bilateral projects, with the purpose of supporting the reform of the judicial system and the fight against corruption.[37] Among the recommendations regarding *respecting the rule of law and the independence of the judicial system* the following can be noticed (pp. 22-23): "abiding by the provisions of the Constitution when issuing emergency ordinances, and implementing the decisions of the Constitutional Court", "political actors must respect the independence of the judicial system", "abstaining from appointing as ministers individuals against whom court decisions have been pronounced in regards to integrity". A series of recommendations were made for the *reform of the judicial system* as well (p. 23): "the adoption of a common and comprehensive plan to ensure the implementation of all the four Codes", "the restructuring of the courts and prosecutors' offices", "the creation of a monitoring group of the judicial reform". Regarding to the *fight against corruption*, the Report recommends (p. 25): "the presentation of some convincing results in regards to the recovery of criminal assets"; "establishing a clear mechanism of coordination and surveillance between the police, the prosecutors' office and the authorities for administrative control", "improving the results in regards to the prevention and sanctioning of corruption, fraud and conflicts of interest", "implementing new national anti-corruption strategies".

The 2013 Report[38] signals that Romania has not appropriately implemented the commitments regarding the independence of the judicial system and the decisions in matters of integrity (p. 2). During the period evaluated the Commission has signalled concerns regarding "the constitutional order" (p. 3), the unfounded use of emergency ordinances, which in fact "are adopted strictly in situations provided by the Constitutions and only in case of emergency" (p. 3), "acts of intimidation and harassment committed against individuals who work in important institutions from the judicial and anti-corruption systems..." (p. 4). To this end, the recommendations regarding the *independence of the judicial system and the supremacy of the rule of law* contain among others: "a consensus regarding the abstention from criticising court decisions, the undermining of the credibility of magistrates or from exercising pressures on them" (p. 5); "the need for the revision of existing norms in order to guarantee that the freedom of the press is accompanied by an adequate protection of institutions and of individual fundamental rights, as well as to make available efficient measures for reparations" (p. 5); "a high professional quality for individual in leadership positions at the Public Ministry and the DNA" (p. 8), "the use by Parliament of new norms for the adoption of clear and objective procedures in the case of suspending the members of Parliament who are the subject of negative procedures in matters of integrity" (p. 8). The Report mentions as well that the EU finances the *anti-corruption projects* from the Ministry of Education, Health, Regional Development and Public Administration. The European support will be efficient only if Romania will in turn understand that it has to put in "efforts to eliminate corruption at all the levels of the Romanian society" (p. 13). In the series of recommendations regarding *the fight against corruption* one can also find "the prevention and punishment of the corruption related to public acquisitions", "the instrumentation of money-laundry dossiers and the confiscation of assets" (p. 13).

Beside the positive aspects and the progress reached in the fight against corruption, the 2014 Report[39] reiterates the issue of the rule of law and the importance of the independence of the judicial system, subjects that have represented "a special theme of the July 2012 report and of the subsequent report from January 2013" (p. 2). The recommendations regarding the *reform of the judicial system* signals among others: "the intensification of the progress in regards to the

[36] Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism, COM(2012) 410 final, https://ec.europa.eu/transparency/regdoc/rep/1/2012/RO/1-2012-410-RO-F1-1.Pdf, accessed April, 2018.

[37] Commission Staff Working Document Romania: Technical Report Accompanying the Document Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism, ,SWD (2012) 231 final, p. 48, http://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:52012SC0231&from=ro, Accessed April 2018.

[38] Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism, COM (2013) 47 final, https://ec.europa.eu/transparency/regdoc/rep/1/2013/RO/1-2013-47-RO-F1-1.Pdf, accessed April 2018.

[39] Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism, COM (2014) 37 final, https://ec.europa.eu/transparency/regdoc/rep/1/2014/RO/1-2014-37-RO-F1-1.Pdf, accessed April 2018.

augmentation of the uniformity of the jurisprudence and of the judicial practice" p. 13), "the inclusion of certain measures for the acceleration of the judicial procedures and for the use of new possibilities such as extended confiscation" (p. 13), "solutions to problems generated by the work load" (p. 14), "legislative measures necessary for the restructuring of the court system" (p. 14). The recommendations regarding the *fight against corruption* are concentrated on the development of a "national anti-corruption strategy through the introduction of certain criteria of reference and obligations that are more coherent for the public administration and by making the results available to the public" p. 15), on the intensification of "the efforts for the prosecution of cases of small-scale corruption" (p. 14), on the implementation of legislation in the field of corruption "equally and in equal conditions" (p. 14).

The 2015 Report[40] emphasizes proactive attitudes in regards to reforms, the Commission expressing its hope that the objectives of the CVM will be reached. In relation to *the reform of the judicial system*, the Commission recommends to Romania: "to finalize as soon as possible the changes that are required to be made in the Criminal Codes..." (p. 14); "to elaborate an operational plan of action in order to implement the strategy for the reform of the judicial system" (p. 14); "to improve the insurance of the implementation of court decisions at all levels" (p. 15). *The fight against corruption* is submitted to the following recommendations: Romania has "to resort to the national anti-corruption strategy in order to identify better the domains exposed to the risk of corruption" (p. 15); "to intensify the pre-emptive and repressive actions directed against conflicts of interest, of favouritism, fraud and corruption in public acquisitions" (p. 15).

The 2016 Report[41] evaluates "how profound the reform is anchored", "the durability of the progress" (p. 2) without which the lifting of the CVM cannot be accomplished. The Commission salutes the positive results in the implementation of the reforms but considers that "the independence of the judicial system and the respect for court decisions" (p. 13) continue to be confronted with challenges. A series of recommendations regarding the *independence of the judicial system* concentrates on: the introduction of a "more robust and independent system of appointing high-level prosecutors" (p. 14); "the instauration of clear and solid procedures for appointment in leadership positions within the magistracy..." (p. 14); "the inclusion in the code of conduct of members of Parliament of clear dispositions regarding the respect for the independence of the judicial system by members of Parliament..." (p. 14); the placement "... of the independence of the justice and its role in the context of the balance of powers" (p. 14) at the centre of the debates regarding a new Constitution. The recommendations related to the *reform of the judicial system* stipulate: that "the present stage of the reform of the Romanian judicial codes should be quickly concluded through an accord in Parliament regarding the changing of the codes, by adopting only the changes that respect the opinions of the judicial institutions, as they were presented in the Government" (p. 15); "the elaboration by the Superior Council of Magistracy of a clear plan through which it could be ensured that the new deadline for the implementation of the outstanding dispositions from the Code of Civil Procedure could be respected" (p. 15). The Commission recommends Romania to continue *the fight against corruption* thusly: by using "EU funds for the dissemination of efficient pre-emptive measures against low-level corruption..."; "... improving the rates of actual recovery"; implementing a new strategy and plan of action in matters of public acquisitions, "by ensuring an anti-corruption framework that is solid from the point of view of the judicial frame, of the institutional mechanisms and of the administrative capacity..." (p. 15).

The 2017 Report[42] touches on the progress from the years 2014 – 2016 which outlined irreversible reforms. However, despite the expectancies, the events that took place in Romania in 2017 have interrupted the line of progress. "The sudden introduction of certain changes, by means of Parliament, hinders the task of proving the sustainability of the judicial frame in domains such as corruption" (p. 3). In regards to the *reform of the judicial system*, the Commission recommends Romania that: "the present stage of the reform of the Romanian Criminal Code and of the Code of Criminal Procedure should be concluded and Parliament should put into practice the plans of adopting the changes presented by the Government in 2016, after the consultation with the judicial authorities" (p. 11); "the Government and Parliament should ensure complete transparency and should adequately take into account the consultations with the relevant authorities and with the parties interested in the frame of the decisional process and in the legislative activity related to the Criminal Code and the Code of Criminal Procedure, to the anti-corruptions laws, to the laws in matters of integrity (incompatibility, conflicts of interest, illicit assets), to the justice laws (referring to the organisation of the judicial system), as well as to the Civil Code and the Code of Civil Procedure, by taking inspiration from the transparency of the decisional process implemented by the Government in 2016" (p. 11). The Commission recommends Romania

[40] Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism, COM (2015) 35 final, https://ec.europa.eu/transparency/regdoc/rep/1/2015/RO/1-2015-35-RO-F1-1.PDF, accessed April 2018.

[41] Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism, COM (2016) 41 final, https://ec.europa.eu/transparency/regdoc/rep/1/2016/RO/1-2016-41-RO-F1-1.PDF, accessed April 2018.

[42] 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, https://ec.europa.eu/info/sites/info/files/com-2017-44_ro_1.pdf, accessed April 2018.

to continue *the fight against corruption* at all levels and to initiate actions for the adoption of certain "objective criteria for making and motivating decisions for lifting parliamentary immunity in order to ensure that the immunity is not used in order to avoid the criminal investigation and prosecution for corruption" (p. 14); to ensure that "The National Agency for the Management of Seized Assets is completely and effectively operational, so that to be able to publish the first annual report with viable statistical information regarding the confiscation of criminal assets" (p. 15).

5. Conclusions

After 2007, the EU invested in Romania with the responsibility that the latter would accomplish reforms in the following domains: the independence of the judicial system, the efficiency of the judicial system, integrity and the fight against corruption. All of these four objectives of reference defined at the moment of the accession cover the aspects essential for the functioning of an EU Member State. According to the theoretical perspective that has been presented, the EU's and Romania's choice in this first stage would come under the model of *rational institutionalism*. Romania has committed itself to implementing a pack that combines legislative and institutional measures in order to fulfil the proposed objectives, under the EU supervision but also with the financial and logistic help of the latter. The CVM represents the EU instrument where the progress but also the recommendations that the deciding Romanian factors are advised to follow are mentioned. The moment the objective will be reached, when the progress will be irreversible, Romania will be in accordance with EU democracies. The link between the rule of law as the basis for democratic regimes has been argued for in the first part of the paper as well. The examples presented and taken from the report of the *Efficiency of the Co-operation and Verification Mechanism for Romania*, compiled by the Romanian Centre for European Policies, but also the CVM reports show for the most part a resistance from the part of Romania in accomplishing the reforms but also certain progress (the years 2014, 2015, 2016). The recorded progress shows the role as an agent of change that the EU fulfils. The EU influence is also reflected in the change in attitude for a part of the Romanian elite, but especially for the civil society in Romania. These changes signify the fact that the EU values have been understood, positively received, shared, internalized and supported by a majority of Romanian citizens (see the model of *social institutionalism*). Opinion surveys are an argument to this end.[43] The moment when the measures taken by Romania will be felt by Romanian citizens, will be incorporated in the judicial and institutional frame, and the progress in matters of reforms will be irreversible, the final purpose of the CVM will be reached and the Romania – EU relationship will be considered a *responsible* one.

References

- Baracani, Elena, "EU Democratic Rules of Law Promotion" in Amichai Magen & Leonardo Morlino, *International Actors, Democratization and the Rules of Law, Anchoring Democracy?*, (New York: Routledge Edition, 2009)
- Börzel, Tanja & Risse, Thomas, "From Europeanisation to Diffusion: Introduction", *West European Politics*, 35 (1) (2012): 1-19
- Centrul Român pentru Politici Publice, *Eficiența Mecanismului de Cooperare și Verificare pentru România*, Policy Memo (16) (2010): 9, http://www.crpe.ro/wp-content/uploads/2012/09/CRPE-Policy-Memo-nr.16-Merită-păstrat.-Eficiența-Mecanismului-de-Cooperare-și-Verificare-pentru-România.pdf, accessed April 2018
- Dahl, Robert, "Can international organizations be democratic? A skeptic's view", in David Held & Anthony McGrew, *The Global Transformation Reader*, (Boston: Polity Press, 2003), 530-541
- Farell, Henry & Héritier, Adrienne, "A rationalist-institutionalist explanation of endogenous regional integration", *Journal of European Public Policy*, 12 (2) (2005): 273-290
- Fuller, Lon L., *The Morality of Law*, (New Haven: Yale University Press, 1969)
- Godefridi, Drieu, "État de droit, liberté et démocratie ", *Politique et Sociétés*, 23(1) (2004): 143-169
- Goodin, E Robert, *Protecting the Vulnerable: A Re-analysis of Our Social Responsibilities*, (Chicago Illionois: Chicago University Press, 1985)
- Institutul European din România, *Acte privind aderarea Republicii Bulgaria și a României la Uniunea Europeană,* (București, 2006), http://beta.ier.ro/documente/Tratate/DCT_Tratat_aderare_Bg_Ro.pd, accessed February 2018
- Jenson, Jane & Mérand, Frédéric, "Sociology, institutionalism and the European Union", *Comparative European Politics*, 8(1) (2010): 74-92
- Khan, Zillur R., *The Concept of Justice and Democracy*, IPSA Prepared for Presentation at the AIBS, (Dhaka, Bangladesh, March 15, 2011), http://rc37.ipsa.org/post/2011/03/29/The-Concept-of-Justice-and-Democracy, accessed March 2018

[43] Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism, COM (2016) 41 final, p. 2, https://ec.europa.eu/transparency/regdoc/rep/1/2016/RO/1-2016-41-RO-F1-1.PDF, accessed April 2018.

- Keohane, Robert, "The Concept of Accountability in World Politics and the Use of Force", *Michigan Journal of International Law*, 24 (4) (2003): 1–21
- Markov, Dimitar, The Cooperation and Verification Mechanism Three Years Later: What Has Been Done and What Is Yet to Come , Sofia, Bulgaria: Friedrich Ebert Foundation, 2010)
- Montesquieu, *Œuvres complètes*, tome II, (Paris: Bibliothèque de la Pléiade, 1958)
- Morlino, Leonardo & Magen, Amichai, EU Rule of Law Promotion in Romania, Turkey and Serbia-Montenegro: Domestic Elites and Responsiveness to Differentiated External Influence, Workshop on "Promoting Democracy and the Rule of Law: American and European Strategies and Instruments", (CDDRL, SIIS Stanford, 2004)
- Pauw, Willem de, *Expert Report on the Fight Against Corruption/Cooperation and Verification Mechanism*, Bucharest, November 12-15, 2007. The report was published on July 3, 2008 to the online edition of The Economist, "The European Union conceals Romania's backsliding on corruption", https://www.economist.com/node/11670671, accessed March 2018
- Rawls, John, "Distributive Justice: Some Addenda," in Samuel Freeman (ed), *John Rawls. Collected Papers*, (Cambridge, Mass.: Harvard University Press, 1999), 154-175
- Schimmelfennig, Frank & Sedelmeier, Ulrich, *The Europeanization of Central and Eastern Europe.* (Ithaca: Cornell University Press, 2005)
- "The rule of law and transitional justice in conflict and post-conflict societies", 23.08.2004, S/2004/616, http://archive.ipu.org/splz-e/unga07/law.pdf, accessed March 2018
- Wolchik, Sharon & Curry, Jane, *Central and East European Politics from communist to Democracy*, (Lanham Maryland: Rowman & Littlefield Publishers, INC., 2008)
- Comunicare a Comisiei către Consiliu și Parlamentul European, Raport privind evoluţia măsurilor de acompaniere în România după aderare, Bruxelles, 27.06.2007, p.2, https://eur-lex.europa.eu/legalcontent/RO/TXT/?uri=CELEX%3A52007DC0378, accessed February 2018
- Conclusions of the Presidency. *European Council in Copenhagen* 21-22 june, 1993, SN 180/1/93 REV 1, https://www.consilium.europa.eu/media/21225/72921.pdf, accessed March 2018
- Decizia 2006/928/CE a Comisiei din 13 decembrie 2006 de stabilire a unui mecanism de cooperare și de verificare a progresului realizat de România în vederea atingerii anumitor obiective de referință specifice în domeniul reformei sistemului judiciar și al luptei împotriva corupției, https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex%3A32006D0928, accessed March 2018
- Document de lucru al serviciilor Comisiei. România: raport tehnic de însoțire a documentului. Raportul Comisiei către Parlamentul European și Consiliu privind progresele realizate în românia în cadrul mecanismului de cooperare și de verificare,SWD (2012) 231 final, p. 48, http://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:52012SC0231&from=ro, Accessed April 2018
- *Eficienţa Mecanismului de Cooperare şi Verificare pentru România,* Centrul român de politici europene, Policy Memo nr. 16, November 2010, p.9
- Presidency Conclusions, *Luxembourg European Council*, 12-13. 12. 2007, http://www.europarl.europa.eu/summits/lux1_en.htm, accessed March 2018
- *Raport Comisiei către Parlamentul European și Consiliu privind Evoluția Măsurilor de Acompaniere în România după Aderare*, COM(2007) 378 final, p.3. Http://Eur-Lex.Europa.Eu/Legal-Content/Ro/Txt/Pdf/?Uri=Celex:52007dc0378&From=Ro, accessed March 2018
- Raport al Comisiei către Parlamentul European și privind progresele realizate de România în cadrul mecanismului de cooperare și verificare, COM(2008) 494 final, http://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:52008DC0494&from=RO, accessed March 2018
- Raport al Comisiei către Parlamentul European și privind progresele realizate de România în cadrul mecanismului de cooperare și verificare, COM(2009) 401 final https://ec.europa.eu/transparency/regdoc/rep/1/2009/RO/1-2009-401-RO-F1-1.Pdf, accessed April 2018
- Raport al Comisiei către Parlamentul European și privind progresele realizate de România în cadrul mecanismului de cooperare și verificare, COM(2010) 401 final https://ec.europa.eu/transparency/regdoc/rep/1/2010/RO/1-2010-401-RO-F1-1.Pdf, accessed April 2018
- Raport al Comisiei către Parlamentul European și privind progresele realizate de România în cadrul mecanismului de cooperare și verificare, COM(2011) 460 final https://ec.europa.eu/transparency/regdoc/rep/1/2011/RO/1-2011-460-RO-F1-1.Pdf, accessed April 2018
- Raport al Comisiei către Parlamentul European și privind progresele realizate de România în cadrul mecanismului de cooperare și verificare, COM(2012) 410 final, https://ec.europa.eu/transparency/regdoc/rep/1/2012/RO/1-2012-410-RO-F1-1.Pdf, accessed April, 2018
- Raport al Comisiei către Parlamentul European și privind progresele realizate de România în cadrul mecanismului de cooperare și verificare, COM (2013) 47 final, https://ec.europa.eu/transparency/regdoc/rep/1/2013/RO/1-2013-47-RO-F1-1.Pdf, accessed April 2018
- Raport al Comisiei către Parlamentul European și privind progresele realizate de România în cadrul mecanismului de cooperare și verificare, COM (2014) 37 final, https://ec.europa.eu/transparency/regdoc/rep/1/2014/RO/1-2014-37-RO-F1-1.Pdf, accessed April 2018
- Raport al Comisiei către Parlamentul European și privind progresele realizate de România în cadrul mecanismului de cooperare și verificare, COM (2015) 35 final, https://ec.europa.eu/transparency/regdoc/rep/1/2015/RO/1-2015-35-RO-F1-1.PDF, accessed April 2018

- Raport al Comisiei către Parlamentul European și privind progresele realizate de România în cadrul mecanismului de cooperare și verificare, COM (2016) 41 final, https://ec.europa.eu/transparency/regdoc/rep/1/2016/RO/1-2016-41-RO-F1-1.PDF, accessed April 2018
- Raport al Comisiei către Parlamentul European și privind progresele realizate de România în cadrul mecanismului de cooperare și verificare, COM (2017) 44 final, https://ec.europa.eu/info/sites/info/files/com-2017-44_ro_1.pdf, accessed April 2018

THE LEGAL EFFECTS OF THE EUROPEAN UNION CITIZENSHIP

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Abstract

The citizenship of the European Union is a reality or a concept? The consecration of the citizenship of the European Union by the Maastrich0t Treaty has been accompanied by the specific rights allowed to the citizens of the Member States. At the present, the Treaty on the Functioning of the European Union and the Charter of fundamental rights of the European Union mention the definition of the citizen of the European Union, the features and role of its citizenship: „Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship". In the Preamble of the Treaty on the European Union, the Member States affirm that they are „resolved to establish a citizenship common to nationals of their countries".

The Court of Justice of the European Union has stated the importance of this concept and its application in relationship with the specific rights of the citizens of the Member States: „Union citizenship is destined to be the fundamental status of nationals of the Member States".

The concept has a certain applicablility in different fields as Internal Market or European Union's area of freedom, security and justice with legal effects in terms of rights and obligations. The citizenship of the European Union does exist but its added value will be tangible at the moment when our ID cards or passports will contain a reference to that; if the citizens of the Member States express their interest in this regard and the political commitement will be evinced, the national citizenship could be replaced with the European Union citizenship on the moment of the Treaties revision's, but, nowadays, according to art. 4. 2 of the Treaty on the European Union, „The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government".

In conclusion, the citizenship of the European Union must be analyzed in a dynamic evolution thanking into account its development, the interest and commitement of the Member States and their citizens and the future of the European Union.

Keywords: *the citizenship of the European Union, rights, ID cards, Member States, Court of Justice of the European Union equal treatment, future, integration, legal effects.*

1. General remarks

Since antiquity the citizenship allowed to a person belonging to a territory governed by an authority has been a source of rights and obligations for that person as individual placed closer or farther from the powerhouse depending on the type of government.

The citizenship represents one of the features of a state as subject of international public law, but European Union (EU) as international intergovernmental organization has created the same relationship with the citizens of its Member States proving the desire of a deep integration.

The establishment of the European Union in the same time with the citizenship of the European Union through the Maastricht Treaty[1] has demonstrated a clear trend for the evolution of this subject of international public law representing a new step within the process of the European integration; European Union is the solely international intergovernmental organization having created a specific citizenship[2].

According with the Treaties and the case-law of the Court of Justice of the European Union (CJEU), the European citizenship allows different rights for the citizens of the Member States[3] being a concept with legal effects and without a legal mention on the national identity cards; setting up such mention depends on the interest of the citizens and the political commitment on that.

The legal effects of the consecration of such citizenship are underlined establishing the list of the rights allowed to the citizens of the Member States by the Treaties, legal acts adopted by the EU institutions on the basis of the Treaties and the case-law of the Court of Justice from Luxembourg; the EU institutions and the Member States are obliged to observe their correct and efficient application.

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[1] Augustin Fuerea, *Manualul Uniunii Europene* (6th edition, revised, Universul Juridic, Bucharest, 2016), 68. „An unional citizenship" has been estsablished by this Treaty.

[2] https://www.uantwerpen.be/en/conferences/the-future-of-eu-citizenship-2017/about-the-conference/abstracts/additional-materials/, accesed March 10, 2018: EU Citizenship as 'Inter-National' Citizenship – A Republican Intergovernmental Approach, Richard Bellamy: „EU citizenship often seen as 'transformative' of national citizenship".

[3] The rights conferred on the Union citizenship has been recognized also by the European Court of Human Rights (see case of *Matthews v. The United Kingdom*, Application no. 24833/94, judgment, 18 February 1999, para.14:"Although Gibraltar is not part of the United Kingdom in domestic terms, by virtue of a declaration made by the United Kingdom government at the time of the entry into force of the British Nationality Act 1981, the term "nationals" and derivatives used in the EC Treaty are to be understood as referring, inter alia, to British citizens and to British Dependent Territories citizens who acquire their citizenship from a connection with Gibraltar").

1.1. Related definitions:

The international legal instruments adopted in the field of human rights ensure and guarantee the respect of those rights for everyone and in the specific cases it is identified the category of persons who are considered by these legal texts; the citizen represents one of those categories.

The main definitions relevant for the analysis of the European Union citizenship can be the following:

- "*The human being*" or "*everyone*"[4] is used within the international human rights legal instruments the person or the individual, who is in a dynamic process of recognition as a subject of public international law. In the specialized doctrine, it is mentioned that "the position and activity of the individual within the macro and micro-social groups to which he belongs can be explained sociologically with the concepts of status and role of the individual", and "the status of the individual is defined as all the rights and duties of the individual within an existing group"[5] .

The preamble of the Charter of Fundamental Rights of the European Union uses the term of individual in connection with the European citizenship: "It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice". In the meantime, the provisions of the Charter guarantee specific rights to "everyone" (for example art.11.1: "Everyone has the right to freedom of expression").

- The *citizenship* expresses the belonging of a person to a particular state or to another subject of international law - namely the European Union[6] .

The Romanian Constitution of 2003, republished, regulates, in art. 5, the Romanian citizenship, which "is acquired, is preserved or is lost under the conditions stipulated by the organic law" and "cannot be withdrawn from the person who acquired it by birth"; moreover, the Universal Declaration of Human Rights guarantees, in art. 15 that: (1) "everyone has the right to a nationality"; (2) "no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality".

- The "Union citizen means any person having the nationality of a Member State"[7], according to art. 2.1. of 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.
- The *national*[8] is a term used by the European Union law to designate the natural or legal person having the citizenship, or the nationality of a state in accordance with its domestic law.

The art.9 of the Treaty on the European Union (TEU) uses the both terms – citizen and national: "*Every national of a Member State shall be a citizen of the Union*". The Treaty on the Functioning of the European Union (TFEU) provisions on the four fundamental freedoms mention also the term "national" or "nationality"[9] one of the reasons being the fact that these freedoms have been guaranteed, firstly, by the Treaty of Rome on the establishing the European Economic Community when the citizenship of the European Union was not yet introduced, for example:

- Art. 45.2 TFEU: "Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment";

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[4] Art. 2.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, November 4, 1950: „Everyone's right to life shall be protected by law".

Universal Declaration of Human Rights, December 10, 1948: Article I "All human beings are born free and equal in dignity and rights"; Article 3 "Everyone has the right to life, liberty and security of person".

[5] Nicolae Popa, Ioan Mihăilescu, Mihail Eremia, *Sociologie juridică*, (Editura Universității din București, Bucharest, 1999), 34.

[6] http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_4.1.1.html, accesed March 10, 2018: „In case C-135/08 Janko Rottmann v Freistaat Bayern, Advocate General Poiares Maduro at the CJEU explained the difference (paragraph 23): 'Those are two concepts which are both inextricably linked and independent. Union citizenship assumes nationality of a Member State but it is also a legal and political concept independent of that of nationality. Nationality of a Member State not only provides access to enjoyment of the rights conferred by Community law; it also makes us citizens of the Union. European citizenship is more than a body of rights which, in themselves, could be granted even to those who do not possess it. It presupposes the existence of a political relationship between European citizens, although it is not a relationship of belonging to a people' ".

[7] Decision, CJEU, *Janko Rottmann v Freistaat Bayern*, March 2, 2010, C-135/08, ECLI:EU:C:2010:104: „It is not contrary to European Union law, in particular to Article 17 EC, for a Member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalisation when that nationality was obtained by deception, on condition that the decision to withdraw observes the principle of proportionality".

[8] In the French language, the term is „*resortissant*" which is also mentioned in the Romania Accession Treaty (ratified by the Law no 157/2005) as „*resortisant*".

[9] Roxana-Mariana Popescu, „ECJ Case-Law on the Concept of „Public Administration" used in Article 45 paragraph (4) TFEU", *The International Conference – CKS 2017 – Challenges of the Knowledge Society Bucharest*, 12th - 13th May 2017, 11th Edition, "Nicolae Titulescu" University Publishing House, 528: "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".

– Art. 49 TFEU: "restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited";

– Art. 56 TFEU: "restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended".

Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, provides that "third-country national means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty" (now art. 20 TFEU)[10]. In this regard, art.15.3 of the Charter of Fundamental Rights of the European Union uses the same word: "*Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union*".

Initially, the citizenship has been defined using the term "nationality" which is still used by some national supreme laws (for example, the Sweden's Constitution)[11].

- According with the Directive 2004/38/EC , the "*Family member*" means:

"(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b)".

1.2. The legal effects of the citizenship of the European Union:

As the Court of Justice of the European Union stated, the "Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for"[12] , while "As regards Article 20 TFEU, the Treaty provisions on citizenship of the Union do not confer any autonomous right on third-country nationals. Any rights conferred on third-country nationals by the Treaty provisions on Union citizenship are not autonomous rights of those nationals but rights derived from the exercise of freedom of movement by a Union citizen. The purpose and justification of those derived rights are based on the fact that a refusal to allow them would be such as to interfere with the Union citizen's freedom of movement by discouraging him from exercising his rights of entry into and residence in the host Member State"[13].

The art.20 of the Treaty on the functioning of the European Union mentions that the citizens of the Union have „*inter alia*" the following rights[14] :

„ (a) the right to move and reside freely within the territory of the Member States;

(b) the right to vote and to stand as candidates in elections to the European Parliament[15] *and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;*

(c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;

(d) the right to petition the European Parliament, to apply to the European Ombudsman, and 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".

[10] Decision, CJEU, March 8, 2011, *Gerardo Ruiz Zambrano, v Office national de l'emploi (ONEm*), C-34/09, ECLI:EU:C:2011:124: „Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen".

[11] Ștefan Deaconu, *Drept constituțional*, (3rd edition – revised, C.H. Beck, Bucharest, 2017), 122.

[12] Decision, CJEC, Septembre 20, 2001, *Rudy Grzelczyk and Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, C-184/99, ECLI:EU:C:2001:458 para. 31.

[13] Decision, CJEC, May 8, 2013, Kreshnik Ymeraga, Kasim Ymeraga, Afijete Ymeraga-Tafarshiku, Kushtrim Ymeraga, Labinot Ymeraga v Ministre du Travail, de l'Emploi et de l'Immigration, C-87/12, ECLI:EU:C:2013:291 para.34-35.

[14] See Ștefan Deaconu, 143. See Augustin Fuerea, *Dreptul Uniunii Europene – principii, acțiuni, libertăți*, (Universul Juridic, Bucharest, 2016), 193.

[15] Article 39.1 Right to vote and to stand as a candidate at elections to the European Parliament of the Charter of Fundamental Rights of the European Union: "Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State".

WHITE PAPER ON THE FUTURE OF EUROPE. Reflections and scenarios for the EU27 by 2025, European Commission COM(2017)2025 of 1 March 2017, p. 25: „Illustrative snapshots: Citizens travelling abroad receive consular protection and assistance from EU embassies, which in some parts of the world have replaced national ones. Non-EU citizens wishing to travel to Europe can process visa applications through the same network".

The articles 21- 24 of the same Treaty explain the content of each of the mentioned rights:

- „Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect"[16] .
- The Directive 2004/38/EC above-mentioned is named „the Citizenship directive" and „lays down: (a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members; (b) the right of permanent residence in the territory of the Member States for Union citizens and their family members; (c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health"[17] .
- „Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State, in which he resides, under the same conditions as nationals of that State"[18] .
- „Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Member States shall adopt the necessary provisions and start the international negotiations required to secure this protection"[19].

In this regard, it has been adopted the Council Directive (EU) 2015/637 of 20 April 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC[20] which must be transposed by the Member States by 1 May 2018.

The effectiveness of this right must take into account the commitment of the third country for recognizing the consular protection of other state than the state of the nationality/citizenship[21] .

- „The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the provisions for the procedures and conditions required for a citizens' initiative within the meaning of Article 11 of the Treaty on European Union, including the minimum number of Member States from which such citizens must come".

The conditions for using citizens' initiative have been stated by the Regulation (EU) no 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative[22] .

- „Every citizen of the Union shall have the right to petition the European Parliament in accordance with Article 227"[23] .

The European Parliament represents the interests of the people or the citizens of the Union because this institution is „composed of representatives of the Union's citizens" (art. 14.2 TEU) and the „citizens are directly represented at Union level in the European Parliament" (art.10.2 of the TEU).

- „Every citizen of the Union may apply to the Ombudsman established in accordance with Article

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[16] Decision, CJEU, May 5, 2011, *Shirley McCarthy v Secretary of State for the Home Department*, C-434/09, ECLI:EU:C:2011:277: „Article 21 TFEU is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States".

Article 45 Freedom of movement and of residence of the Charter of Fundamental Rights of the European Union::"1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States. 2. Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State".

[17] This Directive has been transposed in Romania through the Government Emergency Ordinance no 102/2005 on the free movement on the Romanian territory of the citizens of the European Union Member States and the European Economic Area and the Switzerland citizens.

[18] See the art. 5 of the Romanian Law no. 115/2015 on the election of the local public administration's autorities.

Article 40 Right to vote and to stand as a candidate at municipal elections of the Charter of Fundamental Rights of the European Union: "Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State".

[19] Article 46 Diplomatic and consular protection of the Charter of Fundamental Rights of the European Union: „Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State".

[20] https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/know-your-rights/citizens-rights/diplomatic-and-consular-protection_en, accesed March 10, 2018.

[21] Laura Magdalena Trocan, „Protecția cetățenilor Uniunii Europene de către autoritățile diplomatice și consulare în țările terțe", *Probleme actuale ale spațiului politico-juridic al UE, (2013 edition, October 24-25 2013, Politicile europene în domeniul drepturilor omului: Cetățenia europeană-Implicațiile Cartei Drepturilor Fundamentale ale Uniunii Europene asupra spațiului juridic din România*, Supplement of *Revista Română de Drept European*, Wolters Kluwer), 168.

[22] http://ec.europa.eu/citizens-initiative/public/welcome, accesed March 10, 2018: „The European citizens' initiative allows one million EU citizens to participate directly in the development of EU policies, by calling on the European Commission to make a legislative proposal".

[23] Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have the right to address, individually or in association with other citizens or persons, a petition to the European Parliament on a matter which comes within the Union's fields of activity and which affects him, her or it directly".

Article 44 Right to petition of the Charter of Fundamental Rights of the European Union:" Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to petition the European Parliament".

228”[24].

„By the Decision of the European Ombudsman on Records Management in the Office of the European Ombudsman, 13 March 2017, „the European Ombudsman decided to promote the principle of online public registers by adopting the following provisions:

8.1 For the purpose of coherence in the EU administration, sound financial management and service to the public users, the European Ombudsman takes steps to further the use of a corporate public documents and data register and/or portal for the EU administration.

8.2 Pending the outcome of the above-mentioned actions, the Ombudsman implements, for its organization, the principle of online public registers through publication of core business documents on its online cases section, through direct and full publication of all documents adopted in relation to strategy, policy and high level management, and through the publication of its document filing plan.”[25]

- „Every citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 13 of the Treaty on European Union in one of the languages mentioned in Article 55(1) of the Treaty on European Union and have an answer in the same language”[26] .

In different parts of the Treaties, the EU citizens benefit from other rights (see art. 10.3 TEU: “Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen”) or those rights are developed and explained in the context of EU policies and actions; the Charter of Fundamental Rights of the European Union ensures also the respect of other rights allowed to the EU citizens such as: “Right of access to documents - Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium” (art. 42).

The pursuit of these rights is assured by the European Union on the principle of equal treatement for all citizens in accordance with the art. 9 of the TEU which states: „in all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies”.

3. The future development of the citizenship of the European Union concept

One of the most important challenges for the development of the European citizenship’s is represented by the creation of the specific ID cards. The Directorate general for internal policies (Policy department: citizens' rights and Constitutional affairs) has published in 2016 “*The legal and political context for setting up a European identity document Study*”.

On the “legal and political feasibility of a European Identity document”, this Study mentions the existence of the constitutional European Union’s principles:

- “There is no legal basis in the Treaties to legislate in connection with a European ID card, with the sole purpose of enhancing citizens’ participation in democratic processes at the EU level. Legal basis for action at the EU level is provided in connection with the enhancement of free movement rights, which rights however cannot be seen in isolation from other EU citizenship rights (principle of conferral).
- Given that there are factors hindering the exercise of democratic participation rights by EU citizens which cannot be overcome by the Member States alone (principle of subsidiarity), EU action is necessary. While shaping the concept of a European ID card it should be assessed whether or not it is the most appropriate and least onerous tool to resolve the issues identified (principle of proportionality).
- The process of setting up a European ID card cannot be seen in isolation from data protection legislation and rules applicable to interoperability of electronic identification schemes. In terms of data protection, the storage of, access to and control of personal data are the main issues to consider. The need to ensure the interoperability of a European ID card with electronic identification schemes at the national level should also be addressed.
- Considering the variety of actors involved in decision-making processes at the EU level and thus the plethora of interests, it is crucial for the introduction of a European ID card to be backed by a sufficient level of political will. Member States’ views might be controversial on many points, including the amount of data to be stored on the card or the link of the card with databases”.

The Union’s competence to regulate in connection with ID cards is set out in art. 77(3) of the TFEU which provides that within a special legislative

[24] „A European Ombudsman, elected by the European Parliament, shall be empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies, with the exception of the Court of Justice of the European Union acting in its judicial role. He or she shall examine such complaints and report on them”.

Article 43 European Ombudsman of the Charter of Fundamental Rights of the European Union: “Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the European Ombudsman cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union, with the exception of the Court of Justice of the European Union acting in its judicial role”.

[25] https://www.ombudsman.europa.eu/en/resources/publicregister.faces, accesed March 10, 2018.

[26] Article 41 Right to good administration of the Charter of Fundamental Rights of the European Union: „4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language”

procedure the Council may adopt provisions concerning ID cards[27] , in cases where EU level action would become necessary to facilitate the exercise of the rights under Article 20(2) (a) of the TFEU.

In the field of data protection, at the level of the European Union the following acts have been adopted:

- Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC;
- Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

The third European Commissions' report[28] on the EU citizenship – "*EU Citizenship Report 2017 - Strengthening Citizens' Rights in a Union of Democratic Change Justice and Consumers*" provides also that "On 8 December 2016, the Commission adopted an Action Plan on document security setting out specific actions to improve the security of travel documents, including that of national identity cards issued by Member States and of residence documents for EU nationals residing in another Member State and their family members".

The report provides with information about the EU priorities for 2017–2019 in different action fields such as:

- "Promoting EU citizenship rights and common values:

1. In 2017 and 2018 conduct an EU wide information and awareness raising campaign on EU citizenship rights including on consular protection and electoral rights ahead of the 2019 European elections.
2. Take action to strengthen the European Voluntary Service[29] and promote the benefits and integration of volunteering in education. By 2020, invite the first 100,000 young Europeans to volunteer with the European Solidarity Corps (…).
3. Safeguard the essence of EU citizenship and its inherent values."

- „Promoting and enhancing citizens' participation in the democratic life of the EU:

1. Intensify Citizens' Dialogues and encourage public debates, to improve public understanding of the impact of the EU on citizens' daily lives and to encourage an exchange of views with citizens.
2. Report in 2017 on the implementation of EU law on local elections to ensure that EU citizens can effectively exercise their voting rights at local level.
3. In 2018, promote best practices which help citizens vote and stand for EU elections, including on retaining the right to vote when moving to another Member State and cross-border access to political news, to support turnout and broad democratic participation in the perspective of the 2019 European elections".

- „Simplifying travel, living and working across the EU for citizens:

1. Submit a proposal for setting up a 'Single Digital Gateway' to give citizens easy, online access to information, assistance and problem solving services and the possibility to complete online administrative procedures in cross-border situations by linking up relevant EU and national-level content and services in a seamless, user-friendly and usercentric way[30].
2. Further facilitate and promote Euwide multimodal travel in order to make mobility of EU citizens more efficient and user-friendly, through the specification of Euwide multimodal travel information services and improvements to the interoperability and compatibility of systems and services".

- „Strengthening security and promoting equality:

1. In the first quarter of 2017 finalise the study on EU policy options to improve the security of EU citizens' identity cards and residence documents of EU citizens residing in another Member State and of their non-EU family members.
2. In 2017 assess how to modernise the rules on emergency travel documents for unrepresented EU citizens, including the security features of the EU common format, to guarantee that citizens can effectively exercise their right to consular protection.
3. Carry out in 2017 a campaign on violence against women and actively support the accession of the

[27] Regulation (EU) no. 910/2014 taking full legal effect on 1 July 2016 creates an EU-wide recognition system of electronic identification.

[28] Article 25 TFEU: „The Commission shall report to the European Parliament, to the Council and to the Economic and Social Committee every three years on the application of the provisions of this Part. This report shall take account of the development of the Union".

[29] https://europa.eu/youth/EU/Voluntary-activities/european-voluntary-service_en, accesed March 10, 2018.

[30] file:///C:/Users/oanas/Desktop/PART-2017-156445V1.pdf, accesed March 10, 2018: Proposal for a Regulation of the European Parliament and of the Council on establishing a single digital gateway to provide information, procedures, assistance and problem solving services and amending Regulation (EU) no 1024/2012 COM(2017) 256 final: „This Regulation: lays down rules for the establishment and operation of a single digital gateway to provide citizens and businesses with easy access to high quality, comprehensive information, effective assistance and problem solving services and efficient procedures regarding Union and national rules applicable to citizens and businesses exercising or intending to exercise their rights derived from Union law in the field of the internal market, within the meaning of Article 26(2) TFEU; (b) facilitates the use of procedures by users from other Member States and supports the implementation of the "once only" principle; (a) lays down rules for reporting on obstacles in the internal market based on the collection of user feedback and statistics from the services covered by the gateway".

Union to the Istanbul Convention alongside Member States and present proposals to address the challenges of work-life balance for working families.

4. Act to improve the social acceptance of LGBTI people across the EU by implementing the list of actions to advance LGBTI equality and actively support the conclusion of the negotiations on the proposed horizontal Anti-Discrimination Directive".

4. Conclusions

The citizenship of the European Union represents a concept ensured by the European Union law, namely the Treaties and specific legal acts having legal effects recognized and observed by the Court of Justice of the European Union.

The existence of this citizenship depends on the citizenship/nationality of one of the Member States in accordance with the art.20.1 of TFEU, "*citizenship of the Union shall be additional to and not replace national citizenship*"[31] ; for that, in the Brexit's context, the withdrawal of the United Kingdom implies the deprivation for its citizens of the rights guaranteed at the moment by the European Union citizenship[32].

The legal effects of the EU citizenship can be underlined and identified at the moment when a citizen wants to benefit from one of the rights allowed by the EU law [33]; the effectiveness of those rights is evident and relevant in different economic, political and social sectors[34] - the right to work or to study in any Member State in the same conditions as the nationals of that state; the legal possibility to be involved in the activities EU's institutions or to have access at their actions in certain conditions[35] . The similar rights for the third countries family members are also observed on the basis of the EU citizenship even they do not receive automatically this legal status.

The existence of the EU citizenship represents an important characteristic of the Union which makes EU a special or *sui generis* international intergovernmental organization proving a deep integration of the Member States within the Union.

The main challenge for the citizens[36], national and European leaders[37] aims to set up the European identity document which will prove the Union's citizenship[38] .

In a globalization framework, keeping the citizenship does not preclude the economic, social and cultural advantages of such context and the citizenship of the European Union does not affect the respect of "the cultural and linguistic diversity"[39] and the "national identities"[40].

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[31] Ștefan Deaconu, 143:"The European Union citizenship subsumes the Romanian citizenship".

[32] http://europa.eu/rapid/press-release_MEMO-18-1361_en.htm, accesed March 10, 2018 : „The European Council (Article 50) of 15 December 2017 stated that while an agreement on a future relationship can only be finalised and concluded once the United Kingdom has become a third country, the EU will be ready to engage in preliminary and preparatory discussions with the aim of identifying an overall understanding of the framework for the future relationship, once additional guidelines have been adopted to this effect".

For the period setteled by the Withdrawal Agreement, both categories of citizens – of EU 27 and UK will benefit from the specific rights as European citizens: „A professional who had his or her professional qualifications recognised in the country (an EU Member State or the United Kingdom) where he or she currently resides or, for frontier workers, where he or she works, will be able to continue to rely on the recognition decision there for the purpose of carrying out the professional activities linked to the use of those professional qualifications. In addition, if he or she has already applied for the recognition of his or her professional qualifications before the end of the transition period, his or her application will be processed domestically in accordance with the EU rules applicable when the application was made".

[33] WHITE PAPER ON THE FUTURE OF EUROPE, p.24:"Citizens have more rights derived directly from EU law".

[34] The legal effects of the EU citizenship can be analyzed in the recent decisions of the CJEU which seem to reduce the full application of this concept:

Decision, CJEU, *Jobcenter Berlin Neukölln v Nazifa Alimanovic, Sonita Alimanovic, Valentina Alimanovic, Valentino Alimanovic*, September, 15, 2015, C-67/14, ECLI:EU:C:2015:597: „Article 24 of 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, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC and Article 4 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, as amended by Commission Regulation (EU) No 1244/2010 of 9 December 2010, must be interpreted as not precluding legislation of a Member State under which nationals of other Member States who are in a situation such as that referred to in Article 14(4)(b) of that directive are excluded from entitlement to certain 'special non-contributory cash benefits' within the meaning of Article 70(2) of Regulation No 883/2004, which also constitute 'social assistance' within the meaning of Article 24(2) of Directive 2004/38, although those benefits are granted to nationals of the Member State concerned who are in the same situation".

The same decision has been stated in the case-law C-333/13, *Elisabeta Dano, Florin Dano v Jobcenter Leipzig*.

[35] WHITE PAPER ON THE FUTURE OF EUROPE, p.13: „However, Europe and its Member States must move quicker to interact with citizens, be more accountable and deliver better and faster on what has been collectively agreed".

[36] WHITE PAPER ON THE FUTURE OF EUROPE, p.12: „However, citizens' trust in the EU has decreased in line with that for national authorities".

[37] Preamble of the Treaty on the European Union states that the Member States are „resolved to establish a citizenship common to nationals of their countries".

[38] https://www.uantwerpen.be/en/conferences/the-future-of-eu-citizenship-2017/about-the-conference/abstracts/additional-materials/, accesed March 10, 2018:

EU Citizenship as 'Inter-National' Citizenship – A Republican Intergovernmental Approach, Richard Bellamy: „EU citizenship often seen as 'transformative' of national citizenship": „Union citizenship has to be consistent with sustainability of national citizenship as determined by stakeholders in long-term political decisions about character of state and economy. Otherwise can become itself a source of domination".

[39] Art. 3.3 TEU: „It shall respect its rich cultural and linguistic diversity".

[40] Art. 4.2 TEU: "The Union shall respect the equality of Member States before the Treaties as well as their national identities".

References

- Deaconu, Ștefan, *Drept constituțional*, 3rd edition – revised, C.H. Beck, Bucharest, 2017
- Dumitrașcu, Mihaela-Augustina, *Dreptul Uniunii Europene și specificitatea acestuia*, C.H. Beck, Bucharest, 2015
- Fuerea, Augustin, *Manualul Uniunii Europene*, 6th edition - revised, Universul Juridic, Bucharest, 2016
- Fuerea, Augustin, Dreptul Uniunii Europene – principii, acțiuni, libertăți, Universul Juridic, Bucharest, 2016
- Popa, Nicolae and Ioan Mihăilescu, Mihail Eremia, *Sociologie juridică*, Editura Universității din București, Bucharest, 1999
- Popescu, Roxana-Mariana, "ECJ Case-Law on the Concept of „Public Administration" used in Article 45 paragraph (4) TFEU", *The International Conference – CKS 2017 – Challenges of the Knowledge Society*, Bucharest, 12th - 13th May 2017, 11th Edition, "Nicolae Titulescu" University Publishing House
- Trocan, Laura Magdalena, "Protecția cetățenilor Uniunii Europene de către autoritățile diplomatice și consulare în țările terțe", *Probleme actuale ale spațiului politico-juridic al UE*, 2013 edition, October 24-25 2013, *Politicile europene în domeniul drepturilor omului: Cetățenia europeană-Implicațiile Cartei Drepturilor Fundamentale ale Uniunii Europene asupra spațiului juridic din România*, Supplement of Revista Română de Drept European, Wolters Kluwer
- https://www.uantwerpen.be/en/conferences/the-future-of-eu-citizenship-2017/about-the-conference/abstracts/additional-materials/
- https://europa.eu/youth/EU/Voluntary-activities/european-voluntary-service_en
- http://europa.eu/rapid/press-release_MEMO-18-1361_en.htm

THE CONSTITUTIONAL DIMENSION OF THE RIGHT TO A HEALTHY ENVIRONMENT

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Abstract

Paradoxically, for some of us, and first of all, our lives depend on the Planet Earth on which we live. A healthy Planet Earth will allow us a beautiful, long and healthy life. In international treaties or conventions, as well as in constitutions, there is written about the right to a healthy environment, a right that is usually recongnized to each human being. Although this right is recognized, protected and even guaranteed, shouldn't we speak about our fundamental duty to ensure a healthy environment? On the other hand, even if we are speaking about the right or the duty to a healthy environment, or both of them, first of all, from a legal point of view, there should be a constitutional regulation and not just the need to ensure a healthy environment. This article, being the first step in analyzing this fundamental right of every person, examines some of the international regulations of the right to a healthy environment, but also some of the provisions from different documents of international organizations at regional level, like Council of Europe, or European Union, or Organization of American States, or African Commission on Human and Peoples' Right, and also from eleven constitutions of Eastern Europe countries, but also some aspects regarding the content of this right.

Keywords: *right, environment, health, constitutional, provisions.*

1. Introduction

It is the end of February, the beginning of March, 2018, and in one of the Romanian cities – Braşov – the winter of December – February, 2018, has really come true just now. Nothing special could say many, but it is one of the cities located in the heart of the Carpathian Mountains where practicing winter sports should be a true tradition. We did not intend to analyze and discuss other aspects about the practical or not practical possibility of such sports, whether economic or social, but only reveal a less pleasant and unacceptable truth for many of us –the climate with which we have grown up 20, 30 or even 40 years ago is no longer the same? We often wonder where the winters or the springs are, we limit ourselves to these two seasons which, perhaps in a paradoxical way, coexist at this time because in the calendar we read about the end of the winter and the beginning of the spring, but when we go out we have to face the winter. And, unfortunately, we are not talking about a last cry of the winter, but a real one – with serious snow, with terrible frost, with a strong blizzard. Having spent most of my life in a mountain city, I knew that winter can not only keep the three calendar months of this season, but on the contrary, it can last even 5 or 6 month, from November to March, but under no circumstances manifests itself in the fullness of its forces towards the end of February.

Moreover, paradoxically, even this municipality surrounded by mountains and forest is one of the three, alongside Bucharest and Iasi, here the standards set for improving air quality are not met, which is why they are subject to an infringement procedure by the European Commission, in Case 2009/2296 concerning the finding of non-fulfillment of the obligation established by art. 13 para (1) in conjunction with Annex XI and art. 23 para (1) of Directive 2008/50/EC on ambient air quality and cleaner air for Europe, Directive transposed at national level by the Law No. 104/15.06.2011 on ambient air quality published in the Official Journal of Romania, Part I, No. 452 of June 28, 2011.

We have certainly witnessed, for years, climatic changes that have become more and more visible or felt more and more, affecting the planet we live in, and obviously ourselves. It is true that it is difficult to accept the production of climate change that affects the environment and the fact that the human being is one of the primary factors that causes these changes, and also their emphasis, but we believe that the moment of acceptance has gone a long way, now being a critical moment when words must be turn into actions.

Certainly we will not be able to heal the earth by returning lost health, but at least we will be able to stop its deterioration because "[t]omorrow it is now. We are confronted with the unrelenting threat of the present moment. In this mechanism, always moving, made up of our life and history, it is possible to get too late. There is an unseen book of life in which is written, without fail, as long as we are constant in our negligence"[1].

For a long time, the international community has not been concerned about the effects that human activity, especially industrial, has done on the environment. Perhaps, when the negative effects of his activities have repercussions on the environment, being

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[1] Speech of Martin Luther King, quoted by A. Gore in *Un adevăr incomod, „An inconvenient truth",* RAO International Publishing Company, Bucharest, 2007, pp. 3-4 from Introduction.

more and more visible, people has not even been aware of them, "[t]he technical congregation generating the conviction that he is master of the planet"[2]. Time has shown to people that the Planet has its limits that it can not force because of its actions it can trigger even irreversible reactions that would endanger its own life and even existence on this planet. So we have begun to learn and we are still in such a process that humanity, its existence and its evolution, depend on this planet, the reciprocal being not necessarily valid, perhaps not at all. We like and even managed to control, to rule some natural phenomena, but in the same way "[t]he mankind is increasingly threatened by the processes that it has itself generated and which seem to escape to an ever increasing degree under its control"[3].

Defining the environment, we can say that it is "the complex of physical, chemical, and biotic factors that act upon an organism or an ecological community and ultimately determine its form and survival"[4].

If we are looking on the English Environment Protection Act 1990, we'll see that by art. 1 Par.2, the "environment" consists of all, or any, of the following media, namely, the air, water and land; and the medium of air includes the air within buildings and the air within other natural or man-made structures above or below ground.[5]

A definition in the same way is provided by the Government emergency decree No. 195/2005 regarding the environmental protection[6] in which, by art. 1 para (2) the environment is considered to be the "set of natural conditions and elements of the Earth: air, water, soil, subsoil, landscape features, all atmospheric layers, all organic and inorganic matter, and living beings, interaction, including the elements listed above, including some material and spiritual values, the quality of life and the conditions that can influence the welfare and health of man".

From the above-mentioned definitions, we can see that the environment and, above all, the provisions of a healthy environment, implicitly recognizing, protecting and guaranteeing a right to a healthy environment as a fundamental right of any human being, is in close correlation with health, respectively with the right to health or the right to health protection, as found in international and/or constitutional regulations. In fact, the right to a healthy environment, over time, from the right to health, the fundamental international human rights regulations adopted under the aegis of the United Nations, and not only.

In this paper, we propose, as a first step in the analysis of this right, to identify and analyze international regulations, as well as the national constitutional framework of some states through which the right to a healthy environment is legally enshrined.

2. Content

2.1. The right to a healthy environment in international documents

As we said in the above, "environmental and human rights treaties also neither specifically provide for, nor define the right"[7].

Thus, we will find that in the process of defining and constructing the fundamental human rights, developed especially, its protection and, moreover, at least the recognition of a fundamental human right regarding it, as well as a correlative obligation of states and even the international community were not taken into account. It was appreciated at that time, paradoxically we said after the detonation of two atomic bombs, that "[t]he environmental preservation was not a priority"[8] which is why "[n]o mention of this would have been required"[9] in the Universal Declaration of Human Rights[10]. In fact, it was noted in the doctrine, that it was not a priority for the international community, "there is no mention of environmental protection under the Universal Declaration of Human Rights"[11]. The doctrine also highlighted the fact that the enrolment in international documents of the right to a healthy environment or just environmental references was considered necessary only when the various climatic changes began to affect our dimensions considerably. In this respect, it is stated

[2] D. Marinescu, *Tratat de dreptul mediului, "Treaty of Environmental Law"*, Universul Juridic Publishing House, Bucharest, 2007, p. 11.
[3] Ibidem
[4] Encyclopedia Britannica. This document is available at: https://www.britannica.com/science/environment, accessed on: 04.03.2018.
[5] The English Environment Protection Act 1990 is available at: http://www.legislation.gov.uk/ukpga/1990/43/section/1, accessed on: 05.03.2018.
[6] This emergency ordinance was published in The Official Gazette of Romania, Part I, no 1196 from December 30th 2005, being adopted, with amendments and additions, by Law no 265 from 2006, published in The Official Gazette of Romania, Part I, no 586 from July 06th 2006.
[7] B. K. Twinomugisha, Some reflections on judicial protection of the right to a clean and healthy environment in Uganda in Law Environment and Development Journal, vol 3/3, 2007, p. 247, available at http://www.lead-journal.org/content/07244.pdf, accessed on: 10.03.2017
[8] S. Atapattu, The right to a healthy life or the right to die polluted?: The emergence of a human right to a healthy environment under international law in Tulane Environmental Law Journal vol 16, 2002, pp. 67-68 quoted by H. Kern, in The right to a healthy Environment versus mining:An examination of federal environmental law and its failure to protect people's health in The politics of human rights in Australia. Law under the spotlight, 2015, School of Law and Justice, Southern Cross University, p. 130, available at: http://docplayer.net/29001185-The-politics-of-human-rights-in-australia.html, accessed on: 06.03.2018
[9] H. Kern, op. cit., pp. 130-131.
[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] K. Toepfer, *Statement to the 57th Session of the Commussion on Human Rights*, CHR, 57th sess, (19 March 2001) quoted by H. Kern, op. cit., pp. 130-131, available at: http://docplayer.net/29001185-The-politics-of-human-rights-in-australia.html, accessed on: 06.03.2018

that "most human rights treaties were drafted and adopted before environmental protection became a matter of international concern"[12].

However, this declaration enshrines, through art. 25, the right to a sufficient standard of living through which it is also understood that "every person must be provided with the health and well-being of himself and of his family". Even though the Universal Declaration of Human Rights does not refer to a healthy environment, a right to this right, as we have previously mentioned, we could not imagine how the health of any human being can be assured in a unhealthy environment. For this reason, we also appreciate that, through an extensive interpretation of the stipulated provisions of the Declaration, indirectly is also considered "the right to a healthy natural environment as an aspect of collective health law which concerns both the members of a community which live in a certain area of the Earth, as well as the world's population as a whole"[13].

Even though for a good period of time, by other international regulation, it has not been envisaged to lay down a provisions that at least recognized the right to a healthy environment, however it is possible to be identified "few references to environmental matters in international human rights instruments, although the rights to life and to health are certainly included and some formulations of the latter right make reference to environmental issues"[14]. So, if we are looking if we are studying the International Convention on Economic, Social and Cultural Rights[15], we will be able to identify some provisions related to environment, or environmental protection, or right to healthy environment. In art. 7 lett. b, this convention guarantees the right to safe and healthy working conditions, and in art. 10 para 3 it is specified the right of children and young person to be free from work harmful to their health, and the art. 12 settles the two dimensions of the right to health and, also, in par 2 let. b) it is mentioned that one step to be taken by the States to achieve the full realization of this right shall include those necessary even for the improvement of all aspects of environmental and industrial hygiene. Moreover, in the interpretation that the Committee of Economic, Social and Cultural Rights (CESCR)[16] gives to these latter provisions, it is mentioned, including that "art. 12 para 2 let. b) is about the right to healthy natural and workplace environments and this phrase – "the improvement of all aspects of environmental and industrial hygiene" comprises, inter alia, the requirement to ensure an adequate supply of safe and potable water and basic sanitation; the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health"[17]. Also it is mentioned that "industrial hygiene refers to the minimization, so far as is reasonably practicable, of the causes of health hazards inherent in the working environment"[18], thus making reference to a convention of the International Labor Organization[19] which, by art. 4 para (2) provides, referring to the principles of national policy in its field, that "the aim of the policy shall be to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, by minimize, so far as is reasonably practicable, the causes of hazards inherent in the working environment"[20].

In fact, if we take a look at regional regulations regarding the human rights, we will observe that the "European Convention of Human Rights" does not include in the articles or its Protocols the term "environment" or "the right to a healthy

[12] D. Shelton, *Health and Human Rights Working Paper Series No 1. Human Rights, Health & Environmental Protection: Linkages in Law & Practice. A Background Paper for the World Health Organization*, 2002, p. 6, available at: http://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf, accessed on: 03.03.2018

[13] I. Cloșcă, I. Suceavă, *Tratat de drepturile omului*, „*Treaty of Human Rights*", Europa Nova Publishing House, Bucharest, 1995, p.294.

[14] D. Shelton, op. cit., p. 6.

[15] 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.

[16] Office of the High Commissioner for Human Rights Human, *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, adopted at the twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Contained in Document E/C.12/2000/4), p. 6, available at: http://www.refworld.org/pdfid/4538838d0.pdf, accessed on: 07.03.2018

[17] Ibidem

[18] Ibidem

[19] We are talking about the ILO Convention No. 155 Occupational Safety and Health Convention, 1981, available at: http://blue.lim.ilo.org/cariblex/pdfs/ILO_Convention_155.pdf, accessed on: 07.03.2018

[20] Regulations regarding the environment are found even in Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990. Romania has ratified this convention by Law no 18/1990 which was published in The Official Gazette of Romania, Part I no 314 from June 13th 2001. Thus, the article 24 recognizes the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health, and in the para 2 lett.c) it is mentioned that „to combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution". This Convention is available at: http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf, accessed on 07.03.2018. However, in the case of this regulation we can see that it was adopted after the moment when the environment the changes that affect it and, implicitly, our life, was taken into consideration by the states and the international community, starting to find their regulation in various normative acts.

environment"[21], considering that "[w]hen it was adopted, namely in 1950, environmental issues were not a major concern, industrial development nor raising a serious environmental problem"[22]. So, as it is noted in the doctrine, in this case one can speak of the recognition of the right to a healthy environment as "[t]he result of a jurisprudential evolution which, without the proper creation of new rights, extends the purpose of existing rights"[23]. Thus, in its jurisprudence, a new content of some of the rights enshrined in the Convention, such as the right to life (article 2 of the Convention), the right to respect for private and family life (article 8 of the Convention)[24]; the right of property (art. 1 of the Protocol No. 1 at the Convention); the right to free expression (art. 10 of the Convention); the right to a fair trial (art. 6 of the Convention), the persons have been guaranteed the right to a healthy environment[25].

Unlike the human rights regulations of organizations on the European continent, similar ones on the African and American continent contain environmental provisions as foreseen at American level, or even the need to secure a right in a generally satisfactory environment, favorable to their development, as it is called at African level.

So, the African Charter on Human and Peoples' Rights[26], by art. 24, regulates the right to a general satisfactory environment for all peoples and which has to be favorable to their development. The legal righting has pointed out to this text that it is a "[t]he first conventional, compulsory, stipulation of the right to a healthy environment"[27], the decision to include it in a charter of rights from the states of a continent that does not grant "in general, a priority for environmental concerns"[28].

American Convention on Human Rights Pact of San José[29], as amended by the Buenos Aires Protocol signed on 27 February, 1967, stipulates even in the Preamble that the representatives on the American States present at this conference "are convinced that the historic mission of America is to offer to man a land of liberty and a favorable environment for the development of his personality and the realization of his just aspirations", and by art. 95 let. c) no 1 states that "in order to achieve its various goals, especially in the specific area of technical cooperation, the Inter-American Council for Integral Development shall promote, coordinate, and assign responsibility for the execution of development programs and projects to the subsidiary bodies and relevant organizations, on the basis of the priorities identified by the Member States, in areas such as: economic and social development, including trade, tourism, integration and the environment". Moreover, through a protocol at the American Convention on Human Rights Pact of San José, namely Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", Additional Protocol to the American Convention on (A-52), adopted on 17 November, 1998[30], more precisely through art. 11, was consecrated, *expressis verbis*, the right to a healthy environment according to which "everyone shall have the right to live in a healthy environment and to have access to basic public services", and the States Parties shall promote the protection, preservation, and improvement of the environment. Thus, not only the right granted to every person is stipulated, right granted to every persons, which in fac has who dimensions – the rights to engage in a healthy environment and the right to access basic public services, but also the correlated obligation which is the responsibility of each state to protect, preserve and improve the environment and its quality.

So whether at the regional level, through the established organizations, the states, either expressly, through regulations in conventions, or indirectly, by

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[21] P. Trușcă, A. Trușcă Trandafir, Dreptul fundamental al omului la un mediu sănătos în jurisprudența CEDO (The right ro a healthy environment in the ECHR jurisprudence) in Revista Transilvană de Ştiinţe Administrative (Transylvanian Revue (Journal) of Administrative Science), no 1 (23)/2009, p. 99, available at: http://www.rtsa.ro/rtsa/index.php/rtsa/article/viewFile/124/120, accessed on 03.03.2018.

[22] Ibidem

[23] F. Stârc-Meclejan, Rolul creator al Curţii Europene a Drepturilor Omului privitor la dreptul mediului (The role of the European Court of Human Rights in the field of environmental law) in Analele Universităţii de Vest din Timişoara. Seria Drept. Studii, articole, comentarii. Secţiunea de drept privat (Annals of the West University of Timisoara. Law Series., Studies, articles, comments. Section of private law), p. 168, available at: https://drept.uvt.ro/administrare/files/1481047524-lect.-univ.-dr.-flaminia-sta--rc---meclejan.pdf, accessed on 03.03.2018

[24] For example, in the Lopez Ostra v. Spain Case, by the judgment from December 9th 1994, ECHR pointed out that „naturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health". Starting from this statement, ECHR has analyzed the matter „[i]n terms of a positive duty on the State - to take reasonable and appropriate measures to secure the applicant's

rights under paragraph 1 of Article 8" from Convention. Lopez Ostra v. Spain, no 16798/90 §51, ECHR, 1994, available at: https://hudoc.echr.coe.int/eng#{"itemid":["001-57905"]}, accessed on: 07.03.2018. Thus, the ECHR has highlighted a dimension of the right to a healthy environment that seeks to oblige a state to ensure the protection of this right, to make it possible to achieve it in its fullness.

[25] Ibidem

[26] African (Banjul) Charter on Human and Peoples Rights was adopted in Nairobi June 27, 1981, and was entered into force on October 21, 1986, is available at: http://www.achpr.org/instruments/achpr/, accessed on: 07.03.2018

[27] D. Marinescu, op. cit., p. 381; M. Duţu, Dreptul mediului (Environmental Law), Economica Publishing House, Bucharest, 1996, p. 80.

[28] Ibidem

[29] Adopted at the Inter-American Specialized Conference on Human Rights by the Organization of American States, San José, Costa Rica, 22 November 1969, is available at: https://en.wikisource.org/wiki/American_Convention_on_Human_Rights#CHAPTER_III_-_ECONOMIC,_SOCIAL,_AND_CULTURAL_RIGHTS, accessed on: 07.03.2018. The Charter of the Organization of American States, 119 U.N.T.S. 3, was adopted in 1948 and entered into force on December 13, 1951 and it aws amended more than one time. This Charter is available at: http://www.globalhealthrights.org/wp-content/uploads/2013/10/Charter-of-the-Organization-of-American-States-OAS.pdf, accessed on: 07.03.2018

[30] This Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights "Protocol of San Salvador" is available at: http://www.oas.org/juridico/english/sigs/a-52.html, accessed on: 07.03.2018.

jurisprudence, have recognized the right to a healthy global environment "[t]he reappointment for the quality and protection of the environment was debated in 1972 at the first World Conference on the United Nations on this issue"[31], held in Stockholm. Participants at this conference proclaimed that "man is both creature and molder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. Both aspects of man's environment, the natural and the manmade, are essential to his well-being and to the enjoyment of basic human rights-even the right to life itself"[32]. It is also emphasizes not only the need to protect the environment, or, as it is named by the statement itself – "the human environment", and to improve the quality of life, specifying that "the protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world; it is the urgent desire of the peoples of the whole world and the duty of all Governments"[33]. By the first principle, the Stockholm Declaration recalls to every human being the fundamental right to a healthy environment, the content of which has the following dimensions: the right itself, what it is the "[r]ight to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being", as well as the obligation of each human being to protect and improve the existing environment in view of the existence of a "[s]olemn responsibility to protect and improve the environment for present and future generations". Although the statement does not explicitly define the environment, its main components, elements that may form included in the definition of this environmental concept, can be found in Principle No. 2 of the Stockholm Declaration which mentions that "[m]ust be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate", "[t]he natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems".

The Declaration has built a number of 26 principles, a plan of action for the human environment, including a number of 109 recommendations categorized by areas of action, a resolution on institutional and financial arrangements.

The right to a healthy environment and, in particular, to environmental protection, will make sense and develop a series of regulations over time. The states and the United Nations have succeeded in adopting and obtaining ratification by more and more states of conventions, agreements that outline the legal framework in which to secure such protection. One of these last agreements is the Paris Agreement[34], and art. 4 point 13 stipulates that, "Parties obliged themselves "to promote environmental integrity, transparency, accuracy, completeness, comparability and consistency", Parties acknowledging, since point 11 form the Preamble, that "climate change is a common concern of humankind, and they should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity".

From the analysis of some of the international documents – "[v]arious treaty provisions, general comments or recommendations of treaty bodies and UN consensus documents, it may be possible to delimit some of the major components of the right"[35]. Thus, we also appreciate that "[t]he right to a clean and healthy environment involves many things including clean water, air and soil that are free from toxins, wastes or hazards that threaten human health"[36], given that the right to a healthy environment is also perceived as a dimension of the right to health and the protection of it, the health of any human being is absolutely conditioned by its existence, including in a healthy natural environment.[37]. On the other hand, in the case of this social-economic right, by its third-generation content, if we refer to the chronological classification criteria[38],, but also to the fact that "states need cooperation to

[31] D. Marinescu, *op. cit.*, p. 14

[32] Point I.1. from Declaration of the United Nations Conference on the Human Environment, available at: http://www.un-documents.net/aconf48-14r1.pdf, accessed on: 07.03.2018

[33] Point I.2. from Declaration of the United Nations Conference on the Human Environment.

[34] The Paris Agreement was signed in 2015 and entered into force on 4 November 2016, thirty days after the date on which at least 55 Parties to the Convention accounting in total for at least an estimated 55 % of the total global greenhouse gas emissions have deposited their instruments of ratification, acceptance, approval or accession with the Depositary. See: available at: http://unfccc.int/paris_agreement/items/9485.php, accessed on: 08.03.2018. available atThis Agreement is available at: http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf, accessed on: 08.03.2018.

[35] B. K. Twinomugisha, *op. cit*, p. 247.

[36] Idem, p. 248-249.

[37] In thsi regard, we just recall that the United Nations Conference on Environment and Development, through the Rio Declaration on Environment and Development , 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". Rio Declaration on Environment and Development is available at: http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm, accessed on: 08.03.2018.

[38] To see in this respect I. Muraru, E.S. Tănăsescu, coordinators, *Constituția României. Comentariu pe articole*, "*Romanian Constitution. Comment on articles"*, C. H. Beck Publishing House, Bucharest, 2008, p.326

ensure compliance of this right"[39], it is necessary to appreciate one of the "rights-claims"[40] in which we also refer to "[t[he state's duty to recognize this right of any person"[41], even if it is a "[d]iligence dependent on a number of other factor"[42] of various natures.

2.2. The right to a healthy environment in constitutions

From the above, we can see that, even though the states and the international community, by the United Nations, quite late, understood that they must first and foremost recognize and then create an international legal framework to the right to a healthy environment so that it can be protected.

Considering the delay in international understanding of the need to regulate the right to a healthy environment, as well as to regulate its protection, at national level the attitude of the states was no different. Thus, the right to a healthy environment will find its place in the constitutions after the Stockholm Declaration in 1972, more specifically "[a]fter 1975 and especially in the 1990s and the present millennium"[43].

Thus, "more than 100 constitutions throughout the world guarantee a right to a clean and healthy environment impose a duty on the state to prevent environmental harm, or mention the protection of the environment or natural resources. Over half of these constitutions explicitly recognize the right to a clean and healthy environment, including nearly all constitutions adopted since 1992. Ninety-two constitutions impose a duty on the government to prevent harm to the environment"[44].

Analyzing a number of 10 constitutions of Eastern European states, we have notices that all of them enshrine the right to a healthy environment in various ways and contents, a statement also valid for the Czech Republic[45] which Constitution does not contain a chapter on rights and of the fundamental freedoms, these being provided by a Charter which is part of the Czech constitutional block. Thus, by Article 35 para (1) and (2) of this Charter, it is recognized that "everyone has the right to a favorable environment", and also "the right to timely and complete information about the state of the environment and natural resources". More than that, Article 35 para (3) established that "no one may, in exercising her rights, endanger or cause damage to the environment, natural resources, the wealth of natural species, or cultural monuments beyond the extent set by a law". In fact, the Czech legislator considers that this right is not limited to being constituted as an act of constitutional value, any person being entitled, to the same degree, to be informed in a timely and complete manner not only about the state of the environment but and natural resources. The Bulgarian Constitution[46] contains similar regulations in the respect that it recognizes by art. 55 that "everyone shall have the right to a healthy and favorable environment corresponding to established standards and norms". Also, the Bulgarian constitutional legislator also appreciates that everyone has an obligation to protect the environment, as the Czech legislator in essence appreciates in par. (3) of art. 35. However, if we carefully observe the obligation laid down in that article, the Czech legislator extends the boundaries of that obligation, considering that this negative obligation not to endanger or harm any person concerns not only the environment, but also cultural monuments. Besides, in its preamble, the Constitution of Poland[47] states that the Polish nation adopts this constitution by „[o]bliged to bequeath to future generations all that is valuable from our over one thousand years' heritage". The Constitution of Slovakia[48] also stated, in the preamble, that the adoption of this constitution is also envisaged by the „[e]ndeavoring to implement democratic forms of government, guarantee a life of freedom, and promote spiritual, cultural and economic prosperity". Moreover, the same constitution regulates „the right to protect the environment and cultural heritage", through art. 44 and 45, the Slovak constituent legislator appreciating not only that „every person shall have the right to favorable environment", but also „the right to full and timely information on the environmental situation, and reasons and consequences thereof", and also that „every person shall have a duty to protect and improve the environment and foster cultural heritage", even that „no person shall imperil or damage the environment, natural wealth and cultural heritage beyond the limits set by law". And the Constitution of Hungary[49], speaking about the constitutional foundations, states in article P para (1) that the „natural resources, in particular arable land, forests and the reserves of water, biodiversity, in particular native plant and animal species, as well as cultural assets shall form the common heritage of the nation". The Slovenian

[39] Ş. Deaconu, *Drept constituţional*, „*Constitutional Law*", C. H. Beck Publishing House, Bucharest, 2011, p. 261
[40] I. Muraru, E.S. Tănăsescu, coordinators, *op. cit.*, p.326
[41] Ibidem
[42] Ibidem
[43] I. Muraru, E.S. Tănăsescu, coordinators, *op. cit.*, p.328
[44] D. Shelton, *op. cit*., p. 22
[45] Charter of Fundamental Rights and Freedoms, Resolution of the Presidium of the Czech National Council of 16 December 1992 on the declaration of the Charter of Fundamental Rights and Freedoms as a part of the constitutional order of the Czech Republic Constitutional act No. 2/1993 Coll. as amended by constitutional act No. 162/1998 Coll. This Charter is available at: https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/Listina_English_version.pdf, accessed on: 08.03.2018.
[46] This Constitution is available at: https://www.constituteproject.org/constitution/Bulgaria_2015?lang=en, accessed on: 08.03.2018.
[47] This Constitution is available at: https://www.constituteproject.org/constitution/Poland_2009?lang=en, accessed on: 08.03.2018
[48] This Constitution is available at: https://www.constituteproject.org/constitution/Slovakia_2014?lang=en, accessed on: 08.03.2018
[49] This Constitution is available at: https://www.constituteproject.org/constitution/Hungary_2016?lang=en, accessed on: 08.03.2018

constituent legislator[50] also acknowledges, by Article 72 para (1) that, „everyone has the right in accordance with the law to a healthy living environment", but, by Article 73, settles that „everyone is obliged in accordance with the law to protect natural sites of special interest, rarities and cultural monuments". It is, therefore, that some of the fundamental laws speak of the components of the environment as the constitutive elements of the nation patrimony of a state, to the future generations must be transmitted, in its entirety and in no way, the environment of which we (still) rejoice. In this context, we appreciate that even more substantiated and justified the inclusion in a fundamental law „[t]he obligation of the State and everyone to protect and maintain them, and to preserve them for future generations"[51]. We also consider that such a fundamental duty should not only be borne by the state but by any person. For example, the Constitution of Latvia[52], by art. 115, states that only „the State shall protect the right of everyone to live in a benevolent environment by providing information about environmental conditions and by promoting the preservation and improvement of the environment". In the same way are the provisions of art. 54 para (1) of the Constitution of Lithuania[53], The „State shall take care of the protection of the natural environment, wildlife and plants, individual objects of nature and areas of particular value and shall supervise a sustainable use of natural resources, their restoration and increase", but para (2) of the same article provides that „the destruction of land and the underground, the pollution of water and air, radioactive impact on the environment as well as depletion of wildlife and plants shall be prohibited by law", constitutional text which indirectly imposes such an obligation on any person. On the other hand, the Estonian Constitution[54] established, by art. 53, that „everyone has a duty to preserve the human and natural environment and to compensate for damage caused to the environment by him or her". The Constitution of Croatia[55], by art. 69, recognizing the right to a healthy life, also takes into consideration its dimension of the right to a healthy environment, but states that „the State shall ensure conditions for a healthy environment", as well as that "everyone shall be bound, within their powers and activities, to pay special attention to the protection of public health, nature and environment". Moreover, the Constitution of Romania[56], by art. 35 para (3) stipulating that the „natural and legal persons have a duty to protect and improve the environment".

3. Conclusions

From the moment that Universal Declaration of Human Rights was adopted it had to pass almost 25 years until the right to a healthy environment is recognized and regulated internationally, and then another almost 30 years have elapsed before its incorporation into constitutions becomes a practice of the states. In this respect, the doctrine has highlighted several reasons that have generated such a situation, in addition to those mentioned above, underling that the "different avenues for the integration of environmental concerns in the realization of human rights can be envisaged"[57], and one of these is regarding the necessity that "a right to environment be formally added to the catalogue of internationally guaranteed human rights"[58].

Moreover, by some of the constitutions under consideration, the legislator was concerned about the inclusion of this right in one of the consecrated classifications, such as the category of liberties and economic, social and cultural rights, where they included this Constitution of Poland or Croatia. However, the essence of the issue of the right to a healthy environment, its consecration through constitutions, the regulation of its insurance, protection or guarantee mechanisms in principle should not be reduced to the classification of this right. That is why we share the opinion that "[w]e cannot and should not attempt to categorize this new right as, either a civil and political right, or an economic, social and cultural right, or a solidarity right because it transcends the distinctions and embodies elements found in each of the three categories"[59].

"On a factual level, it has already become apparent that preservation, conservation and restoration of the environment are a necessary and integral part of the enjoyment of, inter alia, the rights to health, to food and to life including a decent quality of life"[60]. "It is by now clear that environmental protection is intrinsically related to a number of other human rights and comes out as both a precondition and an outcome of the enjoyment of many rights"[61].

[50] This Constitution is available at: https://www.constituteproject.org/constitution/Slovenia_2013?lang=en, accessed on: 08.03.2018
[51] Art. P para 1 of Hungarian Constitution.
[52] This Constitution is available at: https://www.constituteproject.org/constitution/Latvia_2016?lang=enaccessed on: 08.03.2018
[53] This Constitution is available at: https://www.constituteproject.org/constitution/Lithuania_2006?lang=en, accessed on: 08.03.2018
[54] This Constitution is available at: https://www.constituteproject.org/constitution/Estonia_2015?lang=en, accessed on: 08.03.2018
[55] This Constitution is available at: https://www.constituteproject.org/constitution/Croatia_2013?lang=en, accessed on: 08.03.2018
[56] This Constitution is available at: https://www.constituteproject.org/constitution/Romania_2003?lang=en, accessed on: 08.03.2018
[57] P. Cullet, *Definition of an environmental right in a human rights context*, published in: *13 Netherlands Quarterly of Human Rights*, 1995, p. 25, available at: http://www.ielrc.org/content/a9502.pdf., accessed on: 08.03.2018.
[58] Ibidem
[59] R. S. Pathak, The Human Rights System as a Conceptual Framework for Environmental Law, in: Brown Weiss, E. (ed.), Environmental Change and International Law - New Challenges and Dimensions, UN University Press, Tokyo 1992, pp. 205-243, quoted by P. Cullet, op. cit., pp. 27-28
[60] P. Cullet, *op. cit*., p.26
[61] P. Cullet, *op. cit*., p.27

The existence of a healthy environment or not, as the case may be, affects positively or negatively, as the case may be, their life and quality and, implicitly, the existence and exercise of other fundamental human rights, such as the right to health or the protection thereof, the right to work, economic freedom, the right to a sufficient or decent living. An appreciation of this right and, implicitly, the protection of the environment as fundamental values in society would seem more opportune, the Croatian legislator who, through art. 3 of the Constitution has appreciated that the conservation of nature and the environment, next to "[f]reedom, equal rights, national equality and equality of genders, love of peace, social justice, respect for human rights, inviolability of ownership and a democratic multiparty system" is one of the "[h]ighest values of the constitutional order of the Republic of Croatia and the ground for interpretation of the Constitution".

It is also opportune for us to appreciate the environment as an essential component of the national patrimony of any state and, why not, of the universal heritage, preserving and protecting it more necessary, more urgently, more imperative that any other component. A sufficient, but not enough, reason for any state, the preamble, and the international community, through its specific organizations and instrument, to be obliged to protect the environment, to established a legal framework in this respect, knowing that "the right to environment requires States to refrain from activities harmful to the environment, and to adopt and enforce policies promoting conservation and improvement of the quality of the environment"[62]. Moreover, this obligation must be regulated so that it rests on any individual and legal entity, for enjoying the environment is possible only if you protect and preserve it, and not just for the present, the development of any society must comply with the principles of development where the environment occupies an important place. In fact, art. 37 of the Charter of Fundamental Rights of the European Union[63], emphasizes those mentioned, specifying that "a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development".

References

- Al Gore, Un adevăr incomod, „An inconvenient truth", RAO International Publishing Company, Bucharest, 2007
- Daniela Marinescu, Tratat de dreptul mediului, "Treaty of Environmental Law", Universul Juridic Publishing House, Bucharest, 2007
- Encyclopedia Britannica, available at: https://www.britannica.com/science/environment
- The English Environment Protection Act 1990, available at: http://www.legislation.gov.uk/ukpga/1990/43/section/1
- Ben Kiromba Twinomugisha, Some reflections on judicial protection of the right to a clean and healthy environment in Uganda in Law Environment and Development Journ*al*, vol 3/3, 2007, available at http://www.lead-journal.org/content/07244.pdf
- Helena Kern, The right to a healthy Environment versus mining:An examination of federal environmental law and its failure to protect people's health in The politics of human rights in Australia. Law under the spotlight, 2015, School of Law and Justice, Southern Cross University, available at: http://docplayer.net/29001185-The-politics-of-human-rights-in-australia.html
- Dinah Shelton, Health and Human Rights Working Paper Series No 1. Human Rights, Health & Environmental Protection: Linkages in Law & Practice. A Background Paper for the World Health Organization, 2002, , available at: http://www.who.int/hhr/Series_1%20%20Sheltonpaper_rev1.pdf
- Ionel Cloșcă, Ion Suceavă, Tratat de drepturile omului, „Treaty of Human Rights", Europa Nova Publishing House, Bucharest, 1995
- Office of the High Commissioner for Human Rights Human, *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12),* adopted at the twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Contained in Document E/C.12/2000/4), available at: http://www.refworld.org/pdfid/4538838d0.pdf
- ILO Convention No. 155 Occupational Safety and Health Convention, 1981, available at: http://blue.lim.ilo.org/cariblex/pdfs/ILO_Convention_155.pdf
- Convention on the Rights of the Child, available at: http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf
- Petrică Truşcă, Andrada Truşcă Trandafir, Dreptul fundamental al omului la un mediu sănătos în jurisprudenţa CEDO (The right ro a healthy environment in the ECHR jurisprudence) in Revista Transilvană de Ştiinţe Administrative (Transylvanian Revue (Journal) of Administrative Science), no 1 (23)/2009, available at: http://www.rtsa.ro/rtsa/index.php/rtsa/article/viewFile/124/120
- Flaminia Stârc-Meclejan, Rolul creator al Curţii Europene a Drepturilor Omului privitor la dreptul mediului (The role of the European Court of Human Rights in the field of environmental law) in Analele Universităţii de Vest din Timişoara. Seria Drept. Studii, articole, comentarii. Secţiunea de drept privat

[62] P. Cullet, *op. cit*., p. 28

[63]Charter of Fundamental Rights of the European Union (2016/C 202/02) is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2016:202:FULL&from=EN, accessed on: 08.02.2018

(Annals of the West University of Timisoara. Law Series., Studies, articles, comments. Section of private law), available at: https://drept.uvt.ro/administrare/files/1481047524-lect.-univ.-dr.-flaminia-sta--rc---meclejan.pdf

- Lopez Ostra v. Spain, no 16798/90 §51, ECHR, 1994, available at: https://hudoc.echr.coe.int/eng#{"itemid":["001-57905"]}
- African (Banjul) Charter on Human and Peoples Rights available at: http://www.achpr.org/instruments/achpr/
- Mircea Duţu, *Dreptul mediului (Environmental Law)*, Economica Publishing House, Bucharest, 1996
- American Convention on Human Rights, available at: https://en.wikisource.org/wiki/American_Convention_on_Human_Rights#CHAPTER_III_-_ECONOMIC,_SOCIAL,_AND_CULTURAL_RIGHTS
- The Charter of the Organization of American States available at: http://www.globalhealthrights.org/wp-content/uploads/2013/10/Charter-of-the-Organization-of-American-States-OAS.pdf
- Rio Declaration on Environment and Development, available at: http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm
- Charter of Fundamental Rights and Freedoms in Czech Republic, available at: https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/Listina_English_version.pdf
- Constitution of Bulgaria, Poland, Slovakia, Hungary, Slovenia, Latvia, Lithuania, Estonia, Croatia, Romania, available at: https://www.constituteproject.org/constitution/search
- Philippe Cullet, Definition of an environmental right in a human rights context, published in: 13 Netherlands Quarterly of Human Rights, 1995, available at: http://www.ielrc.org/content/a9502.pdf
- Charter of Fundamental Rights of the European Union (2016/C 202/02), available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2016:202:FULL&from=EN

THE RELATIONSHIP BETWEEN EURATOM AND THE UNITED KINGDOM AFTER BREXIT

Maria-Cristina SOLACOLU[*]

Abstract

On 29 March 2017 the United Kingdom invoked Article 50 of the Treaty on European Union, triggering the process of withdrawal from the Union – the first Member State to ever do so. This historic moment also marked the beginning of negotiations, with representatives of the two entities focusing primarily on provisions related to the single market and citizens' rights. One topic that has been seldom brought up during these talks is the future of the United Kingdom in the European Atomic Energy Community (Euratom). The purpose of this paper is to determine whether a Member State's withdrawal from the European Union entails leaving Euratom and to identify some of the options the United Kingdom has with regard to either its continued membership of the latter or the forging of a new type of relationship with it. Issues of particular interest are the jurisdiction of the Court of Justice of the European Union over matters relating to nuclear research, materials and technology, the freedom of movement that is granted to nuclear specialists and the fact that Euratom and the European Union share their institutional organisation. Failure to reach an agreement on these subjects, which are likely to hinder negotiations, would have important short-term and long-term consequences that also warrant a closer examination.

Keywords: *Article 50 of the Treaty on European Union – Euratom Treaty – nuclear common market – institutional organisation – withdrawal from Euratom.*

1. Introduction

The referendum deciding the United Kingdom's withdrawal from the European Union was held on 23 June 2016, the result of numerous debates regarding British participation in the European project. Criticism was focused on the matter of immigration and on the perceived loss of national and parliamentary sovereignty[1], as a consequence of the EU's growing array of competences[2] and of the requirement to submit to the jurisdiction of the Court of Justice of the European Union.

One issue that has been rarely, if ever, brought up during the debates over the UK's departure from the EU is the state's participation in the European Atomic Energy Community (Euratom). The likely reason for this omission is the fact that there have not been any serious complaints regarding membership of the organisation. On the contrary, the UK has been an active participant on the nuclear common market and has greatly benefited from it. In spite of this, when discussing plans for the UK's the departure from the EU, British authorities failed to take into consideration Brexit's consequences for the national nuclear industry.

On 29 March 2017 the United Kingdom invoked Article 50 of the Treaty on European Union, triggering the process of the state's withdrawal from the EU. The same letter also mentioned the decision to leave Euratom, with British officials considering that this was a legal necessity, due to the fact that the Treaties of the two organisations are "uniquely legally joined"[3]. The intention to depart from the EU (but not the specific motives behind it) had been previously stated in the Explanatory Notes for the European Union (Notification of Withdrawal) Act 2017[4]. The Notes mention that the power – provided by the Act – to notify the UK's intention of withdrawing from the EU includes the European Atomic Energy Community[5].

Criticism regarding the lack of foresight in respect to the potential departure of a Member State from Euratom can also be aimed at the organisations' authorities: the provisions regarding the withdrawal process are common to the EU and Euratom and they

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[1] The matter of sovereignty was one of several subjects discussed during the negotiations that took place between the EU and British officials prior to the Brexit referendum, with the final deal including several concessions for the UK in that regard. See Michael Gordon, "The UK's Sovereignty Situation: Brexit, Bewilderment and Beyond…", *King's Law Journal*, 2016, https://doi.org/10.1080/09615768.2016.1250465 (accessed on 10 March 2018).

[2] It has been pointed out that, far from the EU overextending itself, any development in its powers and competences is the result of decisions made by the Member States, after significant consideration and in accordance with the procedures regulated by the Treaties. See Paul Craig, "Brexit: A Drama in Six Acts", *European Law Review*, August 2016, Sweet & Maxwell, Oxford Legal Studies Research Paper No. 45/2016. Available at SSRN: https://ssrn.com/abstract=2807975.

[3] HM Government, Department for Exiting the European Union, Nuclear materials and safeguards issues - position paper, 13 July 2017, https://www.gov.uk/government/publications/nuclear-materials-and-safeguards-issues-position-paper, accessed on 10 March 2018.

[4] Available at http://www.legislation.gov.uk/ukpga/2017/9/contents. Article 1 paragraph (1) states that "The Prime Minister may notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU."

[5] Available at http://www.legislation.gov.uk/ukpga/2017/9/notes/division/1/index.htm. It is specified that "The power that is provided by section 1(1) [of the Act] applies to withdrawal from the EU. This includes the European Atomic Energy Community ('Euratom'), as the European Union (Amendment) Act 2008 sets out that the term "EU" includes (as the context permits or requires) Euratom (section 3(2))".

are sparse and general. Considering the importance of matters relating to nuclear energy, a more thorough legislation should be enacted by the competent EU institutions, in order to fill this legislative vacuum. The oversight has led to the current predicament: as the UK embarks on the (rather uncertain) process of withdrawal from the EU, its course of action with regard to Euratom is even more unclear.

It is essential to identify both the consequences of the UK's departure from Euratom and the options that the British state has at its disposal, starting from the limited dispositions contained in the Treaty establishing the European Atomic Energy Community, the Treaty on European Union (TEU) and the Treaty on the Funtioning of the European Union (TFEU). By stimulating academic discourse on this subject, new solutions could be provided, that could later on become legislation and be implemented by the competent authorities.

2. Euratom and the United Kingdom – past, present and future

The establishment of the European Coal and Steel Community was only the first step in the process of integration between its founding members[6]. In 1957, in Rome, the same six states decided, based on an economic impetus and less of a political one[7], to establish two more regional organisations, following the ECSC model: the European Economic Community and the European Atomic Energy Community[8].

It is important to note that, since the moment of their founding, the two Communities were legally distinct organisations, despite being interlinked and having the same membership. At first, the institutional systems of the EEC and Euratom were also separate, but, for practical and budgetary purposes, they were merged later on, leading to the current situation – two organisations, each with its own legal personality, run by the same authorities, with the same membership[9]. The UK's withdrawal decision has made it apparent that this model of functioning creates difficulties for any state that would be interested in being part of one organisation, but not the other.

While the primary objective behind the creation of the EEC was to establish a common market, Euratom's goal was to ensure the peaceful handling of matters related to atomic energy[10], a preoccupation amplified by the establishment of the first civilian nuclear reactors, whose functioning would need both materials of a sensitive nature and specialists competent to work with them. It has also been noted that, at the time of Euratom's founding, there was a particular interest in placing German nuclear industry under supranational control[11].

At present, the Euratom Treaty continues to regulate a common market where the free movement of goods, people, capital and services is applied to a specific domain: that of nuclear energy, which necessitates a very thorough legislation in order to ensure the safety of all participants. For this reason, Euratom established a set of standards that govern the safety of transportation of nuclear goods and of research[12].

One of the most important projects currently run under the guidance of Euratom is the International Thermonuclear Experimental Reactor (ITER), in Southern France, which is the result of a 35-year collaboration between the Member States of the EU (the organisation is a founding member and provides approximately 50% of the funding), China, India, Japan, Korea, Russia and the USA. If successful, ITER (currently the largest nuclear fusion reactor in the world) could provide a solution for limitless and non-polluting atomic power[13]. This project could suffer serious disruptions if its members are not prepared for the consequences of the UK's departure from Euratom and the EU.

2.1. Accession of the United Kingdom to Euratom

The UK refused to participate in the founding of Euratom and the EEC, withdrawing from the negotiations held at Val-Duchesse, in 1956, regarding the establishment of the two Communities[14]. The UK's reticence to participate in the European project was based on several reasons: the fact that the British prioritised their relationship with the Commonwealth over that with European states; the UK's preference for a cooperation system, as opposed to an integration, supranational one; British interest for the creation of a free trade area, and not an economic organisation concentrated on the elaboration of sectoral policies[15]. The UK was also wary of ceding part of its sovereignty and competences to a supranational entity, whose authority and legal jurisdiction it would have to respect. Some of these complaints were again brought up during

[6] Belgium, France, Germany, Italy, Luxembourg and the Netherlands.

[7] Paul Craig, Gráinne de Búrca, *EU Law: Text, Cases, and Materials*, Fifth Edition, Oxford University Press, New York, 2011, p. 6.

[8] The basic plan of what would later become the EEC Treaty and the Euratom Treaty was contained in the Spaak Report, published in 1956.

[9] Augustin Fuerea, *Manualul Uniunii Europene*, Sixth Edition, Universul Juridic, Bucharest, 2016, pag. 25.

[10] Augustin Fuerea, *Dreptul Uniunii Europeane – principii, acțiuni, libertăți*, Universul Juridic, Bucharest, 2016, p. 16.

[11] Wolfram Kaiser, *Using Europe, Abusing the Europeans - Britain and European Integration, 1945–63*, Palgrave Macmillan, 1999, p. 96.

[12] For an example of such dispositions, see Council Directive 2011/70/EURATOM of 19 July 2011 establishing a Community framework for the responsible and safe management of spent fuel and radioactive waste.

[13] https://www.iter.org/proj/inafewlines#1, accessed on 10 March 2018.

[14] Augustin Fuerea, „BREXIT – trecut, prezent, viitor", *Curierul judiciar*, nr. 12/2016, C.H.Beck, Bucharest, p. 631.

[15] Emmanuel Mourlon-Druol, *The UK's EU vote: the 1975 precedent and today's negotiations*, Bruegel Policy Contribution, Issue 2015/08, p. 2.

the debates preceding the Brexit referendum, and influenced the outcome of the vote.

When the UK finally joined the European Communities, it committed to adhering to the Euratom Treaty's provisions, many of which are interdependent with those of the TEU and TFEU (the former EEC Treaty). As long as British membership of the organisations did not experience major setbacks, the aforementioned link was not an issue for the state. However, once the UK triggered Article 50 of the TEU, both the state and the EU were faced with an unforeseen question: what is to become of the UK's membership of the Euratom? The fact that the EU and Euratom are closely intertwined could pose a problem when attempting to continue being a members of only one of the organisations. At the same time, even if this were allowed to happen, the practicalities of it might hinder the functioning of Euratom. Additionally, many of the issues which lead to the UK deciding to leave the EU, such as the jurisdiction of the Court of Justice of the EU over the UK and the freedom of movement granted to workers (in this case, to specialist in the field of nuclear research), would still exist if it were to retain its membership of Euratom.

2.2. Relevant dispositions of the Euratom Treaty

According to the Treaty's Preamble, the Community's founders wished to "create the conditions necessary for the development of a powerful nuclear industry which will provide extensive energy resources, lead to the modernisation of technical processes and contribute, through its many other applications, to the prosperity of their peoples", "to create the conditions of safety necessary to eliminate hazards to the life and health of the public" and "to associate other countries with their work and to cooperate with international organisations concerned with the peaceful development of atomic energy".

Article 93 contains dispositions regarding the free movement of goods, prohibiting "all customs duties on imports and exports or charges having equivalent effect, and all quantitative restrictions on imports and exports" in respect of nuclear material.

Free movement of specialists is governed by Article 96: "The Member States shall abolish all restrictions based on nationality affecting the right of nationals of any Member State to take skilled employment in the field of nuclear energy, subject to the limitations resulting from the basic requirements of public policy, public security or public health" and Article 97 "No restrictions based on nationality may be applied to natural or legal persons, whether public or private, under the jurisdiction of a Member State, where they desire to participate in the construction of nuclear installations of a scientific or industrial nature in the Community".

Article 101 contains provisions regarding Euratom's external relations: "The Community may, within the limits of its powers and jurisdiction, enter into obligations by concluding agreements or contracts with a third State, an international organisation or a national of a third State", with Article 206 specifically mentioning the possibility of concluding an association agreement: "The Community may conclude with one or more States or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedures".

Article 106a lists those Articles of the TEU and TFEU that apply, accordingly, to Euratom. Among them are the Articles governing the process of joining the EU, as well as those concerning withdrawal from the organisation, dispositions concerning the institutions of the EU and matters that can be brought before the CJEU.

2.3. The current relationship between Euratom and the United Kingdom

The UK has been an active participant on the atomic energy common market and has benefited greatly from its provisions. As a consequence, there are many projects and experiments, currently being run on British territory, that depend on Euratom and the EU and that involve the participation of the other Member States and their citizens.

All eight nuclear plants in the UK are owned by a French government owned utility, EDF. A new plant is being built, under the same ownership, in Somerset, at Hinkley Point (with partial Chinese funding). Should the UK leave Euratom, the right of ownership over these facilities could become a major point of contention.

The Culham Centre for Fusion Energy, the UK's national fusion research laboratory, located in Oxfordshire, is partially funded by the EU and employs EU nationals[16]. This laboratory is currently the site of the Joint European Torus, the world's largest operational magnetic confinement plasma physics experiment and the only operational fusion experiment capable of producing fusion energy[17].

Another issue that will need careful reviewing is the fact that the UK houses the world's largest civil plutonium stockpile, at Sellafield[18], in Cumbria, the largest nuclear facility in Europe, owned by the Nuclear Decommissioning Authority (NDA)[19]. The site has

[16] UK Atomic Energy Authority, *Mission and Goals 2017/18*, p. 3, http://www.ccfe.ac.uk/assets/documents/ukaea_missiongoals17-18.pdf, accessed on 10 March 2018.

[17] For more, see https://www.euro-fusion.org/JET/.

[18] The world's first commercial nuclear power station was developed there.

[19] The NDA is a non-departmental public body created through the Energy Act 2004, that reports to the Department for Business, Energy and Industrial Strategy. Among its objectives are ensuring that all waste products, both radioactive and non-radioactive, are safely managed

been operational since the 1940s, with the UK beginning to amass plutonium in the 1950s, fearing the potential running out of its uranium supplies. This did not come about, leaving the UK with the responsibility of storing immense amounts of plutonium, a task that poses numerous cost, security and safety challenges[20]. As long as the state has been a member of Euratom, the Community's civil safeguards have applied, with funding being provided from its resources.

Should the UK leave Euratom, both the procedures and the costs of running Sellafield would have to be reconsidered and could pose serious safety issues for both the host state and for the rest of Europe. According to Euratom provisions, the forms of uranium and plutonium that are used in nuclear fuels and some of the resulting waste belong to the Community[21]. Consequently, should a decision be made to move the Sellafield stockpile to a different state that is part of Euratom, a new issue would arise: the transfer of reprocessed nuclear fuel is governed by legislation that will no longer apply to the UK after it leaves the Community. On the other hand, if Euratom and the UK reach an agreement to transfer ownership of the stockpile to the state, the UK will find itself with increased responsibilities and costs.

2.4. Consequences of leaving Euratom

Withdrawing from Euratom could have serious consequences in several key areas, ranging from the UK's supply of nuclear materials to its opportunities for research and development.

In recent years, approximately 20% of the UK's energy supply came from nuclear power[22], which uses nuclear fuel – that the UK does not produce nationally. Instead, it relies on external sources, and leaving Euratom would hinder the import of such materials and would affect the long-term supply of nuclear fuel.

Another consequence of leaving Euratom would be the interruption to the supply of medical isotopes, which are used in nuclear medicine, especially for the running of medical tests and cancer treatments. Similarly to the case of nuclear fuel, the UK also lacks the necessary reactors for the production of this type of isotopes, importing them instead from Belgium, France and the Netherlands[23].

The British Nuclear Medicine Society has investigated potential sources for medical isotopes in the UK and reached the conclusion that leaving Euratom would have a strong impact on their supply and cost. Difficulties could also arise for patients who travel between Northern Ireland and the republic of Ireland in order to receive radioisotopes for diagnosis or therapy, as leaving the EU and Euratom would mean creating a border between the two, and undergoing the corresponding formalities would create delays and supplementary costs that could have very serious repercussions for the patients' health[24].

Following their departure from Euratom, it is also possible that the British will see their role in nuclear power research diminished. This is an area of particular interest to Euratom, and, by withdrawing from it, the UK would lose vital access to research funds, facilities and experts.

It should also be mentioned that Euratom reports to the International Atomic Energy Agency. If the UK left Euratom, it would need to reach a new agreement with the IAEA.

In May 2017, the UK Parliament's Business, Energy and Industrial Strategy Committee issued a report[25] regarding the consequences, in respect of energy and climate change policy, of leaving the EU and Euratom. The Committee echoed the concern of the nuclear industry that "new arrangements for regulating nuclear trade and activity could take longer than two years to set up" (the allotted time according to Article 50 of the TEU) and warned that "any interval between the UK leaving the European Atomic Energy Community (Euratom) and entering into secure alternative arrangements would severely inhibit nuclear trade and research and threaten power supplies". The Committee recommended that the British Government seek to "delay exit from Euratom, if necessary, to be certain that new arrangements can be in place on our departure from the EU".

2.5. Future possibilities and obstacles

Several solutions have been proposed, both by representatives of the British nuclear industry and by politicians, officials and legal experts. Some of these proposals are more feasible than others, but authorities have yet to decide upon one of them.

The option that would allow the UK to keep its current legislation and standards concerning the nuclear

and implementing policy on the long-term management of nuclear waste. For more, see https://www.gov.uk/government/organisations/nuclear-decommissioning-authority/about.

[20] Houses of Parliament, Parliamentary Office of Science & Technology, *Managing the UK Plutonium Stockpile*, POSTnote nr. 540, September 2016.

[21] Article 86 of the Euratom Treaty: "Special fissile materials shall be the property of the Community. The Community's right of ownership shall extend to all special fissile materials which are produced or imported by a Member State, a person or an undertaking and are subject to the safeguards provided for in Chapter 7".

[22] National Audit Office, The Department of Energy & Climate Change, *Nuclear power in the UK*, 13 July 2016, https://www.nao.org.uk/report/nuclear-power-in-the-uk/, accessed on 10 March 2018.

[23] https://www.instituteforgovernment.org.uk/explainers/euratom, accessed on 10 March 2018.

[24] Press Statement on Euratom and supply of medical isotopes following Brexit from the British Nuclear Medicine Society, supported by the Royal College of Radiologists and Royal College of Physicians, https://www.bnms.org.uk/news/press-release-british-nuclear-medicine-society-statement-on-leaving-euratom.html, accessed on 10 March 2018.

[25] Available at https://publications.parliament.uk/pa/cm201617/cmselect/cmbeis/909/90902.htm, accessed on 10 March 2018.

industry would be that of reversing Brexit with regard to Euratom.

Several issues arise when considering this course of action: once the notification letter has been sent, triggering the withdrawal process, can it be revoked? If the answer is yes, the next point to consider is whether EU would have to consent to such a measure. Furthermore, the practicalities of being a member of Euratom, but not of the EU, would have to be taken into consideration. It is debatable whether the two organisations, albeit legally distinct, can operate separately and have different membership.

According to Article 50 paragraph (3) of the TEU, there are two possible moments when the Treaties cease to apply: either the date of entry into force of the withdrawal agreement or, in the absence of such an agreement, two years after the letter of notification has been sent (unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period). Consequently, before the two year period expires, it should be possible for the Member State to rethink its position. This interpretation of the dispositions would also benefit the EU (and Euratom, respectively), considering the fact that a Member State choosing to stay in the organisation would be to its advantage[26].

Article 106a of the Euratom Treaty mentions that Article 50 of the TEU "shall apply to [the Euratom Treaty]". If we were to interpret this disposition as meaning that invoking Article 50 automatically triggers the process of leaving both organisations, the possibility of withdrawing the letter of notification would mean renouncing the process of leaving both the EU and Euratom, something that the UK has yet to decide it wants.

If we were to interpret Article 106a of the Euratom Treaty as meaning that the withdrawal process itself is similar for both organisations, but that the triggering of it can regard only one, several other issues arise. One such problem is whether the letter of notification can be partially amended - can the UK change its mind regarding Euratom, but maintain its position concerning the EU?

If the answer is yes, the next problem to work out is whether the EU's consent is mandatory in such a situation. If the answer to the question of partial amendment is negative, a possible solution would be to revoke the letter in its entirety, and issue a new one, that would only mention leaving the EU. However, such a move would necessarily involve the consent of the EU.

Even if the UK were to amend its notification letter and the EU to accept such a measure, one major impediment would remain: the UK would still have to respect the EU institutions' authority in matters regarding the common nuclear market and would have to submit to the jurisdiction of the Court of Justice of the European Union. The state would also have to recognise the freedom of movement of nuclear experts who would be interested in working in the UK, for EU-funded reactors and plants. Considering that the CJEU's jurisdiction and the free movement of people have been major points of contention prior to the Brexit referendum, any solution involving their continuation would likely be opposed.

If the UK were to remain a full member of Euratom, several legal and practical complications would arise. The British authorities would have to ensure that all existing EU instruments relating to Euratom remain in force in the UK. The state would also have to continue incorporating in its national law any future regulations or directives relating to Euratom, despite the fact that British involvement in preparing and negotiating such regulations and directives would be limited as a consequence of no longer being represented in the legislative and executive institutions of the EU.

One option that has been repeatedly brought up, with regard to the nature of the future relationship between Euratom and the UK, is that of an "associate membership" of Euratom, with Switzerland being mentioned as an example of the type of rapport that could be established after Brexit. However, all states that enjoy full benefits with regards to funding and access must submit to the jurisdiction of the CJEU in matters relating to the nuclear industry[27]. Once again, the reluctance of the UK to submit itself to the authority of the EU's judicial institution proves to be an impediment.

Furthermore, Switzerland is an associated country (not an "associated member") of Euratom and, even so, it must respect the CJEU's jurisdiction and the dispositions regarding the free movement of nuclear scientists[28]. The two operate under a formal cooperation agreement[29] that centres on thermonuclear fusion and plasma physics. This agreement does not fulfil the role of an associate membership and does not make Switzerland an "associated state" of Euratom.

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[26] For this opinion, see Paul Craig, "Brexit: A Drama in Six Acts", *European Law Review*, August 2016, Sweet & Maxwell, Oxford Legal Studies Research Paper No. 45/2016.

[27] David Phinnemore, "There's no such thing as 'associate membership' of Euratom", *LSE EUROPP Blog*, 18 July 2017, http://blogs.lse.ac.uk/europpblog/2017/07/18/no-such-thing-as-associate-membership-euratom/, accessed on 10 March 2018.

[28] Switzerland participates in several Horizon 2020 research programmes and was temporarily suspended from some of them as a consequence of introducing immigration quotas in 2014.

[29] Agreement for scientific and technological cooperation between the European Union and European Atomic Energy Community and the Swiss Confederation associating the Swiss Confederation to Horizon 2020 — the Framework Programme for Research and Innovation and the Research and Training Programme of the European Atomic Energy Community complementing Horizon 2020, and regulating the Swiss Confederation's participation in the ITER activities carried out by Fusion for Energy, published in the Official Journal of the European Union, L 370, 30 December 2014.

Ukraine also cooperates with Euratom on the basis of an association agreement[30], and the rapport between the two does not entail free movement of nuclear scientists, with the disputes being settled by Ukrainian courts of justice. This model of cooperation would be closer, in terms of obligations for the state, to what the UK wants from a future relationship with Euratom, but it also provides fewer advantages.

Euratom also has less onerous cooperation agreements with other countries such as the USA, Australia, South Korea, Canada, Japan. These third-party countries help fund projects such as the previously mentioned International Thermonuclear Experimental Reactor, which is run by Euratom. But resorting to such an agreement could cause difficulties, considering the UK is extremely integrated into the EU's nuclear energy market.

Another option that the UK has at its disposal, that would be the most difficult to enact, is to become completely independent from Euratom and the common nuclear market and to create its own national legislation regarding nuclear industry and research. To that purpose, the British Parliament has drawn up a Nuclear Safeguards Bill, that will offer an expanded role to the Office for Nuclear Regulation, the UK's national nuclear regulator, which will assume several new responsibilities once the UK exits Euratom. The Bill aims to maintain existing standards in the matter of safeguards.

3. Conclusions

The necessity for a well regulated relationship between Euratom and the UK is obvious when considering the advancement and wellbeing of both entities. The legal nature of said relationship remains uncertain, and is bound to depend as much on political factors, as it is on economical, legal and scientific ones. While membership of Euratom is intrinsically linked to that of the EU, in order to maintain even a more casual bond, similar to that of third-party states, into the future, the United Kingdom would have to accept ceding at least a modicum of sovereignty to the organisation and its institutions. It remains to be seen whether the UK will be willing to compromise on issues such as the freedom of movement of nuclear specialists and the jurisdiction of the CJEU over matters relating to the nuclear common market in order to enjoy the many benefits that come with being a participant in an international project of such magnitude.

Two years could prove insufficient, for a state who has been deeply involved and active on the common nuclear market, as is the case of the UK, to create a national regulation system and to establish independent agreements with third countries that it had been previously interacting with through Euratom. Failure to accomplish these goals could negatively affect not only the departing country itself, but all other Member States of Euratom as well, due to the fact that most projects run by the Community involve several participants, through funding, specialised workers and various other types of contributions. Moreover, a potential breach in safety regulations could cause extremely serious effects which could be felt all across Europe.

Bearing in mind the complex nature of this domain, it is surprising to note the current lack of a comprehensive strategy prepared for enforcement in case of departure of a Member State from Euratom. As a consequence of drawing attention to this oversight, discussions could be stimulated concerning the process and consequences of leaving the Community, with the objective to indentify more solutions.

In the future, thoroughly regulating the process of withdrawal from Euratom – and from the EU – should be a priority, in order to avoid a repetition of the current state of uncertainty. Particular attention should be paid to safety guidelines, ensuring the existence of a supply of time-sensitive medical resources, protecting the rights of EU citizens involved in Euratom projects and clarifying the situation of property rights over facilities and resources housed by the withdrawing state.

References

- Craig, Paul, "Brexit: A Drama in Six Acts", *European Law Review*, August 2016, Sweet & Maxwell, Oxford Legal Studies Research Paper No. 45/2016
- Craig, Paul; de Búrca, Gráinne, *EU Law: Text, Cases, and Materials*, Fifth Edition, Oxford University Press, New York, 2011
- Fuerea, Augustin, „BREXIT – trecut, prezent, viitor", *Curierul judiciar*, nr. 12/2016, C.H.Beck, Bucharest
- Fuerea, Augustin, Dreptul Uniunii Europene. Principii, acțiuni, libertăți, Universul Juridic, Bucharest, 2016
- Fuerea, Augustin, *Manualul Uniunii Europene*, Sixth Edition, Universul Juridic, Bucharest, 2016
- Gordon, Michael, "The UK's Sovereignty Situation: Brexit, Bewilderment and Beyond…", *King's Law Journal*, Volume 27, 2016, https://doi.org/10.1080/09615768.2016.1250465 (accessed on 10.03.2018)
- Kaiser, Wolfram, Using Europe, Abusing the Europeans - Britain and European Integration, 1945–63, Palgrave Macmillan, 1999
- Mourlon-Druol, Emmanuel, *The UK's EU vote: the 1975 precedent and today's negotiations*, Bruegel Policy Contribution, Issue 2015/08

[30] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, published in the Official Journal of the European Union, L 161, 29 May 2014.

- Phinnemore, David, "There's no such thing as 'associate membership' of Euratom", *LSE EUROPP Blog*, 18 July 2017, http://blogs.lse.ac.uk/europpblog/2017/07/18/no-such-thing-as-associate-membership-euratom/, accessed on 10 March 2018
- The European Union (Notification of Withdrawal) Act 2017 and its Explanatory Notes, available at http://www.legislation.gov.uk/ukpga/2017/9/contents, accessed on 10 March 2018, and Explanatory Notes, available at http://www.legislation.gov.uk/ukpga/2017/9/notes/division/1/index.htm, accessed on 10 March 2018
- Houses of Parliament, Parliamentary Office of Science & Technology, *Managing the UK Plutonium Stockpile*, POSTnote nr. 540, September 2016
- National Audit Office, The Department of Energy & Climate Change, *Nuclear power in the UK*, 13 July 2016, https://www.nao.org.uk/report/nuclear-power-in-the-uk/, accessed on 10 March 2018
- Press Statement on Euratom and supply of medical isotopes following Brexit from the British Nuclear Medicine Society, supported by the Royal College of Radiologists and Royal College of Physicians, https://www.bnms.org.uk/news/press-release-british-nuclear-medicine-society-statement-on-leaving-euratom.html, accessed on 10 March 2018
- Report of Business, Energy and Industrial Strategy Committee of the UK Parliament, available at https://publications.parliament.uk/pa/cm201617/cmselect/cmbeis/909/90902.htm, accessed on 10 March 2018
- HM Government, Department for Exiting the European Union, Nuclear materials and safeguards issues - position paper, 13 July 2017, https://www.gov.uk/government/publications/nuclear-materials-and-safeguards-issues-position-paper, accessed on 10 March 2018
- UK Atomic Energy Authority, *Mission and Goals 2017/18*, available at http://www.ccfe.ac.uk/assets/documents/ukaea_missiongoals17-18.pdf, accessed on 10 March 2018
- https://www.instituteforgovernment.org.uk/explainers/euratom, accessed on 10 March 2018
- https://www.euro-fusion.org/JET/, accessed on 10 March 2018
- https://www.iter.org/proj/inafewlines#1, accessed on 10 March 2018

SHAPING EU LAW THROUGH THE PRELIMINARY RULING PROCEDURE - THE UNITED KINGDOM'S CONTRIBUTION

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Abstract

Now that Article 50 of the Treaty on European Union has been triggered and negotiations regarding the withdrawal of the United Kingdom from the European Union are underway, the state's departure from the Union is becoming a reality. However, even if this process is finalised, it is important to draw attention to the fact that the United Kingdom's past contribution to the European project remains crucial and will maintain its relevancy in the future. The preliminary ruling procedure has been an invaluable tool for shaping and developing EU law, and the United Kingdom's withdrawal does not render void any of the rulings pronounced by the Court of Justice in answer to questions referred by British courts, rulings that have had a direct influence over the internal law of all Member States. In consideration of the essential role of the preliminary ruling procedure, this paper will present several instances where the judicial authority of the European Union was called upon to offer an interpretation on the compatibility of the United Kingdom's legislation with EU law and, by answering the questions referred by the British courts, established a binding precedent for the national courts of all Member States and furthered the process of judicial integration.

Keywords: *judicial integration – national court – preliminary ruling – withdrawal from the European Union – binding precedent.*

1. Introduction

The preliminary ruling procedure, currently contained in Article 267 of the Treaty on the Functioning of the European Union, has played a pivotal role in shaping EU law and furthering the process of integration between Member States of the Union. Upon being confronted with a disposition of EU law whose meaning is unclear, the national court can bring the matter to the attention of the Court of Justice of the European Union, who is competent to offer a legally binding interpretation of that disposition[1]. This procedure has been called the "jewel in the Crown" of the CJEU's jurisdiction[2] and has been essential in redefining the relationship between the national and EU legal systems. At first, this rapport was an horizontal one, with the Court in Luxembourg and the national courts being separate and equal. In time, as a consequence of the states' judicial authorities deferring numerous questions for preliminary rulings, the relationship between them and the CJEU took on a vertical aspect, with the latter holding a superior position to that of the national courts, whom it has enrolled as "enforcers and appliers of EU law"[3].

At present, the national courts are a central part of the EU judicial system, with the organisation's judicial authority occupying the highest position and the preliminary ruling procedure being the primary interface[4] between them - approximately two thirds of the cases that are brought before the CJEU concern matters of interpretation or validation of EU legislation.

The United Kingdom, albeit reticent to relinquish some of its competences to the EEC[5], as required by the participation in the European construction, became an active contributor to the development of Community (and, after the Treaty of Lisbon, EU) law once it finally became a member. At first, British courts manifested a restrictive approach to the referral process, only reaching out to the Court of Justice for particularly difficult matters regarding interpretation – a vestige, perhaps, of the UK's initial reluctance to submit itself to the jurisdiction of a supranational authority. However, as time passed and the state adapted to its new position, the British courts took the opposite stance and began referring questions for preliminary rulings whenever there was any amount of uncertainty regarding the correct interpretation of European law, to the extent that higher courts cautioned against overcrowding the CJEU with referrals where the ruling would be unlikely to have any application beyond the instant case.

It should also be mentioned that the UK has been an active intervenor in the procedure of the preliminary

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[1] Augustin Fuerea, *Dreptul Uniunii Europene. Principii, acțiuni, libertăți*, Universul Juridic, Bucharest, 2016, p. 95.

[2] Paul Craig, Gráinne de Búrca, *EU Law: Text, Cases, and Materials*, Fifth Edition, Oxford University Press, New York, 2011, p. 442.

[3] *Ibidem*, p. 443. For details about the preliminary ruling procedure and its role in creating seminal notions of EU law, see Mihaela Augustina Dumitrașcu, *Dreptul Uniunii Europene si specificitatea acestuia*, Second Edition, Universul Juridic, Bucharest, 2015.

[4] Thomas de la Mare, Catherine Donnelly, "Preliminary rulings and EU legal integration: evolution and stasis", *The Evolution of EU Law*, Second Edition, Paul Craig, Gráinne de Búrca (ed.), Oxford University Press, Oxford, 2011, p. 363.

[5] Augustin Fuerea, „BREXIT – trecut, prezent, viitor", *Curierul judiciar*, nr. 12/2016, C.H.Beck, p. 631.

ruling, "submitting observations in roughly thirty to forty cases per year from other Member States"[6].

As a consequence of the UK's traditionally involved role in the shaping of EU law through the preliminary ruling procedure, the state's withdrawal from the organisation is likely to have an impact on the future evolution of the relationship between the national and EU judicial systems. It is for this reason that particular attention should be paid to the British contribution to the development of EU law and the deepening of legal integration.

2. Preliminary rulings and their impact on national legislation

The cases presented in this section were submitted to the Court of Justice by the United Kingdom's national courts, who were in doubt over the correct interpretation and application of Community/EU law and whether British legislation was in accordance with it. The judgments pronounced in these cases had important consequences for the Member States' legislation, with a particular impact on the way that the UK's institutions (judicial or otherwise) enforced EU law. As a consequence of their ample effect on national law, these judgements also affected the way both the European Union and its judicial authority were perceived by British citizens.

2.1. The Queen v./ Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department[7]

This case was brought before the Court of Justice by a national court of the UK, in order to obtain an interpretation of certain dispositions of the Treaty establishing the European Economic Community (now TFEU) and of secondary law concerning the right of residence of a Community (now EU) citizen's spouse, when said citizen returned to his or her country of origin, also a Member State, in order to establish a residence there.

The main proceedings, during which this question was raised, regarded the fact that Secretary of State for the Home Department had decided to deport Surinder Singh, an Indian citizen, who had been married since 1982 to a British national, Rashpal Purewal. Between 1983-1985 the two worked in Germany, and then decided to return to the United Kingdom, in order to set up a business. In 1987, at the wife's request, they divorced and, consequently, the British authorities decided to shorten Surinder Singh's residence permit, refusing to grant him indefinite leave to remain in the country as the spouse of a British citizen.

The following question was raised in front of the national court: if a married woman, national of a Member State, were to exercise the right recognised to her by the Treaty and worked in another Member State, and, subsequently, returned to her Member State of origin in order to open and run a business with her husband, would the relevant Community legislation entitle her spouse (not a Community national) to enter and remain in that Member State with his wife? More clearly, would a couple in that specific situation (returning to the Member State of origin) enjoy the same benefits that would be granted to a couple, consisting of a Community citizen and a national of a third-party state, who decided to move to a different Member State?[8]

The Court's observations were that the Treaty's provisions regarding the free movement of workers aim to facilitate the pursuit of all types of economic and occupational activities, anywhere on the Community's territory, and forbid any measures that would disadvantage those citizens who want to pursue said activities in a different Member State. It is for this reason that the nationals of Member States have the explicit right to enter and reside on the territory of any other Member States in order to pursue an economic activity[9].

A citizen of a Member State could be discouraged from leaving his country of origin in order to pursue an economic activity as an employed or self-employed person on the territory of the Community if, upon returning to the state of origin, with a view to continue pursuing such activities, the conditions which would apply „were not at least equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another Member State"[10]. The Community citizen's spouse being barred from entering the state of origin and living there with him would certainly qualify as such a deterring measure.

It follows that the Member State must allow the citizen's spouse (regardless of his or her nationality) access and the right of residence on its territory, if said spouse travelled with the citizen to another Member State, so that the latter could pursue and economic activity, and then returned to the country of origin with the same purpose. The spouse, national of a third-party state, must enjoy the same rights that would be guaranteed to him or her in case the Community citizen decided to travel to another Member State[11].

This case – and its corresponding judgment – represented an important moment for the United Kingdom and caused significant ripples with regard to

[6] Thomas de la Mare, Catherine Donnelly, *op.cit.*, p. 373.

[7] Judgment of the Court of 7 July 1992, *The Queen v./ Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, C-370/90, ECLI:EU:C:1992:296.

[8] *Ibidem*, para. 9.

[9] *Ibidem*, para. 16 and 17.

[10] *Ibidem*, para. 19.

[11] *Ibidem*, para. 21 and 23.

British legislation concerning immigration for those individuals married to UK nationals who have travelled and pursued economic activities in other Member States.

At present, nationals of a third-party state can apply for an European Economic Area[12] permit in the UK if they fulfil the following requirements: they have lived in another Member State alongside a family member who is a British national; the two have genuinely[13] lived in that state; the British family member has the right to permanent residence in the other state or, as long as he lived there, was working, self-employed, studying or had the necessary means to be self-sufficient. If the British national has been back in the UK for more than three months, at the time of the application, it must be proven that he finds himself in one of the mentioned situations (is pursuing an economic activity, studying or is self-sufficient) in order for the spouse, citizen of a third-party state, to be able to obtain the residence permit.

The notion of British „family member" covers the spouse or partner; parents and grandparents (and their spouses or partners), if the national of third-party state is younger than 21 years old or is dependent on them; children and grandchildren (and their spouses or partners), if the person applying for a permit is dependent on them[14].

On occasion, this judgment has been criticised, in the UK, for creating a way to elude British legislation regarding the right of entry and residence for citizens from third-party states, an accusation which has contributed to the public perception that the EU and its judicial authority overextend themselves and interfere in the Member States' immigration policies.

2.2. Dr. Pamela Mary Enderby v./ Frenchay Health Authority and Secretary of State for Health[15]

Through the judgment pronounced in this case, the Court of Justice reaffirmed the principle of equal pay for men and women, transferring the burden of proof from the worker to the employer in those cases where there are sufficient grounds to suspect the existence of discriminatory practices based on the sex of the workers.

The appellant in the main proceedings was a female therapist, Dr. Pamela Enderby, employed by the Frenchay Health Authority. She stated that the members of her profession, predominantly women, were considerably underpaid in comparison to other similar professions, where most employees were men. As an example, the appellant, whose annual pay was 10.106UKL despite having a level of seniority in the National Health System, presented the case of a clinical psychologist, payed 12.527UKL per year, and that of a principal pharmacist, payed 14.106UKL for the same amount of time

Dr. Enderby's claim was dismissed by the national Employment Tribunal, who considered that, following separate collective negotiations and considering the difficulty in filling the positions of clinical psychologist and pharmacist, it was justified for these differences in pay to exist and that they were not discriminatory in nature. This decision was brought in front of the Court of Appeal, who referred several questions to the Court of Justice in order to establish whether the principle of equal pay for men and women requires that the employer be the one responsible for proving the absence of sex-based discrimination when the remuneration awarded for a job carried out almost exclusively by women is lower than that awarded for a job of equal value, carried out predominantly by men[16].

The Court in Luxembourg was keen to mention that the Treaty provides a framework for the close cooperation between itself and the national courts, „based on a division of responsibilities between them". The Court considered that, according to said division, it is strictly the duty of the national court before which the main proceedings take place (and who „must assume the responsibility for the subsequent judicial decision") to determine, taking into account the particularities of each case, both the need for a preliminary ruling from the Court of Justice and the pertinence of it with regard to the main dispute[17]. Therefore when the Court in Luxembourg receives a request for a preliminary ruling that is not evidently irrelevant to the case, it must respond and is not held to appraise the validity of the hypothesis, which is verified, if necessary, by the national court.

With regard to the existence of sex-based discrimination, the burden of proof normally lies with the worker who, considering himself to be the victim of such discrimination, brings legal action against his employer and, consequently, must support his claim. However, the burden of proof could shift when necessary in order "to avoid depriving workers who appear to be the victims of discrimination of any effective means of enforcing the principle of equal pay"[18].

Consequently, when relevant (in the national court's opinion) statistics indicate the existence of a

[12] The Agreement on the European Economic Area, which entered into force on 1 January 1994, created an „Internal Market" which reunites the Member States of the European Union with three members of the European Free Trade Association – Iceland, Liechtenstein and Norway.

[13] In order to verify this fact, the applicant and the British family member must prove that they lived together in the other Member State for a considerable amount of time and that they integrated there.

[14] The requirements for a residence permit can be found on the official website of the United Kingdom's Government, https://www.gov.uk/family-permit/surinder-singh, accessed on 10 March 2018.

[15] Judgment of the Court of 27 October 1993, *Dr. Pamela Mary Enderby v./ Frenchay Health Authority and Secretary of State for Health*, C-127/92, ECLI:EU:C:1993:859.

[16] *Ibidem*, para. 7.

[17] *Ibidem*, para. 10.

[18] *Ibidem*, para. 14.

considerable difference between the pay granted for services of equal value, of which one is performed almost exclusively by women and one, predominantly by men, the Treaty demands of the employer to prove the said difference is based on objective criteria that do not involve sex-based discrimination[19].

Even when the rates of pay are established following separate processes of collective bargaining for each professional group, without there being any sort of discrimination within one particular group, the employer is not always exempt from providing justifications for the discrepancy. Should the results of the negotiations lead to said groups, having the same employer and syndicate, being treated differently, the former could still be expected to prove that he doesn't disregard the Treaty when establishing the rates of pay[20].

If the employer could invoke the absence of discrimination within each process of collective bargaining in order to justify the difference in remuneration rates, he could easily elude the principle of equal pay for men and women by engaging, each time, in distinct negotiations.

It is solely for the national court (the only one competent to make findings of fact) to determine, through the application of the principle of proportionality if needed, whether and to what extent the lack of candidates for a certain job and the need to entice them by offering a higher salary constitute objective economic reasons that justify the discrepancy between the pay rates for two services, of which one is carried out almost exclusively by women, and the other, by men[21].

The Court of Justice's judgment represented a step forward for the affirmation and enforcement of the principle of equal pay by removing the possibility for the employers to evade it through the use of distinct collective bargaining processes or other such measures.

2.3. Carole Louise Webb v./ EMO Air Cargo (UK) Ltd.[22]

This case confirmed the Court of Justice's position with regard to the fact that, in case of discrimination based on the worker's pregnancy, the fact that a sick man, absent from work for a similar period of time, would have been treated the same way does not constitute a valid defence.

The appellant in the main proceedings was Carole Louise Webb, a female employee of the EMO Air Cargo (UK) Ltd., a company that employed 16 people, of which 4 worked in the import operations department. One of those 4 was a Mrs. Stewart, who became pregnant and intended to depart on maternity leave. In order to cover for her during the period of absence, the company hired Mrs. Webb, for an unlimited period, with an understanding that she would continue to work there even after Mrs. Stewart's return from her maternity leave. Two weeks after being recruited, Mrs. Webb discovered that she, too, was pregnant and was going to give birth around the same time as Mrs. Stewart. The employer was made aware of this fact and decided to fire Mrs. Webb, on the grounds that she would not be able to fulfil the duties she had been hired to perform, which included those that Mrs. Stewart would have normally been responsible for[23].

Mrs. Webb was of the opinion that she had been the victim of sex-based discrimination and brought legal action against her employer before the Industrial Tribunal. Her claims were rejected on the basis that "the true and main reason" she had been fired was not her sex, but the fact that, in the future, she would find herself in the impossibility of fulfilling the role she had been recruited for – specifically, covering for Mrs. Stewart during her absence on maternity leave. According to the Tribunal, if a man had been hired for the same reason and, subsequently, had notified the employer that he would be absent for a period of time similar to that applicable in Mrs. Webb's case, he would have also been fired. Furthermore, the national jurisdiction dismissed the possibility of the case being an example of indirect discrimination, as "the reasonable needs of their business required that the person recruited to cover for Mrs. Stewart during her maternity leave be available"[24]. Appeals made by Mrs. Webb were unsuccessful, but she was allowed to appeal to the House of Lords[25]. The supreme court considered that the case's "special feature" was the fact that the claimant, who had been fired because of her pregnancy, had been hired specifically to replace, at least temporarily, another female worker who was, herself, absent for the same reason.

Unsure whether the importance of the duties Mrs. Webb had been recruited for justified her firing, the supreme court of the UK decided to stay the proceedings and issue a request for a preliminary ruling[26].

The Court of Justice decided that the relevant secondary law[27] prohibits the firing of a female worker

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[19] *Ibidem*, para. 19.

[20] *Ibidem*, para. 23.

[21] *Ibidem*, para. 29.

[22] Judgment of the Court of 14 July 1994, *Carole Louise Webb v./ EMO Air Cargo (UK) Ltd.*, C-32/93, ECLI:EU:C:1994:300.

[23] *Ibidem*, para. 3 and 4.

[24] *Ibidem*, para. 11 and 12.

[25] The House of Lords (specifically the Law Lords) was the supreme court of the United Kingdom until the Constitutional Reform Act 2005, which created the Supreme Court of the United Kigndom.

[26] *Ibidem*, para. 14 and 15.

[27] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. This act was repealed by Directive 2006/54/EC of

who has been contracted for an undetermined amount of time in order to replace another employee for the duration of the latter's maternity leave and who isn't able to fulfil that role because, a short while after her recruitment, she has discovered that she is also pregnant.

Dismissing a female worker because she is pregnant constitutes direct discrimination based on sex, and the situation of a woman who, because of her gravidity, is unable to fulfil the duties she has been hired for cannot be compared to that of a man who is similarly incapable for medical or other reasons: "pregnancy is not in any way comparable with a pathological condition, and even less so with unavailability for work on non-medical grounds, both of which are situations that may justify the dismissal of a woman without discriminating on grounds of sex"[28].

Firing a pregnant woman, who has been hired for an indefinite amount of time, cannot be justified based on her inability to fulfil one of the fundamental conditions of the employment contract, even when the worker's availability is, for the employer, an essential factor for the proper functioning of the business. The reasoning behind this position is that protection granted by Community/EU law to pregnant women cannot be conditioned on whether their presence in the workplace during maternity leave is crucial for the business, any contrary interpretation rendering "ineffective the provisions of the directive"[29].

The Court's interpretation could be criticised for disproportionally affecting employers who find themselves in a situation similar to the one presented here, where a small business must continue employing two workers who are incapable to fulfil their contractual obligations, one of whom has been hired, shortly before becoming unavailable for work, specifically to carry out the tasks of the other absent employee. Moreover, this could discourage employers from hiring female workers due to a concern that they would, later on, find themselves in such a position. A possible solution would be to legislate a mandatory period of performing work duties, before an employee is allowed to take a prolonged leave of absence.

2.4. S. Coleman v./ Attridge Law and Steve Law[30]

Prior to this case, protection against direct discrimination and harassment on grounds of disability was only recognised for the disabled individuals themselves. As a consequence of the Court's ruling, the scope of the protection was extended and a new type of action was created, which can be brought before national Employment Tribunals.

The claimant in the main proceedings, Mrs. Coleman, was hired, starting with 2001, as a legal secretary. In 2002, she gave birth to a son who suffered from several congenital disorders, requiring specialized care, which was mainly provided by the mother. In 2005, Mrs. Coleman accepted to end her employment contract and entered voluntary redundancy. Shortly afterwards, she brought an action before the Employment Tribunal, London South, claiming that she had been the victim of unfair constructive dismissal and of discrimination based on the fact that her son was disabled, which forced her to stop working for her former employer. These discriminatory acts included, according to the claimant: refusal of reintegrating her on the position she had occupied prior to departing on maternity leave; refusal of allowing her the same flexibility as regarded her working hours and "the same working conditions as those of her colleagues who [were] parents of non-disabled children"; insulting the claimant when she asked to requested time off to care for her child, despite the fact that other employees had been granted that benefit; ignoring the formal complaint she made regarding these discriminatory acts; "abusive and insulting comments" targeting both her and her child, specifically because of the latter's disability; being threatened with dismissal when she was late for work "because of problems related to her son's condition", when other employees had not been reprimanded for the same situation[31].

The national court decided to stay the main proceedings concerning Mrs. Coleman's dismissal and to refer several questions for a preliminary ruling, regarding the correct interpretation of the relevant secondary law[32]. Of particular interest is the answer to the question of said legislation offering protection against discrimination and harassment for "employees who, though they are not themselves disabled, are treated less favourably or harassed on the ground of their association with a person who is disabled"[33]. The Court in Luxembourg considered that protection against discrimination as regards employment and occupation must not be limited to people who are, themselves, disabled, as the principle of equal treatment, protected through secondary law, does not apply to a particular category of persons, but according to certain reasons provided within said legislation: "Where an employer treats an employee who is not himself disabled less favourably than another employee

the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

[28] Judgment of the Court of 14 July 1994, *Carole Louise Webb v./ EMO Air Cargo (UK) Ltd.*, C-32/93, ECLI:EU:C:1994:300, para. 24 and 25. The Court of Justice had previously drawn a clear distinction between pregnancy and illness in *Hertz v./ Aldi Marked K/S*, C-179/88, ECLI:EU:C:1990:384.

[29] *Ibidem*, para. 26.

[30] Judgment of the Court of 17 July 2008, *S. Coleman v./ Attridge Law and Steve Law*, C-303/06, ECLI:EU:C:2008:415.

[31] *Ibidem*, para. 19-26.

[32] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

[33] *Ibidem*, para. 27.

is, has been or would be treated in a comparable situation, and it is established that the less favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down by Article 2(2)(a)"[34]. The same comments apply to cases of harassment, which is considered a form of discrimination and is also prohibited: "Where it is established that the unwanted conduct amounting to harassment which is suffered by an employee who is not himself disabled is related to the disability of his child, whose care is provided primarily by that employee, such conduct is contrary to the prohibition of harassment laid down by Article 2(3)"[35].

As a consequence of this ruling, employees can now invoke the protection granted by EU law against discrimination and harassment even in cases where the victim of such behaviour is targeted not for having a disability, but due to caring for or being associated with somebody who is disabled.

2.5. Williams and Others v./ British Airways plc.[36]

The impact of this case on British law has been recently amplified by several judgments given by the national courts, with great importance for the field of employment law, in particular for matters regarding working time. These judgments conformed to the CJEU's preliminary ruling, according to which employers have the obligation to include any supplementary remuneration and other elements of that nature when calculating the payments made in respect of paid annual leave.

The appellants in the main proceedings were pilots hired by British Airways. The terms of their employment contracts were the result of negotiations between British Airways and the pilots' union, the British Air Line Pilots Association[37]. According to those terms, the pilots' remuneration consisted of three elements: a fixed annual sum and two types of supplementary payments. One of them depended on the time spent flying, was fully taxable and was calculated at the rate of GBP 10 per planned flying hour. The second type of payment varied according to the time spent away from base, with a rate of GBP 2.73 per hour, and only 18% of it was taxable[38].

Among the conditions agreed upon by the pilots' union and British Airways was the provision that the payment made in respect to paid annual leave was based only on the fixed annual sum[39]. The pilots considered that, according to relevant EU legislation[40], the paid annual leave sum should be calculated based upon their entire remuneration, including the two types of supplementary payments. The Employment Tribunal and the Employment Appeal Tribunal found in favour of the appellants, but the Court of Appeal found in favour of British Airways, adopting the view that only the fixed annual sum should be considered remuneration[41]. The case was brought before the Supreme Court of the United Kingdom, who, in doubt over the meaning of "paid annual leave" and the extent to which Member States could impose "conditions for entitlement to, and granting of, such leave", decided to stay the proceedings and to refer several questions to the CJEU for a preliminary ruling.

According to the Court in Luxembourg, the article that the pilots based their claims on must be interpreted to mean that "every worker is entitled to paid annual leave of at least four weeks and that that right to paid annual leave must be regarded as a particularly important principle of Community social law"[42]. Furthermore, the right to paid annual leave is consecrated by the Charter of Fundamental Rights of the European Union, in Art. 31 par. (2). The notion of "paid annual leave" should be interpreted to mean that,, during the specified period of time, destined for rest, the workers' remuneration should be maintained at its normal level. The objective is to ensure that the workers' financial position is, during such leave, comparable to their usual one, so that quality of life is not affected during the rest period: "an allowance, the amount of which is just sufficient to ensure that there is no serious risk that the worker will not take his leave, will not satisfy the requirements of EU law". To that end, "where the remuneration received by the worker is composed of several components, the determination of that normal remuneration and, consequently, of the amount to which that worker is entitled during his annual leave requires a specific analysis"[43]. It is solely the national court's prerogative to determine which of the various elements that compose a worker's remuneration must be taken into consideration in a specific case.

Regarding the instant case, the CJEU considered that the supplementary payment corresponding to the time spent in flight should be included when calculating

[34] *Ibidem*, para. 38, 50 and 56 and operative part 1.
[35] *Ibidem*, para. 58 and operative part 2.
[36] Judgment of the Court of 15 September 2011, *Williams and Others v./ British Airways plc.*, C-155/10, ECLI:EU:C:2011:588.
[37] *Ibidem*, para. 7.
[38] *Ibidem*, para. 8.
[39] *Ibidem*, para. 10.
[40] Art. 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time; Clause 3 of the Agreement annexed to Council Directive 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation.
[41] Judgment of the Court of 15 September 2011, *Williams and Others v./ British Airways plc.*, C-155/10, ECLI:EU:C:2011:588, para. 11 and 12.
[42] *Ibidem*, para. 17.
[43] *Ibidem*, para. 19-22.

the sum corresponding to the paid annual leave[44]. Moreover, all components "which relate to the personal and professional status of an airline pilot must be maintained during that worker's paid annual leave"[45].

The Court also underlined the fact that entitlement to an annual leave and to receiving a payment for the duration of it represent two aspects of a single right. EU law does not prohibit Member States from granting workers a superior level of protection in comparison to that guaranteed by the EU, which represents a minimum standard.

In closing, the ruling provides that the dispositions which had been referred to the Court for interpretation mean "that an airline pilot is entitled, during his annual leave, not only to the maintenance of his basic salary, but also, first, to all the components intrinsically linked to the performance of the tasks which he is required to carry out under his contract of employment and in respect of which a monetary amount, included in the calculation of his total remuneration, is provided and, second, to all the elements relating to his personal and professional status as an airline pilot"[46].

3. Conclusions

The judgements we have summarily presented are just a few of those pronounced in cases that the UK has submitted to the CJEU for a preliminary ruling. The importance of national courts cooperating with the Union's jurisdiction can be seen in the effects these rulings have on internal law and on the evolution of EU legislation and integration.

The UK has a long and rich history in the EU, having played a crucial part in establishing many of its policies, even as it eschewed others it considered detrimental to British interests. As a consequence of this position toward the EU, involved and sceptical at the same time, the UK's national courts have frequently referred preliminary questions and submitted observations to the CJEU in order to ensure that they applied EU law as conveniently as possible for the state. These questions and the rulings that the Court of Justice pronounced in answer to them have been an important contribution to the continuous effort of clarifying, improving and shaping EU law.

In the future, the absence of a country preoccupied with safeguarding its national interests could actually prove disadvantageous, leading to a decrease in referred questions and observations and, consequently, of important rulings of the CJEU, that are essential in maintaining the adaptability of EU law and in furthering the integration process.

It is advisable to continue focusing on the essential relationship between the CJEU and the Members States, and encourage the latter's contribution, through the preliminary ruling procedure, to the development of EU law – by increasing the participation of each individual Member, the risk of losing important contributions and slowing the process of integration as a consequence of a state departing from the European Union is lessened.

References

- Craig, Paul; de Búrca, Gráinne (ed.), *The Evolution of EU Law*, Second Edition, Oxford University Press, Oxford, 2011
- Craig, Paul; de Búrca, Gráinne, *EU Law: Text, Cases, and Materials*, Fifth Edition, Oxford University Press, New York, 2011
- Dumitrașcu, Mihaela Augustina, *Dreptul Uniunii Europene si specificitatea acestuia*, Second Edition, Universul Juridic, Bucharest, 2015
- Fuerea, Augustin, Dreptul Uniunii Europene. Principii, acțiuni, libertăți, Universul Juridic, Bucharest, 2016
- Fuerea, Augustin, „BREXIT – trecut, prezent, viitor", *Curierul judiciar*, nr. 12/2016, C.H.Beck, Bucharest
- Hogarth, Raphael; Lloyd, Lewis, Who's afraid of the ECJ? Charting the UK's relationship with the European Court, Institute for Government, London, 2017
- Judgment of the Court of 8 November 1990, *Hertz v./ Aldi Marked K/S*, C-179/88, ECLI:EU:C:1990:384.
- Judgment of the Court of 7 July 1992, The Queen v./ Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department, C-370/90, ECLI:EU:C:1992:296
- Judgment of the Court of 27 October 1993, Dr. Pamela Mary Enderby v./ Frenchay Health Authority and Secretary of State for Health, C-127/92, ECLI:EU:C:1993:859
- Judgment of the Court of 14 July 1994, *Carole Louise Webb v./ EMO Air Cargo (UK) Ltd.*, C-32/93, ECLI:EU:C:1994:300
- Judgment of the Court of 17 July 2008, *S. Coleman v./ Attridge Law and Steve Law*, C-303/06, ECLI:EU:C:2008:415
- Judgment of the Court of 15 September 2011, *Williams and Others v./ British Airways plc.*, C-155/10, ECLI:EU:C:2011:588
- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

[44] *Ibidem*, para. 24.
[45] *Ibidem*, para. 28.
[46] *Ibidem*, para. 31 and operative part.

- Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time
- Council Directive 2000/79/EC of 27 November 2000 concerning the European Agreement on the Organisation of Working Time of Mobile Workers in Civil Aviation
- Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.
- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation
- https://www.gov.uk/family-permit/surinder-singh, accessed on 10 March 2018

LIFTING THE VEIL OF THE GDPR TO DATA SUBJECTS

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Abstract

Every natural person is entitled to personal data protection regardless of his or her nationality, residence, race, age, gender, language, religion, political and other affiliations, ethnicity, social background and status, wealth, birth, education, social position or any other personal characteristic. Europe's clock is now ticking with regards to data protection: just in a few days, on 25 May 2018, a new EU data protection framework - the Regulation (EU) 2016/6791, will apply and will be directly applicable in all the Member States. This new General Data Protection Regulation governs the processing by an individual, a company or an organisation of personal data relating to individuals in the EU. Having in view the impact this regulation has for the entire world, we consider that it should be very well analysed.

The aim of this study is to raise awareness and improve knowledge of data protection rules established by the GDPR. It is recommended for legal professionals and non-specialist legal professionals, and other persons working in the field of data protection. Additionally, this study intends to provide guidance to data subjects as for their rights under the GDPR and to give some relevant examples from our daily life in which data breaches happen.

Keywords: *data protection, data subjects, GDPR, personal, Regulation (EU) 2016/6791.*

1. About Data Protection in Europe

This study provides an overview of the GDPR applicable to data protection in relation to the data subjects' rights. Data is personal data if it relates to an *identified* or at least *identifiable* natural person. If data about such a person is being processed, this person is called the "data subject". Personal data can be contained in computer files or in paper records (*e.g.* telephone numbers, addresses, financial information, photographs, satellite images, car registrations, ID numbers, e-mail addresses, health records).

Looking into the history of individual rights, we note that a right to protection of an individual's private life against intrusion from others (especially from the state), was for the first time foreseen in an international legal instrument in Article 12 of the United Nations Universal Declaration of Human Rights of 1948 on respect for private and family life:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks[1].

This legal provision influenced the development of other human rights instruments in Europe. At the European level, there are several pieces of legislation on data protection, created by both the European Union (hereinafter the "*EU*") and the Council of Europe (hereinafter the "*CoE*"), which have been applied by the international jurisdictions through the years (the case law of the Court of Justice of the European Union and of the European Court of Human Rights are relevant).

In the present, the main important acts in Europe are:

a) at the CoE level - the European Convention for Human Rights (Article 8 – Right to respect for private and family life, home and correspondence), as well as the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108). Article 8 of the Convention recognizes the right to protection of personal data, which guarantees the right to respect for private and family life, home and correspondence, and lays down the conditions under which restrictions of this right are permitted. The Convention 108 is the only legally binding international instrument in the field of data protection.
b) at the EU level - the Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

At the EU level, both primary and secondary EU law[2] regulates the data protection field. The primary EU law comprises the treaties, namely the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU), the Charter of Fundamental Rights of the European Union. The secondary EU law comprises the regulations, directives and decisions of EU adopted by the EU institutions.

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[1] Available online at http://www.un.org/en/universal-declaration-human-rights/.
[2] For more information on sources of EU law, please see Nicolae Popa, Elena Anghel, Cornelia Ene-Dinu, Laura-Cristiana Spataru-Negura, *Teoria generala a dreptului. Caiet de seminar*, third edition, C.H. Beck Publishing House, Bucharest, 2017, p. 153.

As mentioned above, the main EU legal instrument on data protection, in force at this moment, is the Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (hereinafter the "*Data Protection Directive*")[3].

From 25 May 2018 the only binding legal instrument at the EU level shall be the General Data Protection Regulation (hereinafter the "*GDPR*") - Regulation (EU) 2016/679[4]) adopted on 27 April 2016. By this regulation, the European Parliament, the Council of the European Union, and the European Commission intend to strengthen and unify data protection for all individuals within the EU. When the GDPR shall take effect, it will replace the 1995 Data Protection Directive.

Because of the importance of the data protection field, the EU institutions have decided to adopt this piece of legislation through a regulation (instead of a directive) because unlike a directive, it does not require domestic governments to pass any enabling legislation and so it is directly binding and applicable[5].

The GDPR provides data subjects with several rights that can be enforced against undertakings that process personal data. All undertakings acting as controllers are directly affected by the rights afforded to data subjects, while the undertakings acting as processors are affected to a lesser degree.

In Article 1 paragraph (1) of the GDPR it is underlined that:

This Regulation lays down rules relating to the protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data.

According to Article 4 paragraph (1) of the GDPR, there is no need for high-quality identification of the data subject; it is sufficient that the natural person concerned be identifiable:

'[P]ersonal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

A person shall be considered identifiable if a piece of information contains elements of identification through which the person can be identified, directly or indirectly.

The data subjects have several rights under the GDPR (please see Chapter 3 of the GDPR - *Rights of the data subject*).

For instance, Article 12 of the GDPR regulates the need of "*[t]ransparent information, communication and modalities for the exercise of the rights of the data subject*". In order that the data subject understand the information provided by the controller, the latter must use "*a concise, transparent, intelligible and easily accessible form, using clear and plain language, in particular for any information addressed specifically to a child*"[6]. Additionally, the "*information shall be provided in writing, or by other means, including, where appropriate, by electronic means*"[7] or orally (when the data subject requested it specifically, provided that the identity of the data subject is proven by other means.

We consider that such information given to the data subject should not consist of privacy policies that are difficult to understand or excessively lengthy.

This communication between the controller and the data subject shall be done "*without undue delay and in any event within one month of receipt of the request*"[8]. This deadline may be extended by two further months where necessary, depending the complexity and number of the requests, but the controller shall have to inform the data subject of any such extension within one month of receipt of the request, together with the reasons for the delay.

Usually, the controller shall communicate the information free of charge (except for the cases when the requests from a data subject are manifestly unfounded or excessive, raising a problem of repetitiveness)[9]. In this kind of bad faith situations, the controller shall be able to charge a reasonable fee to the data subject (for the administrative costs incurred) or to refuse to act on the request, but the controller shall have to demonstrate the manifestly unfounded or excessive character of the request.

To limit the risk that third parties gain unlawful access to personal data, under the GDPR the controllers should require data subjects to provide proof of identity before giving effect to their rights.

According to Articles 13-15 of the GDPR, the data subject shall have the right to obtain information and access to personal data. Depending if the personal data has been or not obtained from the data subject, the legal provisions are different (Article 13 of the GDPR

[3] Available online at https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A31995L0046.

[4] Available online at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R0679.

[5] For more information on different types of EU legislation, please see Augustin Fuerea, *Dreptul Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2016, p. 45 and following; Mihaela Augustina Dumitrascu, Roxana Mariana Popescu, *Dreptul Uniunii Europene, Sinteze si aplicatii. Editia a II-a, revazuta si adaugita*, Universul Juridic Publishing House, Bucharest, 2015, p. 120 and following; Laura-Cristiana Spataru-Negura, *Dreptul Uniunii Europene – o noua tipologie juridica*, Hamangiu Publishing House, Bucharest, 2016, p. 92 and following.

[6] Please see Article 12 paragraph (1) of the GDPR.

[7] *Idem.*

[8] Please see Article 12 paragraph (2) of the GDPR.

[9] Please see Article 12 paragraph (5) of the GDPR.

when collected from the data subject and Article 14 when not been obtained from the data subject). In both cases, the controller shall provide the data subject with certain information (*e.g.* the identity and the contact details of the controller, the contact details of the data protection officer, the purposes of the processing for which the personal data are intended as well as the legal basis for the processing, the recipients or categories of recipients of the personal data, the period for which the personal data will be stored, the existence of the right to request from the controller access to and rectification or erasure of personal data or restriction of processing concerning the data subject or to object to processing as well as the right to data portability, the right to lodge a complaint with a supervisory authority), except for the case when the data subject already had the information [Article 13 paragraph (4) and Article 14 paragraph (5) letter a) of the GDPR].

According to Article 15 of the GDPR, the data subject is entitled to obtain from the controller "*confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data*" and certain information.

Section 3 of Chapter 3 of the GDPR regulates the rectification and erasure rights of the data subject. In relation to the right of rectification, the position taken through the GDPR is mostly the same as in the Data Protection Directive.

It is normal that in case of errors of personal data regarding a data subject, he or she must be entitled to obtain from the controller without undue delay the rectification of inaccurate personal data concerning him or her. Even in case of incomplete personal data, the data subject shall have the right to have complete the respective information, including by means of providing a supplementary statement.

In certain cases (*e.g.* the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed, the data subject withdraws consent on which the processing is based and where there is no other legal ground for the processing, the personal data have been unlawfully processed), the data subject shall be entitled to obtain from the controller the erasure of personal data concerning him or her, without undue delay. Therefore, the controller shall have the obligation to erase the respective personal data without undue delay. We consider that the GDPR created a broader right to erasure than the Data Protection Directive, therefore the undertakings shall face a broader spectrum of erasure requests than during the Data Protection Directive.

There are certain exceptions to this right (*e.g.* if the processing is necessary for exercising the right of freedom of expression and information, for reasons of public interest in the area of public health, for the establishment, exercise or defence of legal claims)[10].

Under Article 18 of the GDPR, the data subject shall be entitled to obtain from the controller restriction of processing in certain situations (*e.g.* the data subject contests the accuracy of the personal data enabling the controller to verify the accuracy of the personal data, the processing is unlawful and the data subject opposes the erasure of the personal data and requests the restriction of their use instead, the controller no longer needs the personal data for the purposes of the processing, but they are required by the data subject for the establishment, exercise or defence of legal claims).

In case of rectification or erasure of personal data or restriction of processing, the controller shall be held to send a notification "*to each recipient to whom the personal data have been disclosed, unless this proves impossible or involves disproportionate effort. The controller shall inform the data subject about those recipients if the data subject requests it*"[11].

The data subjects have also a new right under the GDPR - the right to data portability. This means that individuals are allowed to obtain and reuse their personal data for their own purposes across different services. This right allows them to copy or transfer personal data easily from one IT environment to another, in a safe and secure way, without hindrance to usability. For certain undertakings, this new right creates a significant additional burden, requiring substantial investment in new systems and processes, while for other undertakings creates a significant opportunity to attract customers from the competitors.

In case the data subjects are not satisfied because of the data processing, they have the right to object, at any time, to processing of personal data concerning them[12]. Controllers are obliged under the GDPR to provide additional information to data subjects regarding this right, and we consider that this will require revisions to standard data protection policies and privacy notices.

The GDPR preserves the position taken through the Data Protection Directive (with only minor amendments) regarding the right to not be evaluated based on automated processing. According to Article 22 of the GDPR, the "*data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her*". However, Article 22 paragraph (2) letter c) of the GDPR clarifies that the explicit consent of the data subject is a valid basis for evaluation based on automated profiling.

The rights enshrined in Chapter 3 of the GDPR can be subject of certain restrictions imposed by the EU or the Member States legislation, if "*such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard:*

a) national security;

[10] Please see Article 17 paragraph (3) of the GDPR.
[11] Please see Article 19 of the GDPR.
[12] Please see Article 21 of the GDPR.

b) defence;
c) public security;
d) the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security;
e) other important objectives of general public interest of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, including monetary, budgetary and taxation a matters, public health and social security;
f) the protection of judicial independence and judicial proceedings;
g) the prevention, investigation, detection and prosecution of breaches of ethics for regulated professions;
h) a monitoring, inspection or regulatory function connected, even occasionally, to the exercise of official authority in the cases referred to in points (a) to (e) and (g);
i) the protection of the data subject or the rights and freedoms of others;
j) the enforcement of civil law claims"[13].

In the next section we aim to give several examples to frame certain situations that come under the GDPR, in order to see concretely how data protection influences our lives.

2. The Impact of the GDPR on Data Subjects, Data Controllers and Data Processors. Remedies and Sanctions

2.1. Analyzing the Impact of the GDPR on Data Subjects

GDPR will completely change the interaction of data subjects with the undertakings that have access to their personal data. Through the GDPR's right to information not only will they become more aware on what personal data is, but also on how granulated and microscopic data - when correlated - can lead to big data analysis.

The information mechanisms developed by the national and European data protection authorities will play a major role in raising awareness regarding the data subject's rights under GDPR. The Article 29 Working Party has already developed a set of Guidelines regarding GDPR's main articles implementation – with respect to the data subject's right, so that GDPR compliance becomes more at ease.

GDPR compliance becomes thus, a blessing for data subjects, while for online platforms, marketers, banking and insurance institutions it becomes a real challenge.

Online platforms and mobile applications (such as LinkedIn, Facebook, Google) must adapt their policies regarding the usage and sharing of personal data, so that they become compliant with the GDPR. The mechanisms through which online platforms inform their users regarding the collection, storage, sharing and usage of their data must be changed so that the opt in to different services will no longer be automated or preselected, and will become, starting with 25 May 2018, an aware, fully responsible given consent. Thus, we will no longer witness automatical subscription to email marketing, automatic sharing of data between platforms or cross platform integrations without our given consent. We are underlining the importance of awareness related to GDPR's definition of consent, as consent can no longer be subject to interpretation – when giving consent the user must be informed on the following information: the type of data that the platform collects, how the data is being used, with whom it is shared, where it will be transferred, and, most importantly, for how long it will be retained. In their quest for GDPR compliance, platforms rush into reconstructing their pages so that the user is properly informed.

One of the largest online banking platforms – PayPal - just revealed a list of partners to which the platform might share your personal data with: a list of "just" 690 comercial partners (banks, marketers, call centers) and authorities (*e.g.* international agencies, fiscal entities) to whom PayPal might reveal some of your most important data: *e.g.* full name, banking account, business details, contact details, transactions details. Prior to 1 January 2018, the webpage did not contain any of the above-mentioned information and none of its users really knew to whom PayPal revealed the information to[14].

Besides being informed on what data will be processed and in what way, from the very moment when creating a user account on an online platform, starting with 25 May 2018, the data subjects will be able to ask data controllers access to what personal data they hold on them. We should see to what extent large social platforms (*e.g.* Facebook) will also give access on the data they historically collected before the 25 May 2018. It would be logic for the data subject to have access both to present and hystorical data, as long as the platform continues to use hystoric data.

The most recent privacy case related to Facebook dates back to February 2018, when a Belgian court threatened to fine the social giant with 250,000 euro a day or up to 100,000,000 EUR if Facebook continues to track people on third party websites and does not delete all data on Belgium citizens holding an account on the platform or not[15]. Just a short Google search using the following keywords "Facebook fined privacy", will lead to no less than 8 million results.

[13] Article 23 paragraph (1) of the GDPR.
[14] List available online at https://www.paypal.com/ie/webapps/mpp/ua/third-parties-list.
[15] Available online at https://www.reuters.com/article/us-facebook-belgium/facebook-loses-belgian-privacy-case-faces-fine-of-up-to-125-million-idUSKCN1G01LG.

In 2017, a Spanish court fined Facebook with 1,200,000 EUR after the national data protection agency proved that Facebook collected and used utilized personal data for advertising purposes[16]. The platform had been collecting data on people's sex orientation and religious beliefs both from the Facebook platform and third-party platforms, without consent.

This was one of the first times when multiple data protection agencies in Europe cooperated on an investigation against a large player on the online market. The Spanish data protection agency cooperated with the other agencies from Belgium, France, Hamburg and the Netherlands, and succeeded in proving that Facebook did not inform its users, or third party websites's users, that they were collecting data and to what extent they were using it.

The findings were surprising: user data was being collected with the help of third party cookies[17] placed on Facebook pages or third-party websites. The cookies were collecting data on the user behaviour on the internet pages on which Facebook had placed its cookies (through the *Like* button). Moreover, it further processed the special character collected data - such as religious and sexual orientation - and profiled users, so they could be targeted with marketing campaigns. At no time the users could perceive that their data was being collected, nor did they know how the social giant was going to use it – the purpose and the extent to which Facebook or its partners will use it. What seems even more tragic is that people who never intended to use a social platform such as Facebook had their personal data collected and used simply by browsing websites.

Meanwhile there are constant debates on how Facebook surprises us each time we navigate. Imagine that behind every surprise you get from Facebook there is huge amount of data the platform gathers about you. We should debate few examples here: Facebook knows when you became friends with someone and congratulates you on that, it knows when you were born so it can say happy birthday – and it shares that information with friends and even friends of friends – maybe even with its commercial friends?!

However, while most of us are aware and agree to the above, we may not agree with Facebook keeping information of a picture we took with our phone (the metadata of the picture - timestamp or location, type of camera/phone), it may store our IP address and even smarphone unique identifier, if you are using Facebook on a dayly basis the platform even knows when you wake up and you go to sleep, all based on your usage behaviour[18]. All this information mixed with artificial intelligence could lead to numerous abuse cases.

Starting with 25 May 2018, with GDPR compliance in place, people will no longer be subject to such condemnable practices, as cookies policies will no longer be tacitly accepted – the active consent becoming a must. Moreover, special data can no longer be processed without explicit consent, and some countries have even suggested banning the usage of special data.

GDPR enforces both data subjects and data protection agencies. Data protection agencies are now able to emit sanctions and fines on their own, which until now, in certain countries, was only possible with the help of the courts of law.

One of the most important missions of GDPR was to protect children data subjects and their personal data. Starting this year children data can no longer be processed without the explicit consent of an adult.

In 2016, the largest top toy companies in the United States were fined for using tracking technologies on popular children websites: Viacom had to pay 500,000 USD, Mattel 250,000 USD, JumpStart 85,000 USD[19].

A more proeminent case of 2017 just crushed parent's trust in new generation toys. Parents in Germany were advised to destroy a doll that could spy their children[20]. The name of the spying doll was Cayla and it could be accessed through the internet with the help of a voice recognition software. Moreover, the doll could be controlled with the help of an application. The Bluetooth connection to the doll proved to be so unsecure that any hacker within 15 meters could listen to what happened near the doll and directly speak to the child playing with it. The case raised a huge debate on smart toys and tracking devices related to children usage.

In 2018 some of the European countries banned the usage of smart watches by children. In Germany the above-mentioned case ended with a cooperation between the national data protection and consumer protection agencies.

Artificial intelligence related to toys connected to the internet, will be raising huge problems in the future. Imagine the power of a toy who learns how to speak while interacting with children around the world. GDPR comes just in time to assure that children are protected from abuse.

As for Romania, in May 2016, the Romanian Fiscal Authority published a list of all citizens having outstanding tax payments at that time, also entitled "the

[16] Available online at http://www.agpd.es/portalwebAGPD/revista_prensa/revista_prensa/2017/notas_prensa/news/2017_09_11-iden-idphp.php.

[17] According to the Tech Terms Computer Dictionary, a "cookie" is a small amount of data generated by a website and saved by your web browser. Its purpose is to remember information about you, similar to a preference file created by a software application. Please see https://techterms.com/definition/cookie).

[18] Please see https://9to5mac.com/2018/03/12/how-to-download-your-facebook-data/amp/.

[19] Please see http://www.dailymail.co.uk/sciencetech/article-3787859/NY-settles-4-companies-stop-tracking-children-online.html.

[20] Please see http://www.bbc.com/news/world-europe-39002142.

shaming list"[21]. It is very interesting that certain payables were contested in the Romanian courts of law, therefore they were very likely to be amended or even cancelled. In this respect, the Romanian data protection authority applied a fine on the Fiscal Authority based on fine capping under current Data Protection Law, amounting to 16,000 RON (approximately 3,500 EUR).

2.2. Analyzing the Impact of GDPR on Data Controllers and Processors

GDPR poses huge amount of pressure on data controllers and processors. It raises a lot of issues that were inexistent until now and both controllers and processors are prone to huge financial efforts in becoming compliant to GDPR.

Establishing internal procedures, applying them and following their implementation presupposes a considerable effort, especially for non-EU entities that process European citizens' personal data.

PwC Canada – through the voice of its privacy director, Mr. Constantine Karbaliotis – conceived a "nightmare letter" that comprised the requests of a data subject after the 25 May 2018[22]. The letter gives a striking image on all the possible requests of an informed data subject under the GDPR, such as:

- access to personal data pursuant to Article 15 of the GDPR;
- 30 days deadline to response – according to Article 12 of the GDPR;
- access to information regarding the collected type of data, data storage;
- request of a copy of the data in readable format;
- access to a list of third party to whom data is revealed to;
- details on the legal grounds for each type of data processing activities and data transfers;
- details regarding the retention period;
- if data from third party sources is being also processed;
- information on automated decision making or profiling – Article 22 of the GDPR;
- if a data breach has ever taken place;
- information on security measures of protecting data (*e.g.* encryption, minimization, anonymization).

The real challenges of the implementation under the GDPR are related to the following rights of the data subjects: access to a copy of the data, data portability, data erasure – the right to be forgotten.

For most undertakings, the right of the data subject to request a readable copy of all the data that they store on the data subject will be a challenge. Data could be stored in different platforms: CRMs excel files on different employees' computers, emails containing email signatures or archives of the emails, online cloud platforms, backups of individual computers or servers in the cloud or even physical archives stored in the other part of the world. If the previous internal procedures of the companies have not included an inventory of the personal data or policies on data storage, retention and circulation, it will be a real challenge to respect the rights to access, portability or erasure.

The right to data portability raises real problems in relation to competition laws and undertakings will be challenged to respect the data subject's right to transfer data to a competitor. The Article 29 Working Party revised its guidelines on the right to data portability on 5 April 2017, giving more light on the elements of data portability, when data portability applies, how general rules governing the exercise of data subjects' rights apply to data portability and how data must be provided in case of portability[23].

However, national competition laws are often not aligned to the GDPR so undertakings might get cought in the middle. In this view, national authorities are also in a race to become GDPR compliant. Starting with human resources related laws and ending with public authorities' policies, the GDPR is being implemented at national levels.

On 14 March 2018, the Romanian Senate published on its website a bill of law in application to the GDPR[24]. According to this bill, the Romanian law shall be more restrictive than the GDPR in certain aspects (*i.e.* Article 3 prohibits the processing of biometric or genetic data other than by public authorities). This bill intends to bring clearance to the processing of the unique identification number under Article 4 and human resources data processing under Article 5. With regards to the "the shaming list" published by the Romanian Fiscal Authority in 2016 mentioned above and to the fine applied in the respective case, please note that this bill of law proposes that fines applicable to public authorities will be no greater than 200,000 RON (approximately 43,000 EUR). We shall follow interestedly the legislative process in order to find out the final version of this piece of legislation.

2.3. Remedies and Sanctions

Rights under data protection law can be exercised by the data subject affected or by a "not-for-profit body, organisation or association which has been properly constituted in accordance with the law of a Member State, has statutory objectives which are in the public interest, and is active in the field of the protection of data subjects' rights and freedoms"[25]. The GDPR clarifies the requirements regarding claims brought by

[21] Please see https://economie.hotnews.ro/stiri-finante-21000512-fiscul-publicat-lista-persoanelor-fizice-datorii-peste-1-500-lei-peste-187-230-romani-restante-fiscale-care-insumeaza-3-4-miliarde-lei.htm.
[22] Please see https://www.linkedin.com/pulse/nightmare-letter-subject-access-request-under-gdpr-karbaliotis/.
[23] Please see https://iapp.org/media/pdf/resource_center/WP29-2017-04-data-portability-guidance.pdf.
[24] Please see https://www.senat.ro/legis/lista.aspx.
[25] Please see Article 80 of the GDPR.

third parties on behalf of data subjects. We also consider that these associations can seek judicial remedies and compensation from controllers and processors, on behalf of multiple data subjects (in collective claims that are similar to class action litigation). It is obvious that in case of minors, they shall be represented by their parents or guardians.

Chapter VIII of the GDPR governs the legal problem of remedies, liability and penalties in case of breach of this regulation. From the analysis of the remedies and sanctions chapter, it appears that the GDPR takes a multi-layered approach for breach of its provisions. Although it sets out the high-level principles and maximum administrative fine amounts, the regulation leaves some latitude to the EU Member States as to how these remedies and sanctions will operate in practice.

According to Article 77 of GDPR, if a data subject considers that the processing of personal data relating to him or her infringes the GDPR, then he or she has the right to lodge a complaint with a supervisory authority, without prejudicing any other administrative or judicial remedy under the GDPR. This complaint can be lodged either where the data controller or data processor has its establishment or in the place of habitual residence of the complainant data subject. The respective supervisory authority shall have to inform the data subject on the progress and the outcome of the complaint, mentioning the possibility of a judicial remedy. We underline that under the "One-Stop-Shop" provided by the GDPR, the supervisory authority to which the complaint is addressed will not necessarily be the authority that is responsible for regulating the relevant controller.

As for the effective judicial remedy against a supervisory authority governed by Article 78 of the GDPR, it is worth mentioning that every natural and legal person shall have the right to bring such a claim if it concerns them[26]. This right shall be exercised where the competent supervisory authority:

a) does not handle a complaint;
b) does not inform the data subject within three months on the progress or outcome of the complaint lodged pursuant to Article 77 mentioned above. These proceedings shall be brought before the courts of the Member State where the supervisory authority is established. If these proceedings were preceded by an opinion or decision of the Board in the consistency mechanism, then the supervisory authority is bound to forward it to the court, the GDPR not stressing a sanction if this obligation is not respected.

Additionally, according to Article 79 of the GDPR, the data subject has the right to bring proceedings against a controller or a processor, before the courts of the Member State where that controller or processor is established, or where the data subjects has his or her habitual residence, "unless the controller or processor is a public authority of a Member State acting in the exercise of its public powers"[27].

We consider that the GDPR provides greater clarity and legal certainty regarding the claims that can be brought by the data subjects than it was regulated through the Data Protection Directive.

Because of the possibility of the data subject to bring proceedings in different Member States (raising the problem that a controller or processor may be subject to legal proceedings in unfamiliar jurisdictions), the GDPR expressly regulates in Article 81 the suspension of proceedings: any competent court other than the first seized one may suspend its proceedings. We emphasize that the claims could be delayed if a national court decides to suspend proceedings pending the outcome of the case in front of the first seized court of law (in another Member State), being also possible that the outcome of the case in the second jurisdiction be influenced by the decision taken in the first seized court of law.

Every data subject who has suffered material or non-material damage, as a result of an infringement of the GDPR, shall be entitled to receive compensation from the controller or processor for the damage suffered. Data controllers and data processors can escape liability if they prove they are not in any way responsible for the event giving rise to the damage invoked by the data subject. Article 82 paragraph (5) of the GDPR expressly provides a "joint and several" liability, meaning that where a controller or processor has paid full compensation for the damage suffered by the data subject, that controller or processor shall be entitled to claim back from the other controllers or processors involved in the same processing that part of the compensation corresponding to their part of responsibility for the damage. This type of clause is needed for ensuring effective compensation of the data subject.

Unlike the Data Protection Directive which exempted data controllers from liability for harm arising in cases of force majeure, the GDPR contains no such exemption, meaning that the data controllers may bear the risk in force majeure cases.

Even though the concept of administrative fines for breaches of EU data protection law did not change a lot under the GDPR, there are significant changes to both the amount of fines and the factors relevant to determining those fines.

The GDPR also provides that the supervisory authorities are entitled to establish the imposition of administrative fines, on a case by case analysis. Article 83 of the GDPR establishes the criteria for deciding whether to impose an administrative fine and deciding

[26] Since the party against which are brought proceedings is a public authority, then the specificities of the administrative review shall be applicable. In this respect, please see Marta-Claudia Cliza, *Drept administrativ. Partea a II-a*, Editura Pro Universitaria, Bucuresti, 2011, p. 78 and following; Elena Emilia Stefan, *Drept administrativ. Partea a II-a*, Editura Universul Juridic, Bucuresti, 2013, p. 52 and following.

[27] Please see Article 79 paragraph (2) of the GDPR.

on the amount of the administrative fine in each individual case.

Although the GDPR establishes several amounts for the administrative fines, it is expressly mentioned that if "*a controller or processor intentionally or negligently, for the same or linked processing operations, infringes several provisions of this Regulation, the total amount of the administrative fine shall not exceed the amount specified for the gravest infringement*"[28].

The GDPR fundamentally changes the potential financial consequences of breaching EU data protection law, the level of the potential sanction depending on the breach and ranging from administrative fines of:

1. up to 10,000,000 EUR, or in the case of an undertaking, up to 2% of the total worldwide annual turnover of the preceding financial year, whichever is higher[29] (for breach of principles such as "by design and by default", non-compliance with the processing related obligations, or failure to appoint a Data Protection Officer). The relevant articles in this respect are:

a) Article 8 (Conditions applicable to a child's consent in relation to information society services);
b) Article 11 (Processing which does not require identification);
c) Article 25 (Data protection by design and by default);
d) Article 26 (Joint controllers);
e) Article 27 (Representatives of controllers or processors not established in the Union);
f) Article 28 (Processor);
g) Article 29 (Processing under the authority of the controller or processor);
h) Article 30 (Records of processing activities);
i) Article 31 (Cooperation with the supervisory authority);
j) Article 32 (Security of processing);
k) Article 33 (Notification of a personal data breach to the supervisory authority);
l) Article 34 (Communication of a personal data breach to the data subject);
m) Article 35 (Data protection impact assessment);
n) Article 36 (Prior consultation);
o) Article 37 (Designation of the data protection officer);
p) Article 38 (Position of the data protection officer);
q) Article 39 (Tasks of the data protection officer);
r) Article 42 (Certification);
s) Article 43 (Certification bodies);

2. up to 20,000,000 EUR, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher[30] (for breaches of the principles relating to processing or of the lawful processing requirements, and for breach of data subject rights). The relevant articles in this respect are:

a) Article 5 (Principles relating to processing of personal data);
b) Article 6 (Lawfulness of processing);
c) Article 7 (Conditions for consent);
d) Article 9 (Processing of special categories of personal data);
e) Article 12 (Transparent information, communication and modalities for the exercise of the rights of the data subject);
f) Article 13 (Information to be provided where personal data are collected from the data subject);
g) Article 14 (Information to be provided where personal data have not been collected from the data subject);
h) Article 15 (Right of access by the data subject);
i) Article 16 (Right to rectification);
j) Article 17 (Right to erasure);
k) Article 18 (Right to restriction of processing);
l) Article 19 (Notification obligation regarding rectification or erasure of personal data or restriction of processing);
m) Article 20 (Right to data portability);
n) Article 21 (Right to object);
o) Article 22 (Automated individual decision making, including profiling);
p) Articles 44 - 49 (Transfers of personal data to third countries or international organisations);
q) Infringements of obligations under Member State law adopted under Chapter IX (Provisions relating to specific processing situations);
r) Non-compliance with access in violation of Articles 58 paragraph (1) and of orders under Article 58 paragraph (2) (powers of the supervisory authorities).

We underline that the administrative sanction regime will require a case by case assessment of the circumstances of each individual infringement, therefore it does not impose liability on a strict liability basis. We consider that the factors that should be taken into account should be the nature, gravity and duration of each infringement, the form of guilt (intention or negligence), the damage mitigation steps already implemented, any technical and organisational measures already implemented, and the manner in which the supervisory authority became aware of the issue.

A Member State is entitled to lay down the rules on whether and to what extent administrative fines may be imposed on public authorities and bodies established in that Member State.

But what happens in the legal systems which do not provide for administrative fines (*i.e.* Denmark, Estonia)? The GDPR expressly regulates that in such Member States, the fine shall "*be initiated by the competent supervisory authority and imposed by*

[28] Please see Article 83 paragraph (3) of the GDPR.
[29] Please see Article 83 paragraph (4) of the GDPR.
[30] Please see Article 83 paragraphs (5) and (6) of the GDPR.

competent national courts, while ensuring that those legal remedies are effective and have an equivalent effect to the administrative fines imposed by supervisory authorities. In any event, the fines imposed shall be effective, proportionate and dissuasive"[31].

Member States may lay down the rules on other effective, proportionate and dissuasive penalties applicable to infringements of this Regulation in particular for infringements which are not subject to administrative fines and shall take all measures to ensure that they are implemented in the national legal system – as a third level of 'penalties'. Taking into consideration certain recitals of the GDPR, these effective, proportionate and dissuasive penalties to be established by the Member States can be interpreted as criminal sanctions for certain violations. We consider that the possible introduction of criminal sanctions for unlawful processing of personal data presents a significant risk for undertakings, depending on how the Member States interpret and apply this power.

For transparency, the Member States are obliged to notify to the European Commission the legal provisions which they adopt by 25 May 2018 and, without delay, any subsequent amendment law or amendment affecting them.

3. Concluding Remarks

The aim of this study is to raise awareness and improve knowledge of data protection rules established by the GDPR. It is recommended for legal professionals and non-specialist legal professionals, and other persons working in the field of data protection.

The data protection right developed out of the right to respect for private life, being related to human beings. Natural persons are, therefore, the primary beneficiaries of data protection - personal data covers information pertaining to private life or to professional or public life of a person. Data also relate to persons if the content of the information indirectly reveals data about a person.

With the application of the GDPR from May 2018, its rules will become legally binding, together with the right to protection of personal data which becomes a separate fundamental right. Having in view the new technologies and the digital revolution, GDPR will satisfy the growing need for the robust protection of personal data.

The new data protection rules shall be applied in Member States by the national courts and by the national data protection authorities (the latter being part of the public administration system[32]), which shall be liable for obeying the GDPR[33].

The new maximum fines of the greater of 20,000,000 EUR or four percent of an undertaking's worldwide turnover are devilish and will manage to scare every general manager perception in order to comply with the GDPR.

In any case, for all the actors involved in data protection, the final countdown is near!

References

- Augustin Fuerea, *Dreptul Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2016
- Marta-Claudia Cliza, *Drept administrativ. Partea a II-a*, Editura Pro Universitaria, Bucuresti, 2011
- Mihaela Augustina Dumitrascu, Roxana Mariana Popescu, Dreptul Uniunii Europene, *Sinteze si aplicatii. Editia a II-a, revazuta si adaugita*, Universul Juridic Publishing House, Bucharest, 2015
- Nicolae Popa, Elena Anghel, Cornelia Ene-Dinu, Laura-Cristiana Spataru-Negura, *Teoria generala a dreptului. Caiet de seminar*, third edition, C.H. Beck Publishing House, Bucharest, 2017
- Roxana-Mariana Popescu, ECJ Case-law on the Concept of "Public Administration" Used in Article 45 Paragraph (4) TFEU, CKS Ebook, "Nicolae Titulescu" University Publishing House, 2017
- Laura-Cristiana Spataru-Negura, *Dreptul Uniunii Europene – o noua tipologie juridica*, Hamangiu Publishing House, Bucharest, 2016
- Elena Emilia Stefan, *Drept administrativ. Partea a II-a*, Editura Universul Juridic, Bucuresti, 2013
- Elena Emilia Ștefan, Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ, ProUniversitaria Publishing House, Bucharest, 2013
- European Union Agency for Fundamental Rights, *Handbook on European data protection law, Council of Europe*, 2014, available at https://www.echr.coe.int/Documents/Handbook_data_protection_ENG.pdf
- Matheson, *GDPR in Context. Remedies and Sanctions*, available at http://www.matheson.com/images/uploads/documents/GDPR_in_Context_-_Remedies_and_Sanctions.pdf
- White & Case, *GDPR Handbook: Unlocking the EU General Data Protection Regulation. A practical handbook on the EU's new data protection law*, September 2017, available at https://www.whitecase.com/publications/article/gdpr-handbook-unlocking-eu-general-data-protection-regulation
- www.9to5mac.com
- www.agpd.es
- www.bbc.com

[31] Please see Article 83 paragraph (9) of the GDPR.

[32] For the European Union public administration concept, please also see Roxana-Mariana Popescu, *ECJ Case-law on the Concept of "Public Administration" Used in Article 45 Paragraph (4) TFEU*, CKS Ebook, "Nicolae Titulescu" University Publishing House, 2017, p. 529.

[33] It is widely acknowledged that nobody can be exempted from liability for the offenses committed in the exercise of public function. For more information, please see Elena Emilia Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ*, ProUniversitaria Publishing House, Bucharest, 2013, p. 317.

- www.dailymail.co.uk
- www.eur-lex.europa.eu
- www.hotnews.ro
- www.iapp.org
- www.linkedin.com
- www.paypal.com
- www.reuters.com
- www.senat.ro
- www.techterms.com
- www.un.org

THE CONCEPT OF UNDERTAKING IN THE EUROPEAN UNION COMPETITION LAW

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Abstract

One of the most important concepts that the European Union Competition Law uses is the undertaking. In order to correctly apply the rules under this domain, it is necessary to fully understand when an entity is or isn`t an undertaking under competition law. Therefore, the main purpose of the following paper is to facilitate the understanding of the concept of undertakings so as to delimit the area of competition law from others. In the following, we will identify the alternative definitions offered in time by the Court of Justice of the European Union in this matter, but also by doctrine and we will have a short glance over the national courts of the member states' practice. Our analyze will take into consideration also those cases which remain under discussion, such as, but not just that, when can a part of an undertaking that is a subject of a transaction be considered a merger under the European Commission Merger Regulation or how can a natural person represent an undertaking under the European Union competition law. In conclusion, undertakings, parts of undertakings or associations of undertakings, mainly in the light of EU competition law, are the concepts we will be dealing with in the following paper.

Keywords: *Undertaking, European Union Competition Law, merger, European Commission, economic activity.*

Introduction

The following paper covers a very important subject to the competition law in general and to the European Union competition law in particular. The matter in discussion regards the concept of an undertaking under a specific area of law. The main concept used in the rules and regulations for EU competition is "undertaking", word that can be interpreted differently according to various domains of law. The paper focuses only on the competition law.

The study comprises several aspects when defining an undertaking under EU competition law, but also takes a short glimpse on national case-law or legislation. The subject was very largely debated in the past and practice still isn't uniformly applied among Member States, even difference between EU Law and national legislation has been observed when analyzing cases under the same provisions. Also, different approaches when interpreting the definitions of an undertaking can deliver different assessments on similar cases. For this reasons, we believe that the subject of the study is one of currently relevance and importance for both, practitioners and theoreticians.

The study will reveal the existing definitions among the EU legislation and that will represent the point where we will start our analysis. Our intention is to find elements of niche in this topic, surprising those facts that can make a difference when approaching the definition of an undertaking under competition law. The research will take into account the jurisprudence of the European Union Court of Justice, the several definitions given by the relevant legislation, short glimpse into the national court-law practice and/or legislation and other sources. We are aware of the lack of uniformity when analyzing this concept, but we care to underline a part of the main differences.

Regarding the already existing specialized literature on this matter, we consider our study as an additional incursion on the subject, but with an overall approach from several sources. Representing only a short introduction on what it could represent a complete research on the existing differences when defining an undertaking, we are confident on a future development of the subject and on its contribution to the ongoing assessments.

Paper Content

The *Treaty on the Functioning of the European Union* ("*TFUE*") lays down several rules that concern competition, rules that apply only to undertakings, as they are defined by law. So, Article 101 stipulates that "The following shall be prohibited as incompatible with the internal market: all agreements between **undertakings**, decisions by **associations of undertakings** and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

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

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obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

− any agreement or category of agreements between **undertakings**,

− any decision or category of decisions by **associations of undertakings**,

− any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

a) impose on the **undertakings** concerned restrictions which are not indispensable to the attainment of these objectives;
b) afford such **undertakings** the possibility of eliminating competition in respect of a substantial part of the products in question." The following Article 102 stipulates that "Any abuse by one or more **undertakings** of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- limiting production, markets or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- making 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."

Furthermore, *Council's Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings* uses this concept to identify the entities that this normative act applies to. In this case, when defining a concentration, the regulation takes into consideration the following aspects: "1. A concentration shall be deemed to arise where a change of control on a lasting basis results from:

a) the merger of two or more previously independent **undertakings or parts of undertakings**, or
b) the acquisition, by one or more persons already controlling at least one **undertaking**, or by one or more **undertakings**, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other **undertakings**.

2. Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an **undertaking**, in particular by:

a) ownership or the right to use all or part of the assets of an **undertaking**;
b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an **undertaking**.

3. Control is acquired by persons or **undertakings** which:

a) are holders of the rights or entitled to rights under the contracts concerned; or
b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving there from.

4. The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b)."

We have underlined a part of the previously text because we believe it is important to observe the carefully change of concepts. An undertaking or a part of an undertaking has to fulfill the main condition of being an autonomous economic activity. This subject can be approached also when referring to the transfer of assets in the context of an existing concentration.

The *Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings* explains that a concentration only covers operations where a change of control in the **undertakings** concerned occurs on a lasting basis. In the light of this document, "the acquisition of control over assets can only be considered a concentration if those assets constitute the whole or a part of an **undertaking**, i.e. a business with a market presence, to which a market turnover can be clearly attributed." The European Commission adds that "the transfer of the client base of a business can fulfill these criteria if this is sufficient to transfer a business with a market turnover."

The subject of defining the concept of an undertaking has been much debated among theoreticians and practitioners of competition law, the notion having a relative characteristic. "The functional approach and the focus on activity than the form of an entity may result in an entity being considered an undertaking when it engages in some activities but not when it engages in others[1]". Here are some relevant cases that show how the European Commission decided in different situations, where an entity was considered an undertaking or not.

On 28 November 1989[2], the Commission received a complaint from the travel agency Pauwels

[1] "EC competition Law – an analytical guide to the leading cases", Ariel Ezrachi, Hart Pubishing, 2008, p.3
[2] http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31992D0521

Travel BVBA ("*Pauwels Travel*") which was related to the ticket distribution system applied during the International Federation of Football Associations ("*FIFA*") World Cup held in Italy in 1990. The main facts where that Pauwels Travel wanted to put together and sell in Belgium World Cup package tours comprising transport, accommodation and entrance tickets to the stadia in which the various matches were to be played, but it found that the ticket distribution system that had been decided on did not allow travel agencies to acquire stadium entrance tickets for the purpose of putting together package tours, any attempts of procuring from different channels, on that matter, resulting in a cease and desist action being brought before the Belgian national courts by the travel agency authorized by the World Cup organizers to sell package tours in Belgium. Two main contracts were signed by the local organizing committee (Federazione italiana gioco calico - FIGC), appointed by FIFA, on the one hand and, firstly, The Compagnia italiana turismo SpA ("*CIT*") and Italia Tour SpA ("*Italia Tour*") and, secondly, 90 Tour Italia, on the other hand, which mainly concluded that the organization of the event and the distribution of tickets to be managed through a jointly set up company, respectively 90 Tour Italy, who had the exclusive grant of the worldwide distribution rights of tickets as part of package tours. This exclusivity arrangement prevented other travel agencies from offering combined package tours with tickets for the 1990 World Cup.

In its decision, the European Commission considered the compatibility of the exclusive distribution agreement with the Article 81 EC[3]. A preliminary question concerned the nature of the entities involved and whether they constituted an undertaking within the meaning of Article 81 EC.

The legal assessment of the concept of undertaking in this case started with the Court of Justice's case-law. In accordance with it, "any entity carrying on activities of an economic nature, regardless of its legal form, constitutes an undertaking within the meaning of Article 85 of the EEC Treaty[4] (see in particular Cases 36/74 of 12 December 1974, Walrave v. Union Cycliste Internationale (1) and C-41/90 of 23 April 1991, Hoefner v. Elser/Macrotron). An activity of an economic nature means any activity, whether or not profit-making, that involves economic trade (see Case 41/83 of 20 March 1985, Italy v. Commission (British Telecommunications)".

Regarding the commercial nature of the World Cup, the Court underlined that *the World Cup* is indisputably a major sporting event, which also includes activities of an economic nature, such as the sale of package tours comprising hotel accommodation, transport and sightseeing, the conclusion of contracts for advertising on panels within the grounds, the conclusion of television broadcasting contracts, the commercial exploitation of the FIFA emblems, the World Cup, the FIFA fair-play trophy and the World Cup mascot and others. *FIFA*, however, is a federation of sports associations and accordingly carries out sports activities, but also engages is activities of economic nature, such as - the conclusion of advertising contracts, the commercial exploitation of the World Cup emblems, and the conclusion of contracts relating to television broadcasting rights.

The FIGC is the national Italian football association, appointed by FIFA to organize the 1990 World Cup. The FIGC was accordingly responsible for the entire organization of the event in accordance with the provisions of the 1990 World Cup regulations and had in particular the task of ensuring that grounds were in order, press facilities provided, parking spaces laid out, etc. For the purpose of financing such expenditure, the FIGC had a share in the net profits of the competition and was able to exploit commercially in Italy the 1990 World Cup emblem, which it had itself created. Thus the FIGC also carried out economic activities.

The local organizing committee was a body set up jointly by FIFA and the FIGC for the purpose of carrying on all activities relating directly or indirectly to the technical and logistical organization of the World Cup. The local organizing committee's tasks included the establishment and implementation of the ticket distribution arrangements. The local organizing committee's revenue derived partly from television rights, advertising rights, the sale of tickets and the commercial exploitation in Italy of the World Cup emblem. The exclusive rights granted to 90 Tour Italia resulted in remuneration for the local organizing committee, in accordance with the provisions of Article 5 of the contract of 26 June 1987.

CIT was an Italian company engaged in travel agency activities. It was therefore an undertaking within the meaning of Article 85.

Italia Tour SpA was a company carrying on an activity similar to that of CIT and was thus also an undertaking within the meaning of Article 85.

90 Tour Italia SpA was a company established under Italian law by CIT and Italia Tour for the purpose of putting together and marketing package tours to the 1990 World Cup.

In this context, the Court decided that, the entities mentioned above, regardless of their legal form, had conducted activities of economic nature, meaning that they represented undertakings within the meaning of Article 85 of the EEC Treaty.

[3] The two fundamental European Competition Law provisions were Articles 85 and 86 of the Treaty of Rome, the treaty that founded the European Economic Community (EEC) that evolved into the European Union. The drafters of one amending treaty to the Treaty of Rome, the Treaty of Amsterdam, decided it was necessary to renumber the two Articles 81 and 82 from 85 and 86; the revised Treaty on the Functioning of the European Union (TFEU) then renumbered the Articles 101 and 102.

[4] Currently article 101 from the Treaty on the functioning of European Union

Another case brought to the European Union`s Court of Justice referred to an action for annulment[5]. The plaintiff, respectively FENIN, which was an association of undertakings that marketed medical goods and equipment used in Spanish hospitals, submitted a complaint to the European Commission alleging an abuse of a dominant position, within the meaning of Article 82 EC, by various bodies and organizations responsible for the operation of the Spanish national health system (SNS). On 31 August 1999, the Commission definitively rejected the applicant's complaint on the dual ground that the bodies and organizations in question were not acting as undertakings when they participated in the management of the public health service. Consequently, the bodies managing the SNS were not acting as undertakings when they purchased medical goods and equipment from the members of the applicant association.

Again, the EU Court of Justice firstly approached this matter by enumerating some of the settled case-law, observing that "in Community competition law the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (Höfner and Elser, Poucet and Pistre, Fédération française des sociétés d'assurances and Others, Case C-55/96 Job Centre [1997] ECR I-7119,

Albany, Case T-61/89 Dansk Pelsdyravlerforening v Commission [1992] ECR II-1931 and Case T-513/93 Consiglio Nazionale degli Spdizionieri Doganali v Commission [2000] ECR II-1807)". On this matter, it is the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic activity, not the business of purchasing, as such. The Court underlined that in accordance with the Commission's arguments, it would be incorrect, when determining the nature of a subsequent activity, to dissociate the activity of purchasing goods from the subsequent use to which they are put. "The nature of the purchasing activity must therefore be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity. Consequently, an organization which purchases goods — even in great quantity - not for the purpose of offering goods and services as part of an economic activity, but in order to use them in the context of a different activity, such as one of a purely social nature, does not act as an undertaking simply because it is a purchaser in a given market. Whilst an entity may wield very considerable economic power, even giving rise to a monopsony, it nevertheless remains the case that, if the activity for which that entity purchases goods is not an economic activity, it is not acting as an undertaking for the purposes of Community competition law and is therefore not subject to the prohibitions laid down in Articles 81(1) EC and 82 EC."

Regarding SNS, the Court qualified it as operating according to the principle of solidarity in that it is funded from social security contributions and other State funding and in that it provided services free of charge to its members on the basis of universal cover. In the light of the aspects mentioned above, the Court considered that the organizations in question do not act as undertakings when purchasing from the members of the applicant association the medical goods and equipment which they require in order to provide free services to SNS members.

The consequences of dual, public and private characteristics were not explored in this case, because FENIN brought up new facts, for the first time, in front of the Court. FENIN argued that SNS, on some occasions, provided private care in addition to State-sponsored healthcare and consequently, in those circumstances, it should be regarded as an undertaking. But, because no reference of this matter were made in the original complaint, the European Commission couldn't be accused of not examining facts which have not been brought to its notice by the complainant before rejecting a complaint on the ground that the practices complained of do not infringe Community competition rules or do not fall within the scope of the Community competition rules. Therefore, in its review of the legality of the decision contested in the present action, the Court also couldn't take the existence of those services into account and it was not necessary in this case for the Court to rule on their potential relevance to the question whether the purchasing operations of those organizations amount to an economic activity. So, in this case, the Court decided that the organizations in question do not act as undertakings under EU competition law, without taking into a consideration a possible relevant fact that could change its decision if it were brought to the European Commission in its original complaint.

A very interesting aspect, among member states' competition laws, regards the Competition Act currently into force in Slovakia. The term of "undertaking" is defined by this act and it comprises any entrepreneur according to the Commercial Code[6]. In addition, the term "undertaking", under the Competition Act, comprises any natural and/or legal person, their associations and associations of these associations, with respect to their activities and conduct that are, or may be, related to competition, regardless of whether or not these activities and conduct are aimed making profit. We can observe that these provisions are

[5] Case T-319/99: http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d0f130de7b3f114105ed4cfb8780f728252721da.e34KaxiLc3eQc40LaxqMbN4Pb34Ke0?text=&docid=48089&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=415463

[6] "(i) any person registered in the Commercial register;
(ii) person which undertakes business based on the trade permission;
(iii) person which undertakes business based on other permission according to special legislation; or
(iv) a natural person, sole agricultural producer registered in the evidence based on special legislation."

almost completely in line with the EU competition rules, with one important exception: the term of "undertaking", in this situation, covers only entities with legal personality. Thus, the Slovak Competition Act, when referring to an undertaking, it involves a person (natural or legal) but it does not cover a "group" of individual persons forming a single economic group.[7] This reasoning derives also from the Council's decision in GIS Cartel Case[8], in which it reached the conclusion that AMO[9] could not apply joint and several liability for the breach of competition rules of the companies belonging to the same economic group in the same way the European Commission did in the same case (Case COMP/F/38.899[10]). The Slovak Competition Act also applies to professional services provided, for example, by lawyers, pharmacists and architects and to the activities of these persons. This category of persons is considered entrepreneurs under the Slovak Commercial Code because they undertake businesses based on permission, according to special legislation. These persons are mainly organized in professional associations or chambers, therefor the case-law of the AMO[11] in the area of competition, as well as Slovak courts, is often related to the assessment of agreements restricting competition, concluded in the form of decisions of associations and, in such cases, the autonomous professional associations had to be treated as undertakings under the Slovak Competition Act. An example of this judgement comes after the Slovak Bar Association (SBA) started an administrative proceeding in order to dismiss the imposed penalty for a breach of an obligation to submit information to the AMO. SBA reasoned that was neither an entrepreneur according to the Slovak Commercial Code, nor any entity whose activities were connected to competition. The motives invoked refer to, on one hand, the fact that all advocates were grouped and listed in a register, which meant that these persons could not be treated as competitors since conditions of the provision of legal services were determined by the state in the public interest with the aim of safeguarding their quality and, on the other hand, that their remuneration for legal services was determined by the general legal regulation or by an agreement between the advocate and client, thus the economic competition influenced by price or advertisement was not present. The Council, after the Regional Court in Bratislava[12] rulling and also in accordance with the Judgement of the European Court of Justice[13] concluded that advocates were entrepreneurs pursuant to section 2(2) letter c) of the Commercial Code and that the SBA was, pursuant to the Act on Advocacy, an autonomous professional organization grouping all advocates and so it represented an association of undertakings according to section 3(2) of the Competition Act.

We found a similar case among the case-law of the Romanian High Court of Cassation and Justice - Decision no. 3415/30 October 2015. The main facts regard an appeal introduced by the Romanian Notary's Chamber (*"RNC"*), seeking to call off an unannounced inspection required by the Romanian Competition Council (*"RCC"*), arguing that the legal provisions invoked by the competition authority aren't applicable in this case. The RNC rejected the RCC interpretation regarding the assimilation of notary offices and chambers as undertakings, recalling art. 3 from Law no. 36/1995 that states the following: "The public notary is invested to fulfill a service of public interest and it has the statute of an autonomous public position". In addition, according to art. 27 from the Deontological Code of Public Notaries, "the work of a notary is exercised through competition conditions, on exclusive professional competence and probity criteria, recognized and unanimous accepted as principles of strengthening the prestige of the public notary institution". The appellant considered that this situation in particular represents the exception that Law no. 21/1996 regarding competition refers to in art. 2 (1) letter b), respectively that the competition law applies to acts and deeds which restrict, prevent or distort competition, except for situations when such measures are taken to enforce other laws or protect a major public interest. To support its idea, some of the EU Court of Justice case-law[14] was brought up, in which the court constantly separates the economic liberties associated to the internal market (i.e. the freedom of establishment, the freedom to provide services, the freedom of movement for workers, etc.) from their exceptions, regarding competition law. Another case was mentioned, one that refers to lawyers, where the EU Court of Justice stated that while an undertaking is subject to the competition law, according to the European treaties, the lawyer exercises its prerogatives of public power inside its responsibilities or an activity of general interest and these activities don't have an economic character, fact that hinder the applicability of competition rules. Another argument brought by the applicant says that nowhere in Europe, the public notary doesn't represent an activity on a market, but an institution of public services. This position helps with respecting the legality of transactions on some markets and this doesn't mean it should be confused with the markets themselves. Mainly, the RNC argues that a public general interest justifies the non-application of

[7] "Competition Law in the Slovak Republic", by Andrea Oršulová,David Raus, published by Kluwer Law International BV, the Netherlands, 2011, p. 48
[8] Decision of the Council No. 2009/KH/R/2/035, 14 august 2009
[9] Antimonopoly Office of the Slovak Republic
[10] http://ec.europa.eu/competition/antitrust/cases/dec_docs/38899/38899_1030_10.pdf
[11] http://www.antimon.gov.sk/antimonopoly-office-slovak-republic/
[12] No. IS 431/2005-43, 2 Oct. 2008
[13] C-309/99, 19 Feb. 2002
[14] Case C-415/93, C-94/04

competition rules, public notaries and their organization fall outside the scope of Article 101 TFUE and for these reasons the RCC shouldn't have the capacity to initiate an investigation and sanction the RNC. In its judgement, the High Court of Cassation and Justice ("*HCCJ*") argues the following:

- reaffirms the definition that Law no. 21/1996 regarding competition gives to the concept of "undertaking", that is "undertakings as described by this law represent any economic operator engaged in an activity of goods or services provision on a given market, regardless of its legal status and financing, as defined in the case law of the European Union", but, also, the fact that even though the public notary provides a service of public interest that does not exclude it from the scope of the competition rules;
- a part of the public notary's activity has a commercial/private character, which is provided in order to obtain profit, so at least this part falls under competition conditions, fact that gives it the status of an undertaking;
- for their services, consisting of documents/procedures completed by capitalizing their professional knowledge, the notary offices receive a price/fee;
- the fee represents income, which can vary from case to case, and the difference between the income and the amount spent on other costs represents profit, which is characteristic to an undertaking. Thus, the income realized by public notaries, in a determined period of time, is not preset, but varies according to the volume of work done, therefor there is an influence exerted by the offer of such services;
- the invoices/receipts given by a notarial office have V.A.T. included and that represents another reason to believe that it practices an economic activity.

Following all the arguments presented above, the HCCJ decided that the RCC has correctly considered the public notary office as an undertaking.

Another subject of interest for our paper is focused on the meaning of the transfer of a part of an undertaking. The Council Regulation (EC) no. 139/2004 of 20 January 2004 on the control of concentrations between undertaking ("the EC Merger Regulation") defines a concentration, among other situations, the change of control on a lasting basis that results from the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings. When talking about the transfer of a part of an undertaking, we cannot forget that the Council's Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses ("Directive no. 2001/23/EC") refers to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.

When do we consider the transfer of a business as a transfer of a part of an undertaking and is there any relation between the concept of "part of an undertaking" used in the EC Merger Regulation with the one used in the Directive no. 2001/23/EC? For example, as we mentioned in the beginning of the paper, the *Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) no. 139/2004 on the control of concentrations between undertakings* says that "the acquisition of control over assets can only be considered a concentration if those assets constitute the whole or a part of an undertaking, i.e. a business with a market presence, to which a market turnover can be clearly attributed". The EU Court of Justice, in an early judgement (Case 24/85[15]), ruled that "a transfer of an undertaking, business or part of a business does not occur merely because its assets are disposed of" and that certain conditions need to be fulfilled in order to asses that the business was disposed of as an ongoing concern. The facts that the court took into consideration in order to determine whether those conditions were met, included the type of undertaking or business, whether or not the business's tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred and the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended. Even so, the court still underlined that "all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation." Furthermore, according to the Directive no. 2001/23/EC "there is a transfer within the meaning of this Directive where there is a transfer of an economic entity which retains its identity, meaning an organized grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary". Also, the EU Court of Justice again indicates in Case C−458/12[16] that "According to settled case-law, in order to determine whether there is a 'transfer' of the undertaking within the meaning of

[15] Judgment of the Court (Fifth Chamber) of 18 March 1986. - Jozef Maria Antonius Spijkers v Gebroeders Benedik Abattoir CV et Alfred Benedik en Zonen BV. - Reference for a preliminary ruling: Hoge Raad - Netherlands. - Safeguarding of employees rights in the event of transfers of undertakings. - Case 24/85 - https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:61985CJ0024

[16] Judgement of the Court (Ninth Chamber) from 6 March 2014 (*) (Request for a preliminary ruling – Social policy – Transfer of undertakings – Safeguarding of employees' rights – Directive 2001/23/EC – Transfer of employment relationships in the event of a legal transfer of part of a business that cannot be identified as a pre-existing autonomous economic entity) - http://curia.europa.eu/juris/document/document.jsf?text=&docid=148743&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=530251

Article 1(1) of Directive 2001/23, the decisive criterion is whether the entity in question keeps its identity after being taken over by the new employer" and "that transfer must relate to a stable economic entity whose activity is not limited to performing one specific works contract. Any organized grouping of persons and of assets enabling the exercise of an economic activity pursuing a specific objective, and which is sufficiently structured and autonomous, constitutes such an entity".

Conclusions

Summarizing the main outcomes of the present study, we can conclude the following:

- Even though an organization has no profit motive or functions without an economic purpose, that doesn't mean that it brings itself outside the concept of undertakings under EU competition law.
- Some cases can remain under discussions when possible relevant information was not taken into consideration at the relevant moment, because of a party's negligence in formulating a complaint or/and an action in front of the court.
- Even though the regulations are legal acts that apply automatically and uniformly to all EU countries as soon as they enter into force, without needing to be transposed into national law, becoming binding in their entirety on all EU countries, there may exist some countries, such as Slovakia (the example offered in the paper content which refers to the definition of undertakings), where the national law can differ from the EU competition rules.
- We can find ourselves dealing with an undertaking, even though an entity is entrusted with public power or provides services of general public interest. As long as this entity's activity or only a part of it is realizes a sort of profit, according to the applicable law, than that entity should be considered an undertaking under EU competition rules.
- When assessing a transfer of a part of an undertaking, several facts need to be taken into consideration in an overall matter, but the most important criteria is to evaluate the scope of the transfer, i.e. to see if the assets transferred or other parts of undertakings are able to maintain an ongoing business or an individual economic entity with a market presence.

We expect that study's impact will effect practitioners it their analyze, helping them to identify more easily when the object of a transfer represents an undertaking or a part of it under competition law and we believe that the study will also influence future articles/papers/documents elaborated by interested persons/entities, because of its synthetized approach and punctual references.

We consider this study only a beginning for a much more complex research of the existing differences between the use of the same concept and we suggest that a further research work should reach more into national court practices and those practices compared in relation with the EU jurisprudence and legislation in order to lead to new findings.

References

- Ariel Ezrachi , EC competition Law – an analytical guide to the leading cases, (Hart Pubishing, 2008)
- Andrea Oršulová,David Raus, Competition Law in the Slovak Republic, (Kluwer Law International BV, the Netherlands, 2011)
- Ioannis Kokkoris, Howard Shelanski, EU Merger Control. A legal and economic analysis, (Oxford Univeristy Press, 2014)
- Massimo Motta, Competition Policy. Theory and practice, (Cambridge University Press, 2004)
- http://heinonline.org/HOL/LandingPage?handle=hein.journals/ibl25&div=155&id=&page=
- http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31992D0521
- http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d0f130de7b3f114105ed4cfb8780f728252721da.e34KaxiLc3eQc40LaxqMbN4Pb34Ke0?text=&docid=48089&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=415463
- http://ec.europa.eu/competition/antitrust/cases/dec_docs/38899/38899_1030_10.pdf
- http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=RO
- http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32004R0139
- http://www.antimon.gov.sk/antimonopoly-office-slovak-republic/
- http://curia.europa.eu/juris/showPdf.jsf?text=&docid=46722&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=892387
- http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61993CJ0415
- http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli:ECLI:EU:C:2006:758
- http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52008XC0416(08)
- https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:61985CJ0024
- http://curia.europa.eu/juris/document/document.jsf?text=&docid=148743&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=530251
- http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC0416(08)&from=RO
- https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0023&from=en

THE LEGISLATION OF THE ROMANIAN PUBLIC ADMINISTRATION IN TODAY'S EUROPEAN CONTEXT

Florin STOICA*

Abstract

In order to be able to adapt to the requirements of the current socio-economic and political context in which Romania is today, the public administration must strive for its efforts, perhaps more than ever, in the sense of its classic mission, namely the implementation of the law and providing quality public services. The connection to the European Central Public Administration obliges the public administration in Romania to keep up with the European trends in the field, and even contribute to the achievement of the Europe 2020 Strategy targets. Defective public administration legislation leads to a hindrance to a state's growth efforts. The modernization of the legislation, the modernization of the institutions in the field have the effects expected in the development of a state. If, since 1990, Romania has the excuse for the state in a "transition", a process that includes the state together with its institutions, the acceleration of the reform process can no longer be excusable due to the context. The integration of the Romanian state into the European space has come with a number of obligations but also rights, but in terms of obligations Romania is still outstanding. Political changes, frequent changes in parliamentary majority and ruling coalition have only increased the incapacity of the Romanian state to honor its obligations In line with European standards. But the common policy of the European community has not been blocked over time but has adapted to the challenges that international politics has provided, so Romania has to make major progress to assimilate the new challenges and honor its obligations.

Keywords: *Public Services, Europe 2020 Strategy, Public Administration, Guvernoment, Legal framework, European Union, administrative capacity.*

1. Introduction

A chapter often brought to the attention of the public, a distinct chapter in all governmental programs in recent years, the reform of public administration has never been a zero priority, although its implications on economic reform were well known. The changes have been slow and fragmented and have had no positive impact on this area.

In each government, the eyes were fixed on economic issues, and then the reforming of the field was attempted, the failure of these changes generated distortions in the economic reform. Worldwide in recent years a phenomenon, can be easily identified, namely globalization, which is also characterized by the intense development of social systems.

So, we are faced with new situations, national states face new challenges, meaning that institutions and administrative systems, and of course everything that is public administration, must prove flexibility in the face of these transformations. Thus, we deduce that within this new geopolitical context the administrative factor is the most defining one for the economic competitiveness of a country or economic region.

By understanding the transformations that the public administration has to suffer, we can conclude that interventions made under the unfinished reform, involve major changes not only at a local and central scale but also regarding public service.

By explaining the concept of reform we should also start from legislation and the provisions of agreements and treaties to which Romania is part. So, during this study, I will try to demonstrate the need to speed up the changes of legislation in the field of public administration. We will also go through the main changes proposed by the new legislation and examine their importance in the implementation of the reform.

Public administration reform is a normal change in the process of developing democracy and in a process of harmonization with the European framework. Thus, the degree of development of a democracy involves the establishment of relations between citizens and administration, the decentralisation of the transfer of power from local to central and the restoration of a solid partnership with the civil society.

Reiterating the above, in Romania, the changes in public administration are getting new dimensions, so that it is a must to keep up with the world trends, but also with the social and political and economic context that the European Union is facing today.

In understanding the concept of reform, we need to relate to all aspects of the public sector organization. Thus, we have on one side, how the coordination of activities in the public domain is authorised, the package of laws governing this matter and administrative capacity on the other side. Administrative capacity[1] requires an assessment of the

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[1] For another details about administrative capacity, see Elena Emilia Ștefan, Drept administrativ. Partea a II-a. Curs universitar, ediția a 3-a revizuită, completată și actualizată, Universul juridic Publishing House, Bucharest, 2018, page 29.

functioning of the hierarchical structure of human resources in public services.

In order to support the process of transformation of the public administration, it is necessary to take a package of measures to be taken within a defined period of time. Measures otherwise foreseen in the Public Administration Strategy.

2. Content

During the transitional period Romania passed through, the public administration underwent major transformations, both at central and at local level. Perhaps the biggest impact this domain has suffered as a result of joining the European Union in 2007, a process that resulted in the linking of public administration with European governmental mechanisms and alignment with the standards imposed by other European administrations[2]. Although notable progress is being made, we identify outstanding chapters, especially in terms of efficiency, effectiveness and image, which are nothing more than a reflection of a conservative organizational culture concentrated more on a formal administration. Thus, the lack of interest in the real impact of its outcomes on society and the acute shortage of partners, such as the business environment, academic enviroment, civil society and relevant social partners, in the decision-making process generate some degree of mistrust between citizens and officials and between civil servants and political actors.

Although Romania has been a member of the European Union for more than ten years and is currently in the second programming period in terms of structural funds allocation and has had several support tools to strengthen administrative capacity, still overdue to reducing bureaucracy, increasing the transparency and professionalisation of the administration, and making the spending of public funds more efficient.

For the current programming period 2014-2020, in the context of negotiations between Romanian authorities and European ones on the Partnership Agreement which is the basis of non-reimbursable grants, there is a growing tendency to be noted at both internal and Commission level of modernising the public administration and creating the necessary capacity to fulfill the role in Romania's socio-economic development. Thus, within the mentioned documents Romania had to fulfill an ex-ante conditionality regarding the public administration field, meaning the elaboration of a plan of measures in order to strengthen the administrative capacity.

The strategy for strengthening the capacity of the public administration has been elaborated in the mentioned context and is a provision included in the framework of the EU Regulation no. 1303/2013, as well as in the document entitled Position of the Commission's Services on the Development of the Partnership Agreement and Programs in Romania for the period 2014-2020.

The strategy contains three key elements, namely[3]:

- the need to remedy some structural weaknesses in the functioning of public administration;
- country-specific recommendations made by the European Commission for the years 2013 and 2014 on public administration;
- the need to ensure / prepare the public administration to meet the obligations assumed at European level in respect of a number of targets / targets set out in the Europe 2020 Strategy, For a Better Regulation Strategy.

At the moment, steps have been made in all three directions, but from the point of view of the legislative framework, the steps are shy, the amendments to the legislation proposed in 2014 are not even finalized today. However, it should be noted that a law change process started in 2015, at which moment the law was sent to the Constitutional Court, the petition showing an appearance of unconstitutionality, thus the law has never been promulgated.

Furthermore, we will continue to focus on proposed changes to the Civil Servants Act, since the law governing the most important institutional resource, namely the human resource, is defining the reform of a system as a whole.

The status of civil servants has its seat in Law 188/1999[4] a normative act that since its promulgation has so far suffered a number of substantial deformations, both at the level of 2006 and at the level of 2003. In 2007 the changes were substantive and led to the republishing of the law. However, today's form is not the one of 2007, the re-published form kept up with the socio-political changes of the times and was amended with successive modifications and additions.

At present, according to the law, the institution responsible for monitoring and methodological coordination at the administration level is ANFP[5]".In the exercise of the powers conferred by the law a number of malfunctions were identified in the interpretation and application of certain normative

[2] Marius Profiroiu,Tudorel Andrei, Dragos Dinca Radu Carp-Study no. 3 Reform of public administration in the context of european integration,European Institute of Romania, 2009.

[3] Annexes no. 1-3 to the Government Decision no. 909/2014 on the approval of the Strategy for Strengthening Public Administration 2014-2020 and the establishment of the National Committee for Coordination of the Implementation of the Strategy for Strengthening Public Administration 2014-2020 of 15.10.2014

[4] For details, see Elena Emilia Ștefan, Manual de drept administrativ. Partea a I-a. Caiet de seminar. Universul juridic Publishing House, Bucharest, 2011, page 173.

[5] V.Vedinas, Statute of civil servants (Law No 188/1999). Comments, legislation, doctrine and jurisprudence Second Edition, reviewed and added, Universul Juridic, Bucharest, 2016, pag.111-121; Also, see. Elena Emilia Ștefan, Manual de drept administrativ. Partea a II-a, ediția a IV-a. Caiet de seminar. Universul juridic Publishing House, Bucharest, 2018, page 88.

provisions, malfunctions motivating the necessity of technical legislative interventions.

In order to elaborate the draft for the modifying normative act, a series of programmatic and strategic documents were considered. Furthermore, I am going to reiterate what has been said about the strategies developed as a result of European agreements and regulations. The following were analysed:

- Government Decision no. 909/2014 for the implementation of the Public Administration Reform Strategy (SCAP) 2014-2020;
- Government Decision no. 525/2016 for the approval of the Public Service Development Strategy (SDFP) 2016-2020;
- Government Decision no. 650/2016 for the approval of the Public Sector Vocational Training (PFS) Strategy 2016-2020.

Based on the elaboration of the strategies approved by the Government Decision no.525 / 2016 and the Government Decision no. 650/2016 five documents were elaborated by ANFP, according to the Strategy for Strengthening the Public Administration 2014-2020, namely:

- Analysis of the current situation of the recruitment and staff evaluation systems in terms of applying the rules in force;
- Analysis on strengthening the role of ANFP and / or setting up an institution responsible for managing contract staff in public administration;
- Analysis of the establishment of an entity with responsibilities in the field of training of public administration staff;
- Analysis on the evaluation of the implementation of the YPS (Young Professional Project) programs and the BSGR (Government of Romania Special Scholarship);
- Analysis of competence frameworks on strategic and specific identified areas

At the level of 2015, ANFP prepared a research report that focused on the correlation between the education system and the labor market. As a matter of fact, it was the product of a partnership, between the ANFP and the university environment.

By Parliament's Decision no. 1/2017 for granting the Government's trust through which the Governing Program 2017-2020 was adopted and one of the provisions of this document also refers to the completion of the action plan assumed by the two strategies.

At the level of the National Civil Servants'[6] Agency a mixed working sub-group was created for the elaboration of an integrated package of legislative solutions for amending and completing the Law no. 188/1999 on the Statute of civil servants. On the agenda of this working group was the transposition within the legislative framework of the Strategy for the development of the public function 2016-2020. The legislative transposition should have also taken into account the draft of the Administrative Code of Romania, the draft normative act on the working table of the legislature. The inter-ministerial working group set up, also benefited from representatives from the academical environment and representatives of trade unions in this field.

Also at the level of 2016, following the partnership between the Romanian Government and the Directorate for Public Governance and Territorial Development of the OECD, a project in the field of public governance was developed and implemented. The purpose of this project was to draw up a public-policy analysis. The outcome of this project can be quantified by identifying 5 priority areas for everything that means public governance in Romania. The following areas of major importance have been identified:

- Coordination at central level, at Government level,
- Strategic management of human resources in public administration,
- Budget Management,
- Open Governance and
- Digital Governance.

For the above-mentioned areas, expert group's recommendations were established, which would be in the course of the ongoing reform process of the administration.

2.1. The expected impact of the legislative amendments proposed by the draft law initiated by the Ministry of Regional Development and Public Administration.

The draft bill initiated by MDRAP proposes both programmatic changes and modifications aimed at completing and remedying some technical deficiencies identified at the level of the Officials' Statute.

Thus, at the level of the implementation programmatic theme, major changes were made aimed at extending the competences of the National Agency of Civil Servants by adding the accounting function and other categories of budgetary personnel within the public administration. Thus, at the level of the Agency, an electronic system for keeping the positions in the administration will be created, implemented and administered.

Also, under this point rules will be introduced that will form the basis of the regulation of the national competition as a means of recruiting civil servants. However, in the explanatory memorandum of the draft law, the implementation of a national recruitment contest will be carried out in the framework of a pilot project, a testing project. Initially, a pilot contest will be held, which will be regulated during the experimental period by some transitional rules. Transitional rules for non-experimental competitions will also be included.

[6] FUNDAMENTAL NOTE to the Government Decision no. 525/2016 for the approval of the Strategy for the development of the public function 2016-2020)

In order to occupy the central state and territorial public offices, two stages will be organised, recruitment and selection. The recruitment will be carried out by organising a national competition that will verify the general knowledge and skills. Selection will be carried out through institutional competition, for each post, and will aim at verifying the specialized knowledge and the specific skills needed to fill a vacant public position.

The contest organised for the purpose of occupying local public functions will have a more unitary organisation, so in the same competition the general and the specific and specialised skills will be checked.

For the recruitment field, the draft law proposes a centralisation at the level of the Agency, through the implementation of a recruitment plan which will be subject to the approval of the Government. The Agency will develop this plan taking into account the proposals of public authorities and institutions.

The rules governing the organisation and development of the civil servant's career are reviewed and supplemented. In this respect, associated salary rates will be introduced for all categories of officials including senior officials.

At the organisational level, the category of senior officials is redefined and a number of public functions are cancelled, namely the prefect, the sub-prefect and the government inspector, functions for which another legal regime will be established. The project also proposes transitional provisions for the implementation of these proposals.

Also within this project, the Agency has a new task, namely to develop general competence frameworks and specific frameworks.

From the second point of view of the MDRAP project, we can see changes that affect the material right of this matter. Thus, the changes and additions are aimed at some improvements for remediating the results of the practice and contributing to the implementation of the new laws.

From the second point of view of the MDRAP project, we can see changes that affect the material right of this matter. Such changes and additions are aimed at some improvements to remedy the results of the practice and contribute to the implementation of the measures imposed by the strategies.

The draft proposes a clarification of the general framework on special statutes[7]. The proposed rules also make flexible the way in which vacancies are temporarily vacant, regulate mobility within the body of civil servants, and extend the ways in which a public office can be employed.

The legislation will contain a new section "The Structure of Posts", which is characterised by general rules applicable to all public institutions and authorities. These norms regulate the organisational structure and the establishment of public functions.

Here too, the attempts are made to eliminate discriminatory situations, thus ammending the regulations on civil servants' rights. The rules on how to develop the careers of a civil servant are also reviewed in order to create a uniform regime.

Also from the point of view of human comprehensiveness, the provisions regarding the competence and activity of disciplinary and parity commissions are clarified.

The draft law technically clarifies the legal regime applicable to civil servants regarding the termination of service relationships.

The authors of the draft law proposed to revise the rules regarding the seniority of the civil service, but also to clarify the norms related to the actual institutional reorganization process as well as the terminology in the field.

This draft law seeks to standardise the applicable legal regime in the event of suspension of civil servants' service relationships in the conduct of their work in the governing bodies of trade unions and the conduct of political activities.

A controversial provision, respect, removal of service relationships in case of referral is provided. The project's authors also proposes regulations for contraventions and sanctions.

As a result of some divergences at the conceptual level, changes that are proposed are aimed at eliminating non-uniform interpretations of norms and simplifying the application of these norms. This explains the public institutions with which the civil servants are in legal service relations and the notion of budgetary personnel is redefined and clarified, in order to determine the regulatory object of the normative act.

Nowadays, the activities that involve the prerogatives of public power are redefined, and the duties involving the exercise of public powers are classified into two categories, namely general and special in nature. Rules on special statutes and specific public functions are introduced.

The draft law now also establishes the legal consequences that may arise if several cases of cessation or suspension of service relationships occur concurrently but also clarify the liability of civil servants in the exercise of their duties.

The rules on redistribution of civil servants and the reserve body of these are provided with clarification in this draft.

In order to obtain unitary legal provisions on reduction of the number of incomplete administrative acts, a new section "Administrative acts" will be introduced in the new laws. Within this section, the author of the text proposes definitions of the administrative act, the administrative act of appointing, amending, suspending and terminating the public office. These provisions are not only about definitions but also about how these administrative acts produce their effects.

[7] Draft "Law on the Statute of Civil Servants and Evidence of Budgetary Staff in Public Administration", March 2017.

The proposed project is perhaps the most complete modification and consolidation of the State Civil Servant since the Law was published in 1999. However, other proposed changes are also important, namely those related to the transposition into other programmatic documents. Thus, the transposition of the Incidental Provisions of the "Strategy for Promotion of Active Aging and the Protection of the Elderly for the Period 2015-2020" is made by introducing rules stipulating the possibility of keeping civil servants fulfilling the retirement conditions for old age in service, observing the express conditions laid down for that purpose.

The transposition of the provisions of the National Public Procurement Strategy is achieved through the introduction of a new public execution function, namely public procurement advisor.

3. Final changes sent to promulgation

Although the draft law initiated by the Ministry of Regional Development and Public Administration is launched in March 2017, in 2015 a group of MPs initiated another draft law amending the Civil Service Statute. Of the two projects, the one in 2015 is on the circuit of approval and approval of a normative act. This bill was submitted to the debates of the two chambers and was verified and amended by the Constitutional Court.

In the explanatory statement submitted, according to the practice and norms for the drafting of the normative acts, the authors of the proposal motivate the necessity of this act in order to strengthen the observance of the principles of equal opportunities for non-discrimination and equity between civil servants.

Among the proposed changes are the modification of the conditions necessary for the promotion, the modification of the situation of suspension of the service relationship, the possibility to continue the activity after retirement, the mobility of the public function.

The motivation of this draft law contains the supplementation required by the Constitutional Court Decision no. 1039/2009, which assumes: "One of the principles underlying the right to work is the stability of legal relationships that arise as a result of the conclusion of the individual labor contract, this principle stemming from the State's obligation to create the legislative framework meant to ensure the salaries of safety and security, the guarantee of keeping the workplace[8] ".

A first form of this proposal was adopted by the Chamber of Deputies in 2016, as amended by the Constitutional Court by the Constitutional Court's Decision No. 667 of November 9, 2016, following the notification of the Government. Subsequent to this notification the normative act is sent to the Senate for reexamination. The reason for unconstitutionality was the amendment related to the granting of bonuses to the staff of the National Agency of Civil Servants.

Following the consolidation of a new form of the normative act was amended by notices formulated by the President of Romania for diminishing the standards of integrity. The Constitutional Court no.32 of January 23, 2018 establishes the new provisions in conflict, art. I, points 14, 18 and 22.

Following the communication of this decision, a new form for this project is reinforced.

The main changes to be adopted are aimed at strengthening the position of senior civil servant, increasing the number of years necessary for the performance of these functions from 5 to 7 years and introducing new regulations regarding the clarification of the category of staff paid from public funds.

It also clarifies the way in which senior civil servants and senior officials can be appointed to public dignity positions, namely by suspending the service relationship. The way of entry into the body of civil servants is also regulated.

The form prepared for the promulgation also contains provisions regarding the development of the career of civil servants and the way of promotion or recruitment for management positions. These changes occur to professionalize and increase administrative capacity. Norms governing the possibilities of mobility within the public service are also provided here.

Notable in this normative act is the continuation of the activity after retirement, which also offers the character of professionalization of the public administration.

By making a parallel between the two draft normative acts, we find that the project elaborated by the Ministry of Regional Development and Public Administration is much more complete and presumes a restructuring of this legislative framework. The central authority project, the most competent authority in the field, supposes the affiliation with the European standards and the strategies and agreements assumed by our state. Some of these measures are also taken up in the project prepared for publication, but the act prepared for publication leaves gaps in the field and does not complete the planned measures within the programmatic documents. These changes are more of a political nature and have no scope that the proposed amendments by the central authority, do not come to follow the plan of measures taken to develop the administrative capacity of the Romanian state.

If these provisions are promulgated and published, they will not stabilize the legislative framework governing the State of Civil Service. We reiterate the need to see all measures taken as ex-ante conditionality in the framework of agreements with European mechanisms. Thus, we see the need to republish this legislation and to follow all the strategic documents that intersect with this area. Legislation needs to be adapted at the same time as the approximation of adjacent legislation and the harmonization of legislation on public and utility services.

[8] Decision of the Constitutional Court no. 1039/2009

4. Conclusion

Although apparently we may conclude that the reform of public administration is close to the end, the analysis of normative acts and the practice of recent years, denotes that the public administration reform is far from complete.

The various studies conducted by civil society and other non-governmental organizations have revealed a series of deficiencies in the management of public office.

All of these studies reveal that the reform of public administration must focus on this essential resource. The public administration faces an important challenge, namely the establishment of a way to create the creative potential of the human resource.

The last period was marked by the attempt to cosmetic the image of the public administration, by applying the conceptual principles regarding the increase of transparency of the administrative act and the taking of measures aimed at combating corruption measures that kept the pages of the newspapers.

The analysis made during the current study reveals precisely the lack of consistency of coherent legislative reform. However, we only refer to the proposal that followed the circuit of a normative act, a proposal that does not have an essential role in the process of reform to strengthen the administrative capacity.

If we relate to the first analyzed proposal, we find that this is incomplete as it does not contain provisions on the computerization and digitization of the administration and does not propose clear measures in encouraging the creative potential.

Although the recruitment process for civil servants is currently regulated, the recruitment process does not reveal the best managers or the best professionals. Practice shows us that the recruitment method has not yet come under the sphere of politics and interest. In this regard, it is worth noting the numerous frauds found by the authorities and the numerous acts initiated at the level of the National Anticorruption Directorate.

If the management style at present is characterized by an authoritative style lacking in professionalism, which denotes the need to develop a new recruitment method and a new way of training for the benefit of professionals, possibly inaccessible on the basis of a contract performance so that political sympathies or other occult forces can influence their activity. What is lacking in the public authorities in the present is the lack of an organizational culture and the lack of trained managers. Officials with senior management positions, even if they often know the field quite well, do not have managerial skills.

In order to be able to complete the reform process in this area it is necessary first to follow the strategies developed in this field and then to comply with the directives imposed by the European mechanisms. As I saying, the legislative framework needs to be modernized and simplified in order to increase administrative capacity, which will have repercussions on economical growth.

References

- Robert C. Denicola, Fair's Fair - An Argument for Mandatory Disclosure, University of Nebraska, 2004
- V.Vedinas, Theoretical and practical treatise on administrative law. Volume I, Editura Universul Juridic, 2018
- V.Vedinas, Statute of civil servants (Law No 188/1999). Comments, legislation, doctrine and jurisprudence Second Edition, reviewed and added, Universul Juridic,Bucharest, 2016
- Marius Profiroiu,Tudorel Andrei, Dragos Dinca Radu Carp-Study no. 3 Reform of public administration in the context of european integration,European Institute of Romania, 2009
- Elena Emilia Ștefan, Manual de drept administrativ. Partea a II-a, ediția a IV-a. Caiet de seminar. Universul juridic Publishing House, Bucharest, 2018
- Elena Emilia Ștefan, Manual de drept administrativ. Partea a I-a. Caiet de seminar. Universul juridic Publishing House, Bucharest, 2011
- Alesina A., Perotti R., The Politics of Economic Growth, Harvard University,Cambridge, Working Paper, no 4341, Cambridge, 1993
- Alesina A., Perotti R., Income Distribution. Political Instability and Investment, NBER Working Paper, n0 4486, Cambridge, 1993
- Balls A., Bombing costs prezent allies with hefty bill, Financial Times, 9 avril1999
- Bardhan P., Corruption and development: a review of issues, Journal of Economic Literature, Vol.35, no 3, 1997
- Barro R., Lee J.-W, Losers and Wienners în economic Growth, NBER Working
- Barro R., J., Economic growth în a cross-section of countries, Quarterly Journalof Economics, vol. 106, p. 407-443, 1991
- Elena Emilia Ștefan, Drept administrativ. Partea a II-a. Curs universitar, ediția a 3-a revizuită, completată și actualizată, Universul juridic Publishing House, Bucharest, 2018
- LAW no. 188 of 8 December 1999 (** republished **)on the status of civil servants *)
- PL-x no. 556/2015-Draft Law amending the Law no.188 / 1999 on the Civil Servants' Statute
- Draft law to amend Law no. 188/1999 on the Statute of civil servants published on 1 March 2017
- FUNDAMENTAL NOTE Government Decision no. 525/2016 for the approval of the Strategy for the development of the public function 2016-2020
- The Strategy for the Development of the Public Function 2016-2020
- Strategy for consolidated public administration 2014-2020
- Decision of the Constitutional Court no. 1039/2009

TOOLS TO ENSURE THE PREVENTION OF CONTRAVENTIONS

Elena Emilia ȘTEFAN[*]

Abstract

Nowadays, the most common form of law infringement is contravention. The Romanian contravention law was improved at the end of 2017 by a legislative novelty regulating the instruments to ensure the prevention of contraventions.

The contraventions provided in this administrative act are diverse and it is interesting that despite this, the law maker provides in many cases the application of a penalty, namely the warning, which is then followed, as the case may be, by the application of a measures plan, limited in time. Furthermore, the offenders will not be pardoned every time, but only once, provided that they fulfill the obligations provided by the measures plan and within the deadline established by the official examiner. This law would have remained only at the stage of intention and without application if the executive had not adopted the administrative act identifying the contraventions contemplated by it, but once the respective Government resolution has been adopted, we can only wait for the time to see the effectiveness of it application.

This is why, in this study, we will analyze this topic by being of great interest and adapted to social realities. By being a legislative novelty for the national law system, the scientific research that we performed is mainly focused on the legislation and the doctrine.

Keywords: *Contraventions, prevention law, correction plan, warning, Government resolution.*

1. Introduction

The field of contraventions is undoubtedly an area with the most profound and complex implications in the everyday life of citizens and, by default, in the administrative practice of authorities with duties in the field[1]. Therefore, we believe that it is required to know the legislation in the field, the contravention functioning mechanism, not so much in terms of the sanction, but especially in terms of the tools for the prevention of contraventions.

The scientific research started with the documentation on the topic and included: legislation, doctrine and case law. Therefore, we noted that, in what concerns the subject we propose and the date on which we draw up this study, no doctrine and case law is available, being about the recent adoption of Prevention Law no.270/2017 of 22.12.2017 (hereinafter referred to as the Prevention Law)[2] and Government Resolution no. 33/2018 establishing the contraventions which fall under the scope of Prevention Law no. 270/2017, and of the correction plan model[3], having the nature of legislative novelty.

Prevention Law no. 270/2017 came into force on January 17th, 2018 but it could not be applied due to the fact there is a provision in the content of the law, respectively art.10 para.(3) which conditioned the subsequent issue of an administrative act, respectively of a Government Resolution to identify the contraventions which fell under the scope of the law and of the correction plan model. This administrative act was adopted only on February 5th, 2018 due to the fact Romania had to face a resigning government during this term.

The activity of public administration authorities[4], at any level, is subject to principles resulting from the legislation, and the lawfulness principle is, in our opinion, the corollary of all principles and is provided by the revised Constitution of Romania itself: "no one is above the law". In the current historical background, in which humanity escalates a new stage of civilization, thus embracing "unity in diversity", the role of general principles of law, the legal expression of fundamental relationships within the society is amplified[5].

Every state has its own enacted law, in accordance with its own socio-political requirements, with the traditions and values it proclaims [6]. The failure to comply with the laws entails legal liability. One explanation for the failure to observe the laws is that the laws are inappropriately made, approved not for common good, but for private interests(...)[7].The violation by the lawmaker of the justness standard often

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[1] Dana Apostol Tofan, *Drept administrativ*, volume II, edition 4, Bucharest, C.H.Beck Publishing House, 2017, p.371.

[2] Prevention Law no.270/2017 of December 22nd, 2017, published in Official Journal no. 1037 of 27.12.2017.

[3] Government Resolution no. 33/2018 establishing the contraventions which fall under the scope of Prevention Law no. 270/2017, and of the correction plan model, published in Official Journal no. 107 of 05.02.2018.

[4] For further details, see Roxana Mariana Popescu, *Jurisprudența CJUE cu privire la noțiunea de „administrație publică" used in art. 45 ara. (4) TFUE,* in proceeding CKS ebook 2017, pp. 528-532.

[5] Elena Anghel, *The importance of principles in the present context of law recodifying*, in proceeding CKS e-Book 2015, p. 753-762.

[6] See Elena Anghel, *Constant aspects of law*, in proceedings CKS-eBook 2011, Pro Universitaria Publishing House, Bucharest, 2011, p. 594.

[7] Mario Vargas Llosa, *Civilizația spectacolului*, Translation from Spanish by Marin Mălaicu-Hondrari, Humanitas Publishing House, Bucharest 2017, p. 126.

leads to the adoption of unfair laws[8]. "Prevention", according to the definition provided by DEXonline means, among others "avoiding bad things by taking timely, preventive measures, prevention"[9]. Bad laws do not harm only the ordinary citizen, but they also lower the prestige of the legal system and amplify the contempt for the law, which, like a poison, empoisons the rule of law[10].

Therefore, in our opinion, Prevention law is not a bad law, but a good law, in accordance with the evolution of the society, adjusted to social realities. A good law should not be seen only from the penalties perspective, but also from the prevention perspective, as in case of the Prevention Law, according to its name given by the law maker. No state has a legislation valid for all times[11]. Therefore, the scope of this study is to point out the opinion of the law maker on the tools for the prevention of contraventions, by presenting in detail how this law works.

2. Content

2.1. Civil sanctions

The governing rules of contraventions are provided by Government Ordinance no. 2/2001 on the legal regime of contraventions[12]. Contravention is defined by Government Ordinance no. 2/2001 (...) as: "the act committed with guilt, established and sanctioned by law, ordinance, Government resolution, or as the case may be, by decision of the local council of commune, city, municipality or district of Bucharest, county council or General Council of Bucharest". Contravention Law protects social values which are not protected under the criminal law, according to art. 1 thesis 1 of Government Ordinance no. 2/2001 (...).

From another point of view, contravention, in the opinion of the European Court of Human Rights is qualified as "criminal charge"[13]. Romania is permanently bound to harmonize its legislation with the European legislation, and the national doctrine has given us many opportunities to analyze the supremacy of the European Union law[14]. Romania ratified the Treaty of Lisbon amending the Treaty on European Union[15] (...) in 2008. The failure to comply with the EU legal regulations leads, as well known, to the opening of the infringement procedure[16]. The European Union law embraces the theory of monism, that is the existence of a single legal order which includes international law and domestic law in an unitary system [17]. In order to eliminate arbitrariness in assessing the social danger degree of an act in order to qualify it as contravention or offence, normative acts provide expressly the category under which a certain illicit conduct falls[18]. A recent study has analyzed comparatively the contravention and the offence[19], but this is not the object of our study. We can therefore say that the will of the law maker, by being based on criminological analyzes, studies and researches is the one that cause an unlawful act to be included in the category of the contraventions or of the offences[20].

Civil sanctions are provided both by the regulations in the filed (*s.n.* G.O. no. 2/2001), and by laws and special contravention laws[21]. According to art.5 of G.O. no. 2/2001 on the legal regime of contraventions, civil sanctions can be principal and complementary. There are three *principal civil sanctions*: warning, fine and provision of community service. *Complementary civil sanctions* are: arrest warrant in rem intended to, used or resulted from contraventions; suspension or cancellation, as the case may be, of the endorsement, agreement or authorization to perform an activity; closing the unit; bank account lock out; the suspension of the activity of the economic agent; the withdrawal of the license or authorization for external, temporary or definitive trade; works dismantling and return of the land at its initial state.

The doctrine identified other complementary civil sanctions provided for by art. 96 para. (2) of G.E.O. no.195/2002: a.) application of penalty points; b.) the suspension of the exercise of the right to drive, on limited term; c.) arrest warrant in rem intended to

[8] See Elena Anghel, *Justice and equity*, in proceedings CKS-eBook 2017, Bucharest, p.370.

[9] https://dexonline.ro/definitie/prevenire, accessed on 07.02.2018.

[10] Mario Vargas Llosa, *Civilizația spectacolului, op.cit*., p. 126.

[11] Laura-Cristiana Spătaru-Negură, *Old and New Legal Typologies*, in proceedings CKS-eBook 2014, Pro Universitaria Publishing House, Bucharest, 2014, p. 354.

[12] Government Ordinance no. 2/2001 on the legal regime of contraventions, published in Official Journal no. 410 of July 25th, 2001, as further amended and supplemented.

[13] See Elena Emilia Ștefan, *Răspunderea juridică.Privire specială asupra răspunderii în dreptul administrativ*, Prouniversitaria Publishing House, Bucharest, 2013, pp.216-218.

[14] 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, pg. 11-21; Augustin Fuerea, *Manualul Uniunii Europene*, edition VI, revised and supplemented, Universul Juridic Publishing House, Bucharest, 2016, pp. 252-253.

[15] For further information see the Treaty on the European Union, Roxana-Mariana Popescu, *Introducere în dreptul Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2011, pp.62-63.

[16] For other details, see Roxana-Mariana Popescu, *General aspects of the infringement procedure*, Lex et Scientia, International Journal, no.2/2010, Pro Universitaria Publishing House, pg. 59-67.

[17] Laura Cristiana Spătaru Negură, *Dreptul Uniunii Europene-o nouă tipologie juridică*, Hamangiu Publishing House, Bucharest, 2016, p.190

[18] Cătălin Silviu Săraru, *Drept administrativ.Probleme fundamentale ale dreptului public*, C.H.Beck Publishig House, Bucharest, 2016, p.214.

[19] Elena Emilia Ștefan, *Delimitarea dintre infracțiune și contravenția în lumina noilor modificări legislative*, Dreptul no. 6/2015, pp.143-159.

[20] Cătălin Silviu Săraru, op.cit., p.215.

[21] A. Iorgovan,*Tratat de drept administrativ*, vol.II edition 4, All Beck Publishing House, Bucharest, 2005, p.408.

contraventions provided for by G.E.O. no. 195/2002 or used for this purpose; d.) vehicle dowtime; e.) ex officio deregistration of the vehicle, in case of declared vehicles, according to the law, by order of the authority of local public administration, with no owner or abandoned.[22]

2.2. Prevention Law

2.2.1. Scope and terms of Prevention Law

Prevention Law no. 270/2017 of 22.12.2017 published in Official Journal no. 1037 of 27.12.2017 and Government Resolution no. 33/2018 establishing the contraventions which fall under the scope of Prevention Law no. 270/2017, as well as of the correction plan model, published in Official Journal no. 107 of 05.02.2018 are the two normative acts with novelty nature in our law system regarding the field of contraventions.

Prevention Law is a normative act which consists of a low number of articles, respectively 11. Appendix no. 1 of Government Resolution no. 33/2018 (...) has 70 items listing the contraventions which fall under the Prevention Law and Appendix no.2 The model of the record of findings and subsequent penalties which consists of: Part 1- *Correction Plan* and Part II – *Correction measures fulfillment modalities.*

The declared scope of the Prevention Law is "*to regulate a series of tools to ensure the prevention of contraventions. The Government Resolution shall establish the contraventions which fall under the scope of this law*". The Government Resolution the Prevention Law refers to is aforementioned Government Resolution no. 33/2018 (...).

The prevention Law defines the following terms which are found in its content, namely: correction measure, correction plan and correction deadline:

- *correction measure:* any measure ordered by the official examiner in the correction plan the scope of which is the fulfillment by the offender of the obligations established by the law;
- *correction plan:* appendix to the record of findings and subsequent penalties, whereby the official examiner established correction measures and deadline;
- *correction deadline:* the term of no more than 90 calendar days, as of the delivery or communication of the record of findings and subsequent penalties, where the offender can correct the ascertained irregularities and fulfill the legal obligations. The correction deadline shall be established by taking into account the circumstances of the offence and the term required for the fulfillment of the legal obligations. The correction deadline established by the control body cannot be modified.

2.2.2. Prevention Law functioning mechanism

According to the law maker, the Prevention Law seems to be a law that sanctions an offender who commits a contravention which falls under the scope of this law and establishes a measure plan that the offender is bound to fulfill within a certain established deadline. In fact, Prevention Law establishes two stages where the official examiner acts when founds the commission of a contravention, following the performance of a control. We hereby point out that not all contraventions benefit from this relaxed sanctioning regime, but only those expressly provided by Government Resolution no. 33/2018 (...) adopted by the executive branch. There is a sole institution with executive powers at the European Union level, namely the European Commission [23]. Furthermore, we have to make two important notes:

1. As of the enforcement of the Prevention Law, by way of derogation from the provisions of Government Ordinance no. 2/2001 (...), for finding and sanction contraventions referred to in Government Resolution no. 33/2018 (...), the provisions of this law shall apply.
2. In what concerns the sanctions applied according to Prevention Law, these shall be supplemented by the provisions of G.O. no. 2/2001(...).

Stage no. 1.

According to the provisions of art. 4 para. (1) in case of finding one of the contraventions established by the Government Resolution in art. 10 para. (3), respectively Government Resolution no. 33/2018 (...), the official examiner concludes a record of findings whereby *warning sanction is applied* and a *correction plan is attached.* In this case, no complementary contravention sanctions are applied.

The law expressly provides that the liability for the fulfillment of the correction measures shall be incumbent on the person who, according to the law, bears the contravention liability for the acts which were found.

The official examiner, according to paragraphs (2 and 3) of art. 4 of the Law shall not draw up a correction plan but shall only apply the warning sanction, in the following situations:

- if the offender fulfills the legal obligation throughout the performance of the control;
- if the contravention is not continuous
- if the sanctioning of the contraventions of art. 10 para.(3) of the Law expressly referred to in Government Resolution no. 33/2018 (...), expressly establish the exclusion from the application of the warning.

Furthermore, Prevention Law also regulates the situation where an offender committed several contraventions which fall under its scope. In such cases, if a person commits several contraventions which are found at the same time by the same official examiner, a single record of findings and subsequent penalties shall be concluded, under the fulfillment of the provisions of art. 4 and, as the case may be, a correction plan shall be

[22] Cătălin Silviu Săraru, *op.cit.,* p.217.

[23] For further information on the European Commission, Augustina Dumitrașcu, Roxana-Mariana Popescu, *Dreptul Uniunii Europene. Sinteze și aplicații*, edition II, Universul Juridic Publishing House, Buchaerst, 2015, p. 65 and the following.

attached to. We hereby point out that the correction plan model the Prevention Law refers to and which is attached to the record of findings and subsequent penalties is the one published in Government Resolution no. 33/2018 (...).

Stage no. 2

Art. 8 para. (1) of Prevention Law establishes that, within no more than 10 business days as of the expiry of the correction deadline, public authority/institution with control powers shall be bound to *resume control* and to fill in part II of the correction plan attached to the record of findings and subsequent penalties and if the case may be, the control ledger with notes on the fulfillment of the correction measures.

Art. 8 para. (2) of Prevention Law provides that, in case the failure to fulfill the legal obligations according to the correction measures within the established deadline is found during the resumption of the control, the official examiner concludes another record whereby the commission of the contravention is found and the contravention sanction/s, other than the warning, is/are applied.

Another important provision of the Prevention Law refers to *the passing of a period of 3 years as of the conclusion of the record of findings* and subsequent penalties, according to this Law. There are two situations regulated by art. 9 of the Law, namely:

- if, within 3 years as of the conclusion of the record of findings and subsequent penalties provided for by art. 4, the offender commits again the same contravention, the legal provisions in force on contravention finding and sanctioning shall be directly applicable;
- if within 3 years as of the conclusion of the record of findings and subsequent penalties provided for by art. 5[24] the offender commits again one or several contraventions provided for by art. 10 para. (3) of the Law, respectively in Government Resolution no. 33/2018 (...), the legal provisions in force on contravention finding and sanctioning shall be directly applicable.

The Prevention Law assigns an article to the importance of the *Control Ledger*. Therefore, art. 6 expressly provides that the official examiner shall be bound to check in the control ledger and in the records of the public authority/institution it is part of whether the offender benefited from the provisions of art. 4. This means that at the end of the control, the details of the control shall be recorded in writing in the control ledger.

There is also the category of those who are not bound to have a control ledger, according to the law. In this case, the official examiner shall be bound to check in the records of public authority/institution it is part of whether the offender benefited from the provisions of art. 4. The official examiner shall be bound to provide expressly the correction plan in the control ledger.

In what concerns the *nullity of the record of findings*, Prevention Law provides in art.7 that the violation of art. 4 paragraphs (1 and 2) shall lead to the nullity of the records.

2.2.3. The obligations of public authorities /institutions with control powers

Prevention Law establishes an obligation which is incumbent on public authorities and institutions responsible for controlling, sanctioning and finding contraventions and describes this obligation in art. 3. Public authorities and institutions responsible for controlling, sanctioning and finding contraventions shall be bound, depending on the fields they lead, to produce and disseminate documentary materials, guides and to allocate on the web page dedicated sections on public information on the following:

a) legislation in force on contravention finding and sanctioning;
b) rights and obligations of these public authorities/institutions in the performance of the activity on finding contraventions and subsequent penalties, as well as rights and obligations of persons subject to these activities;
c) distinct indication of contraventions for which public authority/institution has the power of finding and sanctioning contraventions, as well as of sanctions and/or other applicable measures.

Public authorities and institutions with control powers, depending on their competence areas, shall be bound to guide interested persons for an appropriate and unitary application of the law.

In order for the guiding activity to be carried out, public authorities and institutions with control powers shall be bound: a) to issue guidance and control procedures to be used by persons authorized to carry out control activity; b.) to publish on own sites high-frequency cases and guidance solutions provided in this cases, as well as the developed procedures; c.) to exercise actively the role of guidance of the controlled persons in case of every control activity, thus making available, according to the procedures, the indications and guidance required in order to avoid law infringement on the future. The fulfillment of this obligation shall be expressly mentioned in the control protocol, thus showing the provided indications and guidance.

Finally, the central public administration authorities with powers to coordinate nationally the business environment shall be bound that, within 6 months as of the enforcement of the law, to develop and operate a portal dedicated to providing centralized online services and resources for information purposes.

2.2.4. Examples of contraventions which fall under the scope of Prevention Law

Government Resolution no. 33/2018 for the establishment of contraventions which fall under the scope of Prevention Law no. 270/2017, as well as of the correction plan model, published in Official Journal no.

[24] It is about several contraventions (...).

107 of 05.02.2018 lists in Appendix 1 the contraventions which fall under the scope of Prevention Law.

For example, the following contraventions fall under the scope of the Prevention Law:

- The failure of the signatory parties to submit for publication purposes the collective labor agreement at the level of group of units or sector of activity (art. 217 paragraph 1, letter c. of the Law on social dialogue[25]);
- The establishment of plantations with areas of more than 0.5 ha of fruit trees and of areas larger than 0.2 ha of fruit-bearing shrubs by every economic operator or family or their extension over the limits of those existent, without planting permission, according to the law (art.29 the Law on fruit growing[26]) etc.
- The conclusion of management/forestry service agreements with persons who acquire exclusively the ownership over the land where it is located (art. 3 paragraph 2 of the Law on finding and sanctioning contraventions in the field of forestry[27]) etc.
- The following acts shall not be deemed offences: the issuance of the fiscal receipt containing erroneous data or not containing all the data provided by the law; the fiscal receipt is not handed to the customer by the operator of the electronic cash register and/or the failure to issue the invoice upon the customer's request (art. 10 letter f/ g of G.E.O. no. 28/1999[28]) etc.
- The following acts shall not be deemed offences: the failure of the taxpayer/payer to submit within the deadline provided by the law the tax registration declarations, tax deregistration declarations or declarations of mentions; the failure of the taxpayer/payer to comply with the obligation to submit to the tax body the data archived in electronic format and the computer applications that generated them (art. 336 paragraph 1 letters a/f of the Code of fiscal procedure[29]) etc.
- the failure to purchase the control ledger from the general departments of the public finance administration within the territory where the taxpayer has his/her registered office, on the legal deadline (art. 7 letter a of Law no. 252/2003 on the control ledger[30]) etc.
- The failure of the traders to comply with the legal provisions on misleading and comparative publicity (art. 10 paragraph 1 of Law no. 158/2008 on misleading and comparative publicity [31].) etc.

Conclusions

Prevention Law will prove its efficiency after passing the time test, after drawing a case law and after appearing its first weaknesses or, on the contrary, it will prove to be a perfect law. If the judge does not find principles appropriate to the case resorted for settlement, the judge can and must create a new rule of law[32]. For the time being, we cannot speak about case law, as we have shown before; despite this, in our opinion, the law maker's effort to pardon an offender from the application of a sanction, under certain terms, is commendable, being fully pointed out the preventive nature of this law with regard to contraventions, deeds entailing a lower social danger compared to offences.

As we have shown in the content of the study, Prevention Law has, on the one hand, a derogatory regime of application compared to common law on contraventions, namely G.O. no. 2/2001 and, on the other hand, is applied only to those contraventions which are expressly provided by Government Resolution, respectively Government Resolution no. 33/2018 on the contraventions which fall under the scope of Prevention Law no. 270/2017, as well as of the correction plan model.

The contraventions provided in this administrative act are diverse and it is interesting that despite this, the law maker provides in many cases the application of a penalty, namely the warning, which is then followed, as the case may be, by the application of a measures plan, limited in time. Furthermore, the offenders will not be pardoned every time, but only once, provided that they fulfill the obligations provided by the measures plan and within the deadline established by the official examiner.

To conclude, we believe that we have achieved the scopes established in drawing up of this study, namely to show this legislative novelty in the field of contraventions and we hope that this will be an efficient law and not a reason for breaking the law due to postponing the application of the penalty after the first control where the contravention was found.

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[25] Law no. 62/2011 on social dialogue, published in Official Journal no. 625 of August 31st, 2012, as further amended and supplemented.

[26] Law no. 348/2003 on fruit growing, published in Official Journal no. 300 of April 17th, 2008, as further amended and supplemented.

[27] Law no. 171/2000 on finding and sanctioning contraventions in the field of forestry, published in Official Journal no. 513 of July 23rd, 2010, as further amended and supplemented.

[28] G.E.O. no. 28/1999 on the obligation of economic operators to use electronic cash registers, published in Official Journal no. 75 of January 21st, 2005, as further amended and supplemented.

[29] Law no. 207/20115 on the Code of fiscal procedure, published in Official Journal no. 547 of July 23rd, 2015, as further amended and supplemented.

[30] Law no. 252/2003 on the control ledger, published in Official Journal no. 429 of June 18th, 2003, as further amended and supplemented.

[31] Law no. 158/2008 on misleading and comparative publicity, republished in Official Journal no. 454 of July 24th, 2013.

[32] Elena Anghel, *Judicial precedent, a law source*, in proceeding CKS ebook 2017, Bucharest, p.364.

Refereces

- Elena Anghel, „*Justice and equity",* in proceedings CKS-eBook 2017, Bucharest
- Elena Anghel, „*Judicial precedent, a law source",* in proceeding CKS ebook 2017, Bucharest
- Elena Anghel, „The importance of principles in the present context of law recodifying", in proceeding CKS e-Book 2015
- Elena Anghel, „*Constant aspects of law",* in proceedings CKS-eBook 2011, Pro Universitaria Publishing House, Bucharest, 2011
- Iorgovan,*Tratat de drept administrativ*, vol.II edition 4, All Beck Publishing House, Bucharest, 2005
- Augustina Dumitrașcu, Roxana-Mariana Popescu, *Dreptul Uniunii Europene. Sinteze și aplicații,* edition II, Universul Juridic Publishing House, Buchaerst, 2015
- Augustin Fuerea, *Manualul Uniunii Europene,* edition VI, revised and supplemented, Universul Juridic Publishing House, Bucharest, 2016
- Mario Vargas Llosa, *Civilizația spectacolului*, Translation from Spanish by Marin Mălaicu-Hondrari, Humanitas Publishing House, Bucharest 2017
- Laura Cristiana Spătaru Negură, *Dreptul Uniunii Europene-o nouă tipologie juridică*, Hamangiu Publishing House, Bucharest, 2016
- Laura-Cristiana Spătaru-Negură, „*Old and New Legal Typologies",* in proceedings CKS-eBook 2014, Pro Universitaria Publishing House, Bucharest, 2014
- Roxana Mariana Popescu, „Jurisprudența CJUE cu privire la noțiunea de „administrație publică" used in art. 45 ara. (4) TFUE", in proceeding CKS ebook 2017
- Roxana-Mariana Popescu, *Introducere în dreptul Uniunii Europene,* Universul Juridic Publishing House, Bucharest, 2011
- Roxana-Mariana Popescu, „*General aspects of the infringement procedure",* Lex et Scientia, International Journal, no.2/2010, Pro Universitaria Publishing House
- 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
- Cătălin Silviu Săraru, *Drept administrativ.Probleme fundamentale ale dreptului public*, C.H.Beck Publishig House, Bucharest, 2016
- Elena Emilia Ștefan, "Delimitarea dintre infracțiune și contravenția în lumina noilor modificări legislative", Dreptul no. 6/2015
- Elena Emilia Ștefan, *Răspunderea juridică.Privire specială asupra răspunderii în dreptul administrativ,* Prouniversitaria Publishing House, Bucharest, 2013, pp.216-218
- Dana Apostol Tofan, *Drept administrativ*, volume II, edition 4, Bucharest, C.H.Beck Publishing House, 2017, p.371
- Prevention Law no.270/2017 of December 22nd, 2017, published in Official Journal no. 1037 of 27.12.2017
- Government Resolution no. 33/2018 establishing the contraventions which fall under the scope of Prevention Law no. 270/2017, and of the correction plan model, published in Official Journal no. 107 of 05.02.2018
- Law no. 207/2015 on the Code of fiscal procedure, published in Official Journal no. 547 of July 23rd, 2015, as further amended and supplemented
- Law no. 62/2011 on social dialogue, published in Official Journal no. 625 of August 31st, 2012, as further amended and supplemented
- Law no. 158/2008 on misleading and comparative publicity, republished in Official Journal no. 454 of July 24th, 2013
- Law no. 252/2003 on the control ledger, published in Official Journal no. 429 of June 18th, 2003, as further amended and supplemented
- Law no. 348/2003 on fruit growing, published in Official Journal no. 300 of April 17th, 2008, as further amended and supplemented
- Law no. 171/2000 on finding and sanctioning contraventions in the field of forestry, published in Official Journal no. 513 of July 23rd, 2010, as further amended and supplemented
- G.E.O. no. 28/1999 on the obligation of economic operators to use electronic cash registers, published in Official Journal no. 75 of January 21st, 2005, as further amended and supplemented
- Government Ordinance no. 2/2001 on the legal regime of contraventions, published in Official Journal no. 410 of July 25th, 2001, as further amended and supplemented
- https://dexonline.ro/definitie/prevenire, accessed on 07.02.2018

GOVERNMENT INVESTITURE

Elena Emilia ȘTEFAN[*]

Abstract

This study aims to analyze the procedure of the investiture of the Government and to briefly present current configuration of the Romanian Government. In this respect, based on the current legislation and on the analysis of the public activity official information, ministries which currently operate according to government program, as well as the modality the government program is established or the list of the future members of the cabinet is drawn up will be summarized. We believe that this is a highly topical issue, the Government being the public authority which, according to the provisions of the Constitution ensures the performance of domestic and external policy of the country and it is important to know the structure of the Government, especially since our country is quite familiar with the government investiture procedure since recent Governments had a rather short term of office.

The area covered by the subject we propose is quite extensive and includes a combination between constitutional law, parliamentary law, administrative law and general theory of law. The following are among the scopes of this study: the performance of an inventory of the ministries that make up the current Government; brief presentation of the Government investiture procedure and of the meaning of the government political program, due to the fact it is an extremely up-to-date subject and we strongly believe that it is important to understand the constitutional mechanism of making up the Government.

Keywords: *Constitution, public authorities, ministries, Government, government resolution.*

1. Introduction

So far, no similar study has been drawn up in the current doctrine[1], namely a study which aims to perform a review of the Government investiture procedure which includes a presentation of the ministries corresponding to a 4-year political program, on the structure we are proposing. Every state has its own law, in accordance with own socio-political demands, with traditions and values it proclaims[2]. The starting point in the draw up of our study was based on a social legal reality, namely in 2017 Romania had two Governments, both carried out the activity on 5-7-month term of office and now, at the beginning of 2018, we have a third Government. The difference between the two Governments of 2017 consists in the termination of the term of office, respectively Government no. 1- S. Grindeanu was dismissed by censure motion by the Parliament and Government no. 2- M. Tudose ceased the term of office by the resignation of the prime minister.

Therefore, by means of this study, we intend to analyze this situation, premise from which we start and we try to answer questions such as: are there any weaknesses in the legislation, is human factor to blame in this case, etc. Following this analysis, we hope that we can find the explanation of why there have been three governments in one year and two months. Therefore, the common point of the theoretical analysis of the subject is the constitutional procedure of Government investiture, with its components: government political program and structure of the future executive body.

The way the society evolves and the manifestation ways of the legal phenomenon will be the main indications of its efficiency[3]. The revised Constitution of Romania is a modern constitution, comparable with the European constitutions, our country having a two-chamber executive body. We have to mention that, there is a sole institution with executive powers at the European Union level, namely the European Commission[4]. The relation between European law and national law is by no means a one way road due to the primacy of the European law[5]. The

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[1] Dana Apostol Tofan, *Critici și soluții cu privire la reglementarea Guvernului în perspectiva revizuirii Legii Fundamentale*, RDP no.1/2013; Horia Diaconescu, Dan Claudiu Dănișor, *Poziția Ministerului Public față de puterea executivă în dreptul unor state vest-europene și în România*, Dreptul no.5/2006; Cristian Ionescu, *Despre rolul constituțional al Ministerului Public*, Dreptul no.6/2017; Elena Emilia Ștefan, *Scurte considerații asupra răspunderii membrilor Guvernului*, RDP no.2/2017, Universul Juridic Publishing House, Bucharest, 2017; Elena Emilia Ștefan, *Participarea Ministerului Public la procesele de contencios administrativ*, RDP no.1/2014 etc.

[2] Elena Anghel, *Constant aspects of law*, published in proceedings CKS-eBook 2011, Pro Universitaria Publishing House, Bucharest, 2011, pp. 594 .

[3] N.Popa, I.Mihăilescu, M.Eremia, *Sociologia juridică*, University of Bucharest Publishing House, Bucharest, 1997, p. 7.

[4] For further details see Augustina Dumitrașcu, Roxana-Mariana Popescu, *Dreptul Uniunii Europene. Sinteze și aplicații*, edition II, Universul Juridic Publishing House, Bucharest, 2015, p. 65 and the following.

[5] Nicolae Popa, Teoria generală a dreptului, edition 5, C.H.Beck Publishing House, Bucharest, 2014, p, 108. Also, see Roxana-Mariana Popescu, Specificul aplicării prioritare a dreptului comunitar european în dreptul intern, în raport cu aplicarea prioritară a dreptului internațional, Revista Română de Drept Comunitar, no. 3/2005, pp. 11-21 and in what concerns the supremacy of the European Union law, see

European Union law embraces the theory of monism, that is the existence of a single legal order which includes international law and domestic law in an unitary system[6].

2. Paper content

2.1. Government investiture

The law substantiates political administrative framework, jurisdictional hierarchy, capable of favoring for people a common and homogeneous living environment in which they can capitalize their legitimate interests[7]. The legislative branch has an important or a less important role in the formation of the executive[8]. The legitimacy of a Government depends on two cumulative factors:

a) the Government is invested by means of a legal procedure, which is strictly complied with;
b) throughout the performance of the mandate, the Government benefits from formal support, expressed by parliamentary procedures, by a majority of the members of the Parliament[9].

2.1.1. The stages of the Government investiture procedure

Stage 1 – the appointment of the candidate to the position of prime-minister

The Romanian Constitution recognized the role and historical importance of pluralism and political parties by dedicating them a place of honor within the general principles that enshrine our state as a state subject to the rule of law, democratic and social state[10].

According to the revised Constitution of Romania, art. 85 and art. 103, after the general parliamentary elections, the President of Romania calls the majority party or in its absence, all the parties represented in the Parliament, for *consultation purposes*, in order to appoint the candidate to the position of prime-minister of Romania. In fact, the one who has the initiative to carry out this constitutional procedure of forming the Government is the President of Romania. In recent years in Romania, there was no majority represented in Parliament, but there were unions, alliances, coalitions etc. The political groups and coalitions of political groups which are consulted by the head of the state before the appointment of the person who will form the government shall have an important role in the investiture of the prime-minister[11]. Therefore, as the doctrine provided, "pluralism is guaranteed by the Constitution[12]".

Stage 2- request of the investiture vote

The appointed candidate has available a 10-day interval when he/she has to prepare the two elements which will be submitted to the Parliament and for which the vote of confidence will be requested: respectively the government team and the program[13]. In what concerns the members of the government, they are chosen by their party based on the agreements between the parties which are members of the government coalition[14]. Of course, the appointed prime-minister has a certain influence in appointing ministers from his/her party[15].

Stage 3 - granting the investiture vote

According to the doctrine, the legislative branch of the Parliament is not limitless. It is a limited power which is exercised according to the Constitution, but also with some principles that go beyond it in its formal sense[16]. The Permanent Bureaus of the two Chambers will ensure the multiplication and distribution to the deputies and senators of the program and the list of the Government, as soon as they have been received from the candidate appointed for the position of prime-minister[17]. According to the provisions of art. 86 of the Regulation on the joint activities of the Chamber of Deputies and the Senate, permanent bureaus establish the date of the joint sitting no later than 15 days after the receipt of the Government program and list, while taking measures to convene deputies and senators[18]. Deputies and senators who take part in the debates shall not be entitled to modify or supplement the program because it shall be accepted or rejected as such[19].

The members of the Parliament, who meet in joint sitting, vote under absolute majority the investiture of the Government, after the candidate has presented the

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Augustin Fuerea, Manualul Uniunii Europene, edition VI, revised and supplemented, Universul Juridic Publishing House, Bucharest, 2016, pp. 252-253.

[6] Laura Cristiana Spătaru Negură, Dreptul Uniunii Europene-o nouă tipologie juridică, Hamangiu Publishing House, Bucharest, 2016, p.190.

[7] Nicolae Popa, Teoria generală a dreptului, op.cit., 2014, p. 50.

[8] I Muraru, E.S.Tănăsescu, Drept constituțional și instituții politice, edition 15, volume II, C.H.Beck Publishing House, Bucharest, 2017, p.246.

[9] Cristian Ionescu, Raporturile Parlamentului cu Guvernul și Președintele României. Comentarii constituționale, Universul Juridic Publishing House, Bucharest, 2013, p. 66.

[10] E. Niculescu, Political pluralism and multiparty, Challenges of the Knowledge Society, "Nicolae Titulescu" University of Bucharest, May 16th -17th 2014, published in CKS e-book 2014, p. 315.

[11] Muraru, E.S.Tănăsescu, op.cit., p. 248.

[12] E. Niculescu, Constituțional landmarks of political pluralism, Challenges of the Knowledge Society, "Nicolae Titulescu" University of Bucharest, May 17th-18th 2013, published in CKS e-book 2013, pp. 577-583.

[13] V. Vedinaș, Drept administrativ, edition IV, Universul Juridic Publishing House, Bucharest, 2009, p. 330.

[14] Muraru E.S.Tănăsescu, *op.cit.,* 149.

[15] *Idem,* p. 149.

[16] D. C. Dănișor, I. Dogaru, Ghe. Dănișor, *Teoria generală a dreptului,* edition 2, C.H.Beck Publishing House, Bucharest, 2008, p. 494.

[17] C.S.Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public,* C.H.Beck Publishing House, Bucharest, 2016, p. 604.

[18] *Ibidem,* p. 604.

[19] C. Ionescu, *op.cit.,* p. 84.

political government program and after every proposed future minister has passed the hearing of the specialized commissions who give an advisory opinion. Granting the vote of confidence shall entail the following consequences:

- The program turns into political government program;
- The list of proposals on the future government team, nominated by the resolution of the Parliament for the granting of the vote of investiture shall become mandatory for the president, who shall be bound to appoint the Government by means of a decree[20].

Stage 4 – the appointment by the President of the Government approved in the Parliament and the swearing into office

Two legal situations occur within this stage, namely:

- the head of the state signs the decree for the appointment of the Government, as approved by the Parliament and
- every minister swears into office before the head of the state, as provided by the Constitution.

The date of the oath is the date as of which the Government in its entirety and every member of it exercises its term of office[21].

2.1.2. Government political program and list

The legislation on the structure of the Government consists of the following: Constitution of Romania and Law no. 90/2001 on the organization and functioning of the Government and of the ministries[22].

In what concerns the *structure of the Government*, according to art. 102 para. (3) of the revised Constitution of Romania, the Government consists of: the "*prime-minister, ministers and other members as established by the organic law"*. Law no. 90/2001 (...) provides that: "the Government consists of the prime-minister and ministers. The Government can also include the deputy prime-minister, Minister of State and Ministers-delegate, with special assignments granted by the prime-minister, provided in the Government list presented to the Parliament for the vote of confidence". *The deputy prime-minister* has available an own working apparatus, which is part of the working apparatus of the Government and coordinates the authorities provided for by art. 3 par. (30 of Law no. 90/2001, (...)**[23]**.

In what concerns *government program*, according art. 103 of the revised Constitution of Romania includes two provisions on this subject matter, namely:

"(2) The candidate to the office of Prime Minister shall, within ten days as of his/her designation, seek the vote of confidence of Parliament upon the program and complete list of the Government.

(3) The program and list of the Government shall be debated upon by the Chamber of Deputies and the Senate, in joint sitting. Parliament shall grant confidence to the Government by a majority vote of the Deputies and Senators".

Obviously, when finalizing the program, the opinions of the candidate for the position of prime-minister, as well as those of the future ministers will be taken into account for the areas where they will be assigned tasks, if the Parliament accepts the Government program and list[24]. The government program will be the mirror of the political program that the respective party proposed and supported in the electoral campaign and for the implementation of which requested the votes of the poll[25].

The current Government follows the 2018-2020 political program, which is a public document, being also available online on the executive page[26]. Again, the constitutional provisions on the investiture of the Government, an authority of the central public administration[27] were fulfilled with due to the fact we have the executive in office. In our law system, as the doctrine provided, "the obligation on the fulfillment of the rules of law is ensured, if required, by the coercive force of the state[28]".

The current Government of Romania, configuration 2018-2020, consists of a Prime-Minister, four deputy prime-ministers: 1.) deputy prime-minister and the minister for regional development and public administration; 2) deputy prime-minister and the minister of environment; 3.) deputy prime-minister for the implementation of strategic partnerships of Romania; 4.) deputy prime-minister and the following *ministries:* 1) Ministry of Regional Development and Public Administration; 2.) Ministry of Environment; 3.) Ministry of the Interior; 4.) Ministry of External Affairs; 5.) Ministry of National Defense; 6.) Ministry of Public Finance; 7.) Ministry of Justice; 8.) Ministry of Agriculture and Rural Development; 9.) Ministry of National Education; 10.) Ministry of Labor and Social Justice; 11.) Ministry of Economy; 12.) Ministry of Energy; 13.) Ministry of Transport; 14) Ministry of European Funds 15.) Ministry for Business Environment Commerce & Entrepreneurship; 16.) Ministry of Health; 17.) Ministry of Culture and

[20] V.Vedinaș, *op.cit.,* p. 330

[21] R.N.Petrescu, *op.cit.,* p. 79.

[22] Law no. 90/2001 on the organization and functioning of the Government and ministries, published in Official Journal no. 164 of April 2nd, 2001, as further amended and supplemented.

[23] R.N.Petrescu, *op.cit.,* p. 80.

[24] Cristian Ionescu, *op.cit.,* p. 82.

[25] *Ibidem,* p. 82.

[26] See: http://gov.ro/ro/obiective/programul-de-guvernare-2018-2020, accessed on 11.02.2018.

[27] In what concerns the term of "public administration" see, Roxana Mariana Popescu, Jurisprudența CJUE cu privire la noțiunea de „administrație publică" utilizată în art. 45 alin. (4) TFUE, published in proceeding CKS ebook 2017, pp. 528-532.

[28] Roxana Mariana Popescu, *Introducere în dreptul Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2011, p.12.

National Identity; 18.) Ministry of Waters and Forests; 19.) Ministry of Research and Innovation; 20.) Ministry of Communications and Information Society; 21.) Ministry of Youth and Sport; 22.) Ministry of Tourism; 23.) Ministry for Romanians Abroad; 24.) Ministry for Liaison with Parliament; 25.) Minister-delegate for European Affairs.

2.2. Case study – ministries of current Government

In order to meet the scope of this study that we proposed at the very beginning, we will present selectively information on certain ministries.

Ministry for Liaison with Parliament

One of the ministries of the current executive is the Ministry for Liaison with Parliament. It was established by Government Resolution no. 22/2017 for the organization and functioning of the Ministry for Liaison with Parliament[29]. The Ministry for Liaison with Parliament is a specialized body of the central public administration, with legal status, subordinated to the Government. This *ensures and coordinates the performance of the activities within the constitutional relationships between the Government and the Parliament*. In order to fulfill its duties, the Ministry is entitled to request information from the ministries, from the other authorities of the central or local public administration, as well as from the other public institutions.

According to the Regulation on the organization and functioning of the Ministry for Liaison with Parliament approved by Order no. 160/MRP/18.05.2017[30] the ministry is headed by the Minister for Liaison with Parliament, member of the Government, minister who has the capacity of main credit release authority. In the ministry coordination and representation, the minister is assisted by two secretaries of state, two secretaries general and a deputy secretary general. The personnel required for the performance of the activity of the ministry consists of public servants and of contractual personnel.

Ministry for Romanians Abroad

The Ministry for Romanians Abroad was established by Government Resolution no. 17/2017 on the organization and functioning of the Ministry for Romanians Abroad **(...)**[31] and has available a dedicated web page[32].

The Ministry for Romanians Abroad issues and applies the policy of the Romanian state in the field of the relationships with Romanians abroad under the meaning assigned to this term by Law no.299/2007 on the support provided to Romanians abroad[33] and acts to strengthen the relations with them and to preserve, develop and express their ethnic, cultural, linguistic and religious identity, under the fulfillment of the legislation of the state of which citizens or residents are, as well as in accordance with the relevant international regulations.

The phrase "*Romanians abroad*", according to the provisions of art. 1 letter a) of Law no. 299/2007 on the support granted to Romanians abroad refers to: "*Romanian persons, as well as to those belonging to the Romanian cultural area outside Romania*."

Institute "Eudoxiu Hurmuzachi" for Romanians abroad is a public national institution, with own legal status, subordinated to the Ministry for Romanians Abroad. The activity of the Institute is performed based on an annual plan of activities, which is subject to the approval of the minister until January 30th**.** Institute "Eudoxiu Hurmuzachi" for Romanians abroad is financed from own income and from state budget grants. The General Manager and the Deputy General Manager of Institute "Eudoxiu Hurmuzachi" for Romanians abroad are issued and appointed by the order of the Minister for Romanians abroad, under the terms of the law.

3. Conclusions

As A.Iorgovan showed, the government investiture is the complex of legal acts and deeds, as well as the appropriate procedures, provided by the Constitution in order to have a legal and legitimate government team[34]. From this point of view, the legislation on the forming of the Government has been observed in our country. We agree with the doctrine which provides that "no state has a legislation valid for all times"[35]. Despite this, the fact that we had three governments in one year does not mean a weakness of the legislation, but the loss of majority political support, based on the principle regarding the investiture procedure symmetry. If in public law the term of office terminates by specific means, as opposed to private law where we speak about insolvency[36], which cannot be applied in case of the termination of the Government

[29] Government Resolution no. 22/2017 for the organization and functioning of the Ministry for Liaison with Parliament, published in Official Journal no.49 of January 17th, 2017.

[30] See: http://mrp.gov.ro/web/organizare/regulament-de-organizare-si-functionare/, accessed on 08.02.2018.

[31] Government Resolution no. 17/2017 on the organization and functioning of the Ministry for Romanians Abroad and for the amendment and supplementation of Government Resolution no. 857/2013 on the organization and functioning of Institute Eudoxiu Hurmuzachi for Romanian abroad published in Official Journal no. 46 of January 17th, 2017.

[32] See: http://www.mprp.gov.ro/web/, accessed on 12.02.2018.

[33] Law no. 299/2007 on the support granted to Romanians abroad, republished in Official Journal no. 261 of April 22nd, 2009.

[34] A.Iorgovan, *Tratat de drept administrativ*, vol I, All Beck Publishing House, Bucharest, 2005, p. 370.

[35] Laura-Cristiana Spătaru-Negură, *Old and New Legal Typologies*, published in proceedings CKS-eBook 2014, Pro Universitaria Publishing House, Bucharest, 2014, p. 354.

[36] For further details on international insolvency see G.Fierbințeanu, V.Nemeș, *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)?*, published in CKS-ebook 2017, pp. 227-233. See: http://cks.univnt.ro/cks_2017_archive/cks_2017_articles.html, accessed on 12.02.2018.

term of office, although this would be an interesting subject to analyze on the future.

Therefore, the current Government is quite large in its composition, but the large number of ministers is not necessarily a successful formula in fulfilling a 4-year term of office if there is no political support.

References

- Elena Anghel, *Constant aspects of law*, in proceedings CKS-eBook 2011, Pro Universitaria Publishing House, Bucharest, 2011
- D. C.Dănișor, I. Dogaru, Ghe. Dănișor, *Teoria generală a dreptului*, edition 2, C.H.Beck Publishing House, Bucharest, 2008
- Horia Diaconescu, Dan Claudiu Dănișor, Poziția Ministerului Public față de puterea executivă în dreptul unor state vest-europene și în România, Dreptul no.5/2006
- Augustina Dumitrașcu, Roxana-Mariana Popescu, *Dreptul Uniunii Europene. Sinteze și aplicații*, edition II, Universul Juridic Publishing House, Bucharest, 2015
- G.Fierbințeanu, V.Nemeș, 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)?, in CKS-ebook 2017, pp.227-233
- Augustin Fuerea, *Manualul Uniunii Europene*, edition VI, revised and supplemented, Universul Juridic Publishing House, Bucharest, 2016
- Cristian Ionescu, Raporturile Parlamentului cu Guvernul și Președintele României. Comentarii constituționale, Universul Juridic Publishing House, Bucharest, 2013
- Cristian Ionescu, Despre rolul constituțional al Ministerului Public, Dreptul no.6/2017
- A.Iorgovan, *Tratat de drept administrativ*, vol I, All Beck Publishing House, Bucharest, 2005
- E. Niculescu, *Political pluralism and multiparty*, Challenges of the Knowledge Society, "Nicolae Titulescu" University of Bucharest, May 16th -17th 2014, publicat în CKS e-book 2014
- E. Niculescu, *Constituțional landmarks of political pluralism*, Challenges of the Knowledge Society, "Nicolae Titulescu" University of Bucharest, May 17th-18th 2013, published in CKS e-book 2013
- Nicolae Popa, *Teoria generală a dreptului*, edition 5, C.H.Beck Publishing House, Bucharest, 2014
- N.Popa, I.Mihăilescu, M.Eremia, *Sociologia juridică*, University of Bucharest Publishing House, Bucharest, 1997
- Roxana-Mariana Popescu, Specificul aplicării prioritare a dreptului comunitar european în dreptul intern, în raport cu aplicarea prioritară a dreptului internațional, Revista Română de Drept Comunitar, no. 3/2005
- Roxana Mariana Popescu, Jurisprudența CJUE cu privire la noțiunea de „administrație publică" utilizată în art. 45 alin. (4) TFUE, in proceeding CKS ebook 2017
- Roxana Mariana Popescu, *Introducere în dreptul Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2011
- C.S.Săraru, Drept administrativ. Probleme fundamentale ale dreptului public, C.H.Beck Publishing House, Bucharest, 2016
- Laura Cristiana Spătaru Negură, *Dreptul Uniunii Europene-o nouă tipologie juridică*, Hamangiu Publishing House, Bucharest
- Laura-Cristiana Spătaru-Negură, *Old and New Legal Typologies*, in proceedings CKS-eBook 2014, Pro Universitaria Publishing House, Bucharest
- Elena Emilia Ștefan, *Scurte considerații asupra răspunderii membrilor Guvernului*, RDP no.2/2017, Universul Juridic Publishing House, Bucharest, 2017
- Elena Emilia Ștefan, Participarea Ministerului Public la procesele de contencios administrativ, RDP no.1/2014
- Muraru, E.S.Tănăsescu, *Drept constituțional și instituții politice*, edition 15, volume II, C.H.Beck Publishing House, Bucharest, 2017
- Dana Apostol Tofan, Critici și soluții cu privire la reglementarea Guvernului în perspectiva revizuirii Legii Fundamentale, RDP no.1/2013
- V. Vedinaș, *Drept administrativ*, edition IV, Universul Juridic Publishing House, *Bucharest*, 2009
- Constitution
- Law no. 299/2007 on the support granted to Romanians abroad, republished in Official Journal no. 261 of April 22nd, 2009
- Law no. 90/2001 on the organization and functioning of the Government and ministries, published in Official Journal no. 164 of April 2nd, 2001, as further amended and supplemented
- Government Resolution no. 22/2017 for the organization and functioning of the Ministry for Liaison with Parliament, published in Official Journal no.49 of January 17th, 2017
- Government Resolution no. 17/2017 on the organization and functioning of the Ministry for Romanians Abroad and for the amendment and supplementation of Government Resolution no. 857/2013 on the organization and functioning of Institute Eudoxiu Hurmuzachi for Romanian abroad published in Official Journal no. 46 of January 17th, 2017
- http://cks.univnt.ro/cks_2017_archive/cks_2017_articles.html, accessed on 12.02.2018
- http://www.mprp.gov.ro/web/, accessed on 12.02.2018
- http://mrp.gov.ro/web/organizare/regulament-de-organizare-si-functionare/, accessed on 08.02.2018
- http://gov.ro/ro/obiective/programul-de-guvernare-2018-2020, accessed on 11.02.2018

EMERGING LEGAL ISSUES REGARDING CIVILIAN DRONE USAGE

Andrei-Alexandru STOICA*

Abstract

Unmanned vehicles are becoming a common sighting in our day-to-day life and are soon going to become an important economic drive in creating workspaces and help achieve new milestones in human activities. As such, the technology revolving around the unmanned vehicles will push itself as much as it's needed but with each achievement in the field of robotics a legal issue arises around how to use the newly acquired piece of technology in a public or private space and whether or not should such a technology be placed under a strict governmental control.

As the saying by Prof. Henry W. Haynes (1879) goes **"The possession of great powers and capacity for good implies equally great responsibilities in their employment.** *Where so much has been given much is required." so does an unmanned vehicle and its operator must follow a degree of legal guidelines on how to properly use the gadget and to also to understand the legal limitations when interacting with other entities.*

This paper will focus on identifying and answering some legal issues regarding what is required for a drone to fly over an identifiable space, but also if the operator must have a document that was conferred by a state to acknowledge the skills of the pilot or should a software limitation be in place for national security safeguards. The paper will also tackle the issue of identifying legal documents from different states that can be applied to drone flight operations and also if different states have adopted sanctions to persons who did not abide to said legal norms.

Keywords: *uav, pilot license, air laws, examination, drones.*

1. Facts and legal issues regarding unmanned vehicles.

1.1. Introduction and facts regarding the legality of unmanned vehicles.

The progress of robotics and communications technology has drawn a point in which the average consumer now has the possibility to acquire unmanned drones and use them in their day-today life. This progress however brings forth new social and legal issues such as operator liability, privacy violations, certification requirements and new mulct or crimes to be classified.

Even at this stage of the technology, lawmakers must be ready to tackle future modes of transportation of passengers and cargo by unmanned vehicles, as such a new phenomenon of remote controlled devices will bring forth new social services that must be covered by laws.

Current drone technology only allows the drone to be handled by a remote pilot, who can either be a lone operator or comprised of a team operators, who operators the unmanned vehicle based on the data that is being gathered from its camera, sensors and satellite connection. A second type of unmanned vehicle is based on self-management and self-guidance, on the basis of pre-programmed instructions, machine learning or even artificial intelligence[1]. The later type of unmanned vehicles is a newly formed category that is based on automation and as such can only accomplish tasks within programmed limits.

The focus of this paper will be mainly on unmanned aerial vehicles and their legal status and situation based on current aircraft regulatory regime. While aircraft regulations may seem well established, drones offer a different approach to a traditional legal branch and bring a plethora of new situations which require either a new understanding of the older legal provisions or must be accompanied with new legal regulations based on their current and short-term future prospects.

The first time the concept of unmanned aerial vehicles was handled by the Protocol amending the Paris Convention (1929)[2] in the context of unmanned balloons that were developed and used both scientifically and military. Later, small planes were remote controlled and used with the same objectives in mind, but had shortcomings when range and fuel autonomy was taken into consideration.

As such, the Chicago Convention on International Civil Aviation[3] recognizes unmanned aerial vehicles under article 8[4] and establishes a positive obligation

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[1] Kristian Bernauw, Drones: The emerging era of unmanned aviation, University of Ghent, Belgium, UDK: 347.823.37(497.5) 341.24:347.823.3 Prethodno znanstveno priopćenje Primljeno: kolovoz 2015, pg. 227-228.

[2] Convention relating to the Regulation of Air Navigation (1919), article 15 was amended in 1933 with the following provision: *"No aircraft of a contracting State capable of being flown without a pilot shall, except by special authorization, fly without a pilot over the territory of another contracting State".*

[3] 4.04.1947, International Civil Aviation Organization.

[4] No aircraft capable of being flown without a pilot aircraft shall be flown without a pilot over the territory of a contracting State without special authorization by that State and in accordance with the terms of euch authorization. Each contracting State undertake8 to insure that the flight of such aircraft without a pilot in regions open to civil aircraft shall be so controlled as to obviate danger to civil aircraft

towards states to ensure that such flights will be conducted without endangering other civilian aircraft. The requirement for drones in this case should be to at least be registered to an individual, a legal entity or even to a governmental body, but just this condition has proven that it can be difficult to achieve or lackluster when accidents happen, this being taken under consideration as Annex 7 to the Chicago Convention established the requirement for states to have a national aircraft register[5]. For civilian aircraft accidents to even be considered a registry must exist and drones have been considered being registered to said registry to benefit from compensation clauses, as article 1 of the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface[6] dictates.

To ensure that drones are flying in such a manner that allows for compensation in case of accidents and discourage unmorally conduct is by introducing a legal obligation for operators to be licensed, registered and have a minimal understanding of safety laws and procedures, similarly to how a person acquires a driving license for a car or a plane.

The only drawback of the Chicago Convention is that of not being able to foresee the rise of autonomous drones and semi-intelligent software, as such the convention only covers drones that are piloted by a human operator and not guided by one through a software interface. However, the International Civil Aviation Organization (henceforth will be abbreviated I.C.A.O.) has been active as of 2006 in recognizing the impact of unmanned vehicles and started developing legal guidelines for members to integrate in their national legal system.

I.C.A.O. had two informal meetings in 2006 and 2007 in order to develop standards regarding drone operations and started a collaboration with the European Organization for Civil Aviation Equipment and the Radio Technical Commission for Aeronautics in order to fully grasp how drones operate and to have a lager vision on how the technology might evolve later on[7].

The most important regulatory work is the inclusion of fully autonomous drones under the definition of article 8 of the Chicago Convention, as it was endorsed in the 35th Session of the I.C.A.O. Assembly[8] and as such ensuring that states will have to tackle this issue in their own national legislation. With this inclusion, a proper definition of the concept can be understood as *„An unmanned aerial vehicle is a pilotless aircraft, in the sense of Article 8 of the Convention on International Civil Aviation, which is flown without a pilot-in-command on-board and is either remotely and fully controlled from another place (ground, another aircraft, space) or programmed and fully autonomous"*[9].

Despite having guidelines on how drones should operate and how air space should be segregated to accommodate the new devices, states still have issues in implementing these principles and standards and sometimes require trial-and-error to grasp the real issues that drones bring forth.

However, the European Union acknowledges the ongoing need to regulate drones, this being a common strategy as the Riga Declaration[10] claims in the opening statement regarding principles: *„Drones need to be treated as new types of aircraft with proportionate rules based on the risk of each operation"* with rules being simple and performance based. As such, the European Union launched on the 7th of December 2015 the Aviation Strategy which will gather amendments from anyone interested and have a formal debate in the European Parliament on how the final regulatory document should handle drones. The current agenda supports a spring 2018 deadline for amendments and proposals followed by the formal debate[11].

This is however lackluster since by 2014 there were 87 states from around the world that were developing drones or were already owning civilian and military drones and doing operations on a regulatory basis[12] and as such not everyone was ready to discuss and adopt an international legal binding document on how unmanned vehicles should operate.

1.2. Standards and practices for unmanned vehicles.

To help states integrate unmanned aerial vehicles in non-segregated airspace I.C.A.O. developed guidelines that were integrated into the Manual on Remotely Piloted Aircraft Systems[13] which reinstates that "*Each contracting State undertakes to adopt measures to insure that every aircraft flying over or maneuvering within its territory and that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force. Each contracting State undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time under this Convention. Over the high seas, the rules in force shall be those established under this*

[5] Tabel 1 of Annex 7 to the Chicago Convention.
[6] Rome, 7.10.1952.
[7] ICAO, Unmanned aircraft systems, Cir 328 AN/190, pg. 1-2, ISBN 978-92-9231-751-5.
[8] Global Air Traffic Management Operational Concept (Doc 9854), First Ed., I.C.A.O, Apendix B.
[9] See note 8, pg. 42.
[10] Riga Declaration on Remotely Piloted Aircraft (drones) "FRAMING THE FUTURE OF AVIATION" Riga - 6 March 2015, European Council.
[11] Information was gathered from http://www.consilium.europa.eu/en/press/press-releases/2017/12/22/updated-aviation-safety-rules-and-new-rules-on-drones-approved-by-the-council/.
[12] Michael Shank and Elizabeth Beavers, Sign a drone treaty before everyone does as we do, USNews, 04.02.2014.
[13] ICAO Document nr. 10019 AN/507, First Ed. 2015.

Convention. Each contracting State undertakes to insure the prosecution of all persons violating the regulations applicable."[14] As such article 12 requires states to adopt legal provisions to ensure that unmanned aerial vehicles are being flown under principles that govern public safety and transparent liability.

Furthermore, the manual offers an insight to what drones should require to be air ready based on what documentation is required for a civilian airplane, that being: a certificate of registration, certificate of airworthiness, a license for each member of the crew, a log book, a radio, and other requirements that are based on its capability (if it can carry passengers or goods)[15]. Regarding the certificate of airworthiness, this is a requirement that is only required if the device is capable of doing international flights and as such is not a requirement for internal drone flights and also the manual states that the license to fly a drone is not needed.

However, the problem of the drones is exactly the lack of a license to fly, since a lot of drones can easily be acquired from the market and be used right out of the box without any prior knowledge or safety checks. The lack of a proper course in air safety can be a decisive moment between a fatal accident and a safe conduct.

Furthermore, drones do not abide to the general type of operation that the Chicago Convention regulates, meaning that it does not follow a general commercial air transport operation paradigm or even that of the general aviation operation (corporate or aerial work).

Articles 8, 12 and 20[16] from the Chicago Convention establish the need for drone registration to be done similarly to an identification plate on a car, this being a sign of the drones nationality and that it is under the supervision of a state or more states. The obligation requires that the license plate (markings) to be placed in a prominent position or affixed conspicuously to the exterior. The markings are to be obtained after registration in a national database and be fixed, preferably, by the registrar.

The manual also covers the need for a certification for operators, but the requirement is only limited to commercial operators or to those who can conduct operations as services and must be contracted in this manner. Furthermore, the operator must ensure that all employees are familiar with the laws, regulations and procedures applicable to the performance of their duties, prescribed for the areas to be traversed, the aerodromes to be used and the air navigation facilities relating thereto, and operations must be conducted only under safe conditions and under operational control of the operator. The manual also recommends that responsibility for operational control should only be delegated to the remote pilot-in-command (PIC) and to a flight operations officer/flight dispatcher if an operator's approved method of control and supervision of flight operations requires the use of flight operations officer/flight dispatcher personnel[17].

The certification should contain the name of the state of the operator, a number and an expiration date, the name of the operator, contact details and signature of the governmental or private body that has provided certification, types of operations that are authorized, models of unmanned vehicles that can be operated and airspace categories that can be used accordingly. According to I.C.A.O. Assembly Resolution A38-12[18] certifications that are remitted according to international requirements are also recognized by other states without further need towards obtaining a new certification of the same class or category.

Furthermore, the Manual requires that licensed (certified) operators must hold a series of documents in order to conduct safe operations, these are represented by the present manual are not limited to the following[19]: the certificate of operations, operations specifics to the vehicle model, operations manual, flight manual, maintenance control manual, insurance, the registry certification, air worthiness certification (if its conducting international operations), certification for special components, radio license, noise certification, special loads certification and cargo manifest.

After the operator has launched an operation, he must have a certified copy of the license on him, a certified copy of registry paper, a certified copy of the air worthiness certification, license for each pilot/operator in certified copy, a log book, operation specifics, cargo manifest and special documentation for dangerous goods, noise certification and radio license, and also the operation must be accompanied with a flight manual in order to help during situations.

The operator is also responsible[20] for the maintenance of the vehicle and its components and also have on hand emergency equipment for servicing the flight or emergency situations. The manual recommends that commercial flights should only be allowed after a maintenance organization approves the flight and should be done as accordingly to a maintenance control manual that the state of registry has provided. Besides such a manual, a maintenance log book should be kept by the operator and also the operator must record modifications and repairs done to the vehicle.

Also, human resource management must be kept in check and encouraged since the remote flight crew

[14] Article 12 of the Chicago Convention,
[15] Pg. 6 of the Manual on Remotely Piloted Aircraft Systems.
[16] Every aircraft engaged in international air navigation shall bear its appropriate nationality and registration marks.
[17] Pg. 55-56 of the Manual on Remotely Piloted Aircraft Systems.
[18] Consolidated statement of continuing ICAO policies and associated practices related specifically to air navigation, 24.09-04.10.2013.
[19] Chapter 6.6, pg. 60-62 of the Manual on Remotely Piloted Aircraft Systems.
[20] Chapter 6.8, pg. 65-68 of the Manual on Remotely Piloted Aircraft Systems.

must be prepared with ongoing courses for knowledge and skills on operational procedures, coordination and handover procedures, abnormal and emergency situations, situational awareness and human performance indicators for threats and errors that may occur during flight. Also, the human resource management must be able to cope with fatigue and must grasp the risks and mitigation techniques for fatigue.

In addition[21], Chapter 8 of the Manual addresses one of the main issues regarding drone pilots, an issue in which they have to follow the same responsibilities and guiding principles as regular pilots meaning that they must abide to national and international air law. The manual opens up with a theory that in the future a single license will be able to cover all types of scenarios but will feature ratings, limitations and endorsements. Also, the manual does not apply to people who own and use drones as sports or recreational devices, however national legislation will have to include a degree of control on flight patterns and areas and also the category of drones that can be used in said areas.

The license will be issued or rendered valid by a legally based authority within the registrar state. The I.C.A.O. Manual addresses a key issue regarding the pilot license that can be obtained, meaning that he must have a medical assessment, an observer competency proof (if its needed), proof regarding experience and a special licenses for international flights. Also a minimum age is considered for obtaining a drone pilot license, as such it is considered that the age of 18 is appropriate.

Additionally, the guidelines offer the registrar state the possibility to organize examinations in order to award the pilot license and also a courses for safety operations and air safety, conducted by authorized instructors. The examination should have a theoretical knowledge examination and a practical skill test. The theoretical exam should at least cover subjects such as air law, general knowledge regarding drones, flight management, human performance, meteorology, navigation, radiotelephony and the principles of flight, while the practical test should focus on threat and error management, maneuvers, airmanship, drone controls.

Since the aforementioned manual is not legally binding member states to I.C.A.O. are not obliged to follow these guidelines, but they can implement some aspects in order to deter unlawful conduct and to prevent fatal accidents.

However, not all states have adopted a licensing procedure for pilots beyond that of doing a simple registration of the device and applying the markings on the drone. For the most part, the United States of America and European Union offer a small informational brochure regarding *dos and don'ts* in drone operations for civilians[22]. The informative material has common elements, even thou there are two distinct systems, and focuses mainly on what is prohibited with civilian drone operations.

Both administrative and legal systems consider as guiding principles for drone operations the following: safety checks before operations, applying and obtaining drone insurance, respecting private property and privacy laws, no operations near airports or crowded areas, always have the drone in sight and do not operate changes to the drone. While the I.C.A.O. Manual recommends the starting age for drone pilots should be 18, both the European Union and the United States of America offer the possibility for drone operators to obtain their license at the earliest of age 16.

This is however tied to drone tiers that are based on the weight of the device, manufacturer specifications and risk involved[23] and so it includes an open category that can be used by anyone without any certification, but requires the user to be at least 14 years old, and also a specific and certified category that requires prior certification depending on the type of drone that will be operated. The drones are to be registered if they pass the 250 grams mark and require special registration and certification if they pass the 55 kilogram mark[24], a similar approach is also available in the European Union[25]. If a drone is under the 250 grams mark, it will not be subject to any registration requirements or pilot licensing, the only rule is that of following the core principles of flight as established by the aviation administration authority.

2. Solutions and proposals in deterring unlawful drone operations.

2.1. Certifications and flight approvals approved by aviation authorities.

Starting with 2016 the Federal Aviation Administration in the U.S.A. introduced the Remote Pilot Knowledge Test that focuses on aspects such as regulations, airspace and requirements, weather, performance and operations, and is organized as a 2 hour written exam with a 60 question paper with only one possible answer and can require that the participant to have maps or charts on hand, while having a minimum of 70% of the questions needed to pass (42

[21] Chapter 8 of the Manual, pg. 73-76.

[22] Brochure for the European Union available at the following link: https://www.easa.europa.eu/sites/default/files/dfu/213888_EASA_DRONE_POSTER___v5.pdf and information for flying a drone in the U.S.A. can be read at the following website: https://www.faa.gov/uas/getting_started/.

[23] European Aviation Safety Agency Opinion 01/2018 – can be accessed at the following address: https://www.easa.europa.eu/document-library/opinions/opinion-012018.

[24] Section 336 from the Federal Aviation Administration.

[25] Julia Fioretti, EU agrees registration for drones, downloads of flight recordings, Reuters, 30.11.2017.

out of 60 questions must be answered correctly)[26]. The test must be repeated once every 24 months and must also be accompanied by a vetting by the security administration on transports.

The only exception to the examination is considered those who fly model aircraft and those who have drones under the 250 grams mark. Persons who are already licensed pilots for manned aircraft can also receive the drone certification without the need to pass the test but have to get their accreditation validated by a drone instructor beforehand.

In Romania, the Civil Aviation Agency published an informative brochure[27] regarding drone flight requirements and it's based on the Navigation Directive D.N. 14-02-001[28]. The document states that a certification of identification, a national permit to fly for drones with a mass of over 15 kilograms, insurance, approval for operations for general flights and a very special approval if the flight is done over the Danube Delta.

Regarding the aforementioned approval, Romania has an interesting approach in limiting drones over its skies, meaning that operators must reserve a portion of the airspace and must be requested with at least 45 days before the operation. Furthermore, if the drone is equipped with a camera, then the operator must request a special authorization from the Ministry of Defense of Romania that can be obtained anywhere from 1-30 days after submission. The only exceptions from these specifics are similar to other legal systems, meaning that model aircraft are exempted and also any other drone under 1 kilogram in mass if it only operates in no populated areas and contains no filming or data transmission devices. Currently there are no exams needed in order to fly a drone but there are some authorized flight instructors.

The European Air Safety Agency does not issue pilot licenses, this is reserved to member states that can issue such documents, but must be done under the guidelines established by the agency[29]. For example, the United Kingdom implements the I.C.A.O. Manual and the European Air Safety Agency Regulation[30] in order to restrict unlawful drone flights by requiring permits for operators. These permits are valid for 12 months and applies to both indoor and outdoor operations.

Under current guidelines, drone operators in the United Kingdom must comply with a series of requirements in order to operate, as such if the drone is under 20 kilograms then the operator must have an operating permission and a pilot qualification, but only if the operator is doing aerial work[31], if not, then the casual operator is exempted from this rule. If the total weight of the devices is more than 20 kilograms, then the operator will require a registration and airworthiness certificate[32]. A permission only addresses the flight safety aspects of the flight operation and does not constitute permission to disregard the legitimate interests of other statutory bodies such as the Police and Emergency Services, the Highway Agency, Data Commission or other authorities.

However, all drone operators must comply with the Regulation (EC) 785/2004 on Insurance Requirements for Air Carriers and Aircraft Operators[33] and as such must acquire a minimum insurance based on the device in question. The Regulation exempts from this requirement the following unmanned aircraft: model aircraft and drones that are under 500 kilograms that have no commercial purpose or are being used in local flight instruction. Also, the operators must abide to the visual line of sight principle, meaning that they can only operate at a distance of 500 horizontally and 400 feet vertically, but these ranges can be extended if the owner is a holder of special certifications or the aviation authority has approved an exempt for a situation.

In the United Kingdom a license exam has not been introduced officially as it is awaiting for a proper regulation by the European agency, however users who partake in aerial work must have a small unmanned aerial vehicle permission that can be obtained only after a course organized by a drone instructor has been undergone and a certificate was given to them.

Other European Union member states have adopted internal regulations as placeholders till a proper legal document is adopted, as such France is considered a pioneer[34] with the Creation and Use Orders that came into force in early 2016, both orders aiming at limiting the numbers of drones in the sky and also the number of drones being manufactured and their development. French laws also introduce a category that the current European legislation does not provide a

[26] Part 107 of the Federal Aviation Regulations is the written drone knowledge exam introduced in order to limit the number of commercial and civilian drones in the sky, information can be accesed at the following website: https://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=20516.

[27] Material can be read at the following link: http://www.caa.ro/media/docs/Guidance_material_Unmanned_Aerial_Vehicles.pdf.

[28] Which can be accessed at the following link: http://www.caa.ro/pdf/Directiva%20identificare%20UAV.pdf.

[29] E.A.S.A. informational document: https://www.easa.europa.eu/easa-and-you/general-aviation/licensing-general-aviation.

[30] As implemented by the United Kingdom in Cap 722 - Unmanned Aircraft System Operations in UK Airspace – Guidance published by the Safety and Airspace Regulation Group of the Civil Aviation Authority, 31.03.2015.

[31] Details that a flight is for the purpose of aerial work if valuable consideration is given or promised in respect of the flight or the purpose of the flight.

[32] See note 30, pg. 34-35.

[33] Official Journal of the European Union L 138/1, 30.04.2004.

[34] As stated by the legal blog lexology.com with information that can be read at the following website: https://www.lexology.com/library/detail.aspx?g=7257ad71-6f12-4c2c-bfde-ed40088fb961 and also the Library of Congress, U.S.A. has an online article that gets updated regularly: https://www.loc.gov/law/help/regulation-of-drones/france.php that was prepared by Nicolas Boring, Foreign Law Specialist, April 2016.

legal oversight and that being the *particular activities* situation, which is defined as something that is not hobby, competitive, commercial or experimentation. Also, to fly drones in public spaces is possible only with prefecture`s approval.

The particular activities, flight testing and competitive drone operators must also have pass a theoretical examination and must finish a practical training course (and may require up to 20 hours of drone flight), while commercial operators could also be obliged to possess additional license for a manned aircraft and at least one hundred hours of flying a manned vehicle.

Flying a drone without permission or without a license can lead to jail time to up to six months a fine of 15 000 euros (if done out of negligence) and can also lead to 1 year of jail time and a fine of 45 000 euros if the user intentionally flies the drone without permission and in a no-fly zone. The law also criminalizes drone video and photography that was done without respecting property, intellectual property and private laws, meaning that in doing so a person can face a jail time of at least one year in jail and a fine 75 000 euros.

Furthermore, the laws also require for a registration at the civil air authority and adding a license plate to the drone showing owner details and drone registration number. Manufactures must also include the force of impact from maximum height for all drones sold in France. Current legal drafts point towards electronic registrations and safety features pre-installed in drones.

2.2. Possible solutions in deterring unlawful flights.

Al-Jazeera reporters were fined and jailed for flying a drone over Paris in 2015[35] after two days of unlicensed operations and being caught by the Police without having the required documentation (license plate and registration documents) and without an approval to fly in public areas. French authorities also stated that at least 13 unauthorized drones' flights near nuclear plants were documented but nobody was found after the investigation in order to be accountable for the unauthorized flights.

Romania has started criminal investigations for at least 4 persons on the usage of drones during the February 2017 protests[36] as the drones were not registered and were flying in a crowded and public space, without special authorization. Romania has also fined unauthorized usage of drones[37] and users could also face jail time depending on the severity of their deed, as one person found after filming a local church and was fined for 5000 lei (over 1000 euros) for not registering the drone to the civil air authority and obtaining a license plate for it.

Currently, Italy and Germany have also started drone training programs aimed at limiting drones in the sky to only those who own operators flight licenses and only to those who have a minimum insurance. Germany has even introduced a take-off weight limitation and fireproof identification based on their weight as a requirement[38]. These two states are also implementing the I.C.A.O. guidelines and current European Air Safety Agency regulations in order to deter unlawful flights that can cause accidents. Without these legal requirements, accidents similar to the ones over Canada in autumn 2017[39] or early 2017 in China[40] could lead to potential catastrophic incidents in which a drone that flies in the cockpit of a much larger manned aircraft could lead to its crash and cause an unimaginable aftermath. As such, the case in China was also accompanied by the arrest of the operator, but in both cases the international agreed limit of 450 meters altitude was breached.

As a solution to these situations, states have adopted different measures of protecting no-fly zones from drones. As such United Arab Emirates[41], Japan[42] and South Korea[43] have adopted hunter drones to spot and take-out drones that are flying in protected areas and to try and identify and prosecute the owners for these situations. Other states have introduced specially trained police eagles in order to fight unlawful drone flights, but the results are mixed[44] and may require future usage and training to determine the impact in combating unauthorized flights.

Another possible solution is by introducing a theoretical examination before take-off and introduced in the drone application that comes with drone for the mobile phone camera/controller[45]. This has been implemented so far in the United States of America and United Kingdom by one of the leading drone manufactures and developers, DJI, and it forces operators to take an 8 question exam on its GO4app and based on the common-sense flight rules exam it will allow the user to either start the drone or attempt to pass the exam after the operator gained some more knowledge regarding flying under United Kingdom national legislation.

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[35] BBC, Paris drones: Al Jazeera journalist fined 1000 euros, 3.03.2015.

[36] ProTV, Dosar penal pentru folosirea ilegala a unor drone in timpul protestelor din Piata Victoriei. 4 persoane chemate la Politie, 17.02.2017.

[37] Alin Cordos, 5000 lei amenda pentru drona folosita ilegal, ProPolitica, 22.05.2017.

[38] See note 34 for a brief mention of the laws that are referenced.

[39] Sherrise Pham, Drone hits passenger plane in Canada, CNN, 16.10.2017.

[40] Euan McKirdy, Drone's operator detained for flying near Chinese airplane, CNN, 17.01.2017.

[41] Zahraa Alkhalisi, Dubai develops a drone hunter to keep its airport open, CNN, 4.11.2016.

[42] Udi Tirosh, Japan introduces a drone hunting drone – nets rogue drones midair, Diyphotograpy.com, 15.12.2015.

[43] Jeff Daniels, Around 60.000 security forces, interceptors drones deployed to protect Pyeongchamp Olympics, CNBC, 05.02.2018.

[44] Tyler Essary, These drone-hunting eagles aren't messing around, Time, 17.02.2017; Thuy Ong, Dutch police will stop using drone-hunting eagles since they weren't doing what they're told, TheVerge, 12.12.2017.

[45] Nick Summers, DJI forces UK pilots to sit a 'knowledge quiz' before takeoff, Engadget, 21.12.2017.

Currently, the only limitation for drones is that of a geofencing system that has been implemented in order to force drones and their operators from straying in protected areas such as airports, high density urban areas or other areas, but this limitation has been hacked a number of times because of faulty security around the application that comes with the drone[46] and as such users could circumvent their way and be able to fly over the imposed limit.

3. Conclusions

Combating unlawful flights has proven a continued focus for most states, however people have adopted a stance against drones that fly over their private property and for situations where authorities failed to properly intervene.

For example, in the United States of America persons have adopted the stand-your-ground principle[47], a principle that derives from a law that designates a person's abode (or, in some states, any place legally occupied, such as a car or place of work) as a place in which the person has certain protections and immunities and allows such a person in certain circumstances, to attack an intruder instead of retreating. Typically, deadly force is considered justified homicide only in cases when the actor reasonably feared imminent peril of death or serious bodily harm to oneself or another.

This was an issue raised in front of a national court where a person shot a drone that was hovering his home, dubbing him the "*Drone Slayer"*[48]. Afterwards the pilot demanded a reparatory decision, but the county judge ruled that drone cases are under the competence of federal courts and as such the pilot must file another lawsuit. However, the court provided some light regarding private property limits by referring to the Supreme Court Case from 1946, Causby v. United States[49], in which the Supreme Court established that 83 feet (or 25 meters) is the maximum height limit for private property.

Some solutions to these types of privacy invaders have been considered and deployed, one of these being the DroneShield, a detector based on acoustic technology that notifies the local monitoring service if a drone comes close to the target in proximity. This device was a crowd funded gadget that soon came under military contracting and is now a piece of technology that can only be sold under the International Traffic in Arms Regulations (ITAR)[50] due to its functionality. This device was also used during the Boston Marathon in 2015, as the entire area was declared by local authorities as a no-fly zone[51].

Currently, there are lots of applications for mobile phones that showcase no-fly zones for drone users[52], but this technology has to be implemented into the drone themselves, while operators must follow training courses and eventually pass a theoretical and practical examination in order to operate drones, regardless of classification and/or weight. The I.C.A.O. Manual was published in 2015 but soon afterwards most states have started implementing it in various degrees and will implement most of its rules as they were laid out by technicians and legal practitioners around the world, being considered an international standard.

Sadly, most drone manufacturers will not implement a software based limitations to drones as it does require additional costs for software development and so will have to defer to states developing national solutions in order to deter unlawful flights. However, the automobile industry started in 1886 when Karl Benz built the first horseless carriage (the car)[53] and it was driven by people without a permit, but afterwards local authorities required people prove they can drive the car for their own safety and the safety of others and so certification was required[54] in order to drive the machine. So will drones follow suite and will abide to the I.C.A.O. regulations in order to be able to fly legally and will also require a proper insurance in case of responsibility.

References

- Kristian Bernauw, Drones: The emerging era of unmanned aviation, University of Ghent, Belgium
- Convention relating to the Regulation of Air Navigation (1919)
- Chicago Convention on International Civil Aviation (1947)
- Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (1952)
- ICAO Circular - Cir 328 AN/190
- Global Air Traffic Management Operational Concept (Doc 9854), First Ed., ICAO
- Riga Declaration on Remotely Piloted Aircraft (drones) – 2015

[46] Lisa Vaas, Hacked drone flying up, up and away over geofencing restrictions, NakedSecurity, 18.07.2017.
[47] Mark Randall, The Castle doctrine and stand-your-ground law, Old Research Post, 24.04.2012, 2012-R-0172.
[48] Cyrus Farivar, Drone slayer cleared of charges, Arstechnica, 27.10.2015.
[49] No. 630/1.05.1946, Supreme Court of Justice.
[50] Adrianne Jeffries, The new Star Wars is still waiting on its DroneShield, TheVerge, 21.09.2014.
[51] Alan Philips, MIT Grad's Anti-Drone tech used at Boston Marathon, DroneLife, 21.04.2015.
[52] A small yet informative list can be viewed for reference here: https://dronelife.com/2017/03/14/where-can-i-fly-my-drone-these-5-apps-will-help/.
[53] Information can be accessed here: https://www.mercedes-benz.com/en/mercedes-benz/classic/history/benz-patent-motor-car/
[54] Automobile Magazine, Fast Facts: The 113-year history of the driver's license, 20.02.2012.

- Michael Shank and Elizabeth Beavers, Sign a drone treaty before everyone does as we do, USNews, 04.02.2014
- ICAO Document nr. 10019 AN/507, First Ed. 2015
- Consolidated statement of continuing ICAO policies and associated practices related specifically to air navigation, 24.09-04.10.2013
- Informative Broshure and EASA Opinion 01/2018
- Section 336, Federal Aviation Administration (USA)
- Julia Fioretti, EU agrees registration for drones, downloads of flight recordings, Reuters, 30.11.2017
- Part 107 of the Federal Aviation Regulations (USA)
- CAA (Romainia) Informative Guidelines for Drones
- Navigation Directive Romanian CAA – D.N. 14-02-001/25.02.2014
- Cap 722 - Unmanned Aircraft System Operations in UK Airspace – Guidance published by the Safety and Airspace Regulation Group of the Civil Aviation Authority, 31.03.2015
- Regulation (CE) 785/2004 - Official Journal of the European Union L 138/1, 30.04.2004
- lexology.com – legal blog and website dedicated for publishing articles
- Nicolas Boring, Regulations of Drones: France, Library of Congress, April 2016
- BBC, Paris drones: Al Jazeera journalist fined 1000 euros, 3.03.2015
- Sherrise Pham, Drone hits passenger plane in Canada, CNN, 16.10.2017
- Euan McKirdy, Drone's operator detained for flying near Chinese airplane, CNN, 17.01.2017
- Zahraa Alkhalisi, Dubai develops a drone hunter to keep its airport open, CNN, 4.11.2016
- Udi Tirosh, Japan introduces a drone hunting drone – nets rogue drones midair, Diyphotograpy.com, 15.12.2015
- Jeff Daniels, Around 60.000 security forces, interceptors drones deployed to protect Pyeongchamp Olympics, CNBC, 05.02.2018
- Nick Summers, DJI forces UK pilots to sit a 'knowledge quiz' before takeoff, Engadget, 21.12.2017
- Lisa Vaas, Hacked drone flying up, up and away over geofencing restrictions, NakedSecurity, 18.07.2017
- Mark Randall, The Castle doctrine and stand-your-ground law, Old Research Post, 24.04.2012
- Supreme Court of Justice (USA) Case No. 630/1.05.1946
- Automobile Magazine, Fast Facts: The 113-year history of the driver's license, 20.02.2012

BRIEF CONSIDERATIONS ON THE RELATIONSHIP BETWEEN THE ROMANIAN CONSTITUTIONAL COURT, THE STRASBOURG COURT AND THE LUXEMBOURG COURT

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Abstract

In 2018, our country celebrates the 11 years that have passed since Romania's accession to the European Union, this year also being a preparatory year for the Romanian presidency of the Council of the European Union. Throughout its history, Romania has undergone profound transformations, one of which being the emergence of a new constitutional order after the Revolution of 1989, represented by the 1991 Constitution, revised in 2003, which established the principles of functioning of the state governed by the rule of law, as well as its operating mechanisms. The constitutional review was assigned to the Constitutional Court, as the guarantor of the Constitution's supremacy and the sole authority of constitutional jurisdiction. The jurisprudence of the Constitutional Court has been steadily evolving, but it is indissolubly linked to that of the Strasbourg Court and that of the Luxembourg Court. The Convention for the Protection of Human Rights and Fundamental Freedoms, on the one hand, and the Treaties establishing the European Union, as well as the European law, as interpreted by the Court of Justice of the European Union, are the benchmark elements of the constitutional review. In this context, it seems relevant to analyse the relationship between the Constitutional Court of Romania, the European Court of Human Rights and the Court of Justice of the European Union, from a theoretical perspective, but especially from a jurisprudential perspective.

Keywords: *Constitutional Court, European Court of Human Rights, Court of Justice of the European Union, jurisdiction, relationship.*

1. Introduction

The European Court of Human Rights and the Court of Justice of the European Union have been set up by two organizations with different goals and powers. The first of the two courts is the judicial authority of the Council of Europe, which operates as a corollary of a space of democracy and of the safeguarding of human rights. As to the Court of Justice of the European Union, essentially, its mission is to review the legality of acts of the institutions of the European Union, to ensure that Member States meet their duties resulting of the Treaties and to interpret EU law upon request of the national courts.

With regard to human rights, the powers of the two courts overlap. By way of example, we mention that, if in 2014, through the Judgment of July 16, 2014, in Case *Hämäläinen v. Finland*[1], the European Court of Human Rights reiterated that states are not required to recognize the marriage of same sex couples and that the definition of marriage and of the family, within the meaning of the European Convention on Human Rights is the traditional one, and that how the Member States address this issue is an internal problem, the question arises how the Court of Justice of the European Union shall adjudicate on a matter which also refers to the application of human rights, respectively on the meaning of the notion "spouse".

Under these terms, this paper, without pretending to treat exhaustively the human rights issue in relation to the two courts, addresses in a systematic manner, the way in which the Constitutional Court of Romania integrates the Convention for the Protection of Human Rights and Fundamental Freedoms and, respectively, the Charter of Fundamental Rights of the European Union, into domestic law.

2. Legal framework

The legal basis of the relationship between the Romanian Constitutional Court, the Strasbourg Court and the Luxembourg Court is reflected in art. 20 and art. 148 of the Romanian Constitution, republished[2]. If

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[1] Source: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-145768%22]}

[2] According to art. 20 of the Fundamental Law, with the marginal title *International treaties on human rights*: „(1) Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to. (2) Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions."

According to art. 148 of the Fundamental Law, with the marginal title *Integration into the European Union*: „(1) Romania's accession to the constituent treaties of the European Union, with a view to transferring certain powers to community institutions, as well as to exercising in common with the other member states the abilities stipulated in such treaties, shall be carried out by means of a law adopted in the joint sitting of the Chamber of Deputies and the Senate, with a majority of two thirds of the number of deputies and senators. (2) As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence

the first article was found, in a similar form, in the text of the Constitution of 1991[3], the second one was added during the revision of the Basic Law, in order to create the possibility of Romania's accession to the European Union.

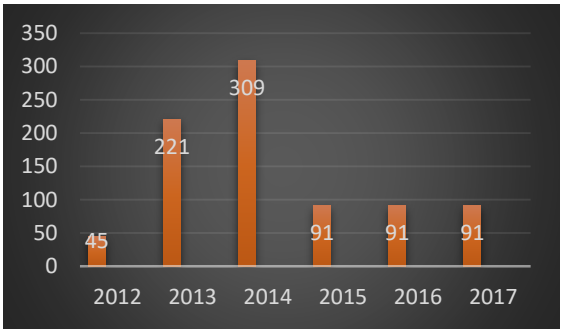
As to the grounds for invoking the provisions of the Charter of Fundamental Rights of the European Union within the constitutionality control, we mention that, initially, the reporting was made to the provisions of art. 20 par. (1) of the Constitution, but, after 2009, the Constitutional Court held that it "is incorrect. The Charter, according to art. 6, par. 1 of the Consolidated Version of the Treaty on European Union, published in the Official Journal of the European Union, series C no. 84 of 30 March 2010, has the same legal value as the Treaty on European Union and the Treaty on the functioning of the European Union, which, within the meaning of art. 148 of the Constitution of Romania, are the constitutive treaties of the European Union. Therefore, within the Romanian constitutional system, the Charter of Fundamental Rights of the European Union is not covered by art. 20 of the Constitution, which refers to international treaties on human rights, so that the author of the exception should have invoked the norms of the Charter in conjunction with art. 148 of the Basic Law"[4].

3. The Constitutional Court of Romania and the Strasbourg Court

The relationship between the Romanian Constitutional Court and the European Court of Human Rights has a long history, as Romania has ratified[5] the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols ever since 1994. Thus, since the time of the ratification of the Convention, it is a part of national law, so that any reference to any of its texts is subject to the same rules applicable at relating to the provisions of the Constitution[6]. Following the ratification, Romania undertook to respect its provisions, as well as the interpretation of the Convention given by the European Court of Human Rights, within the limits of this; otherwise, Romania would be in the situation of a party to the Convention that fails to comply with its obligations undertaken under international public law and domestic law, contrary to the provisions of art. 11 par. (1) and (2) and art. 20 par. (1) of the Constitution[7].

The beginning of invoking the provisions of the Convention on Human Rights and Fundamental Freedoms within the constitutional review was carried out in a case filed in 1996 before the Constitutional Court, on the settlement on the exception of unconstitutionality of certain provisions of the Code of Criminal Procedure[8]. Since then, the number of cases of alleged non-compliance with the provisions of the Convention has increased significantly, as shown in the chart below, concerning the situation of the last years[9]:

Chart no. 1



Appropriately, the case-law of the Constitutional Court was significantly influenced by the judgments of the European Court of Human Rights. We can say that, nowadays, the judgments of the Constitutional Court where there isn't any reference made to the case-law of the European Court of Human Rights are becoming increasingly rare, especially if the provisions on the quality of the law, the principle of non-retroactivity of the law, the principle of equality of rights, free access to justice and the right to a fair trial or the right to defence are invoked as grounds for unconstitutionality[10].

A clarification of interest from the perspective of Romania's status as an EU member state, refers to the fact that the accession of the European Union to the Convention on Human Rights and Fundamental Freedoms was launched at the same time with the entry into force, on June 1st, 2010, of the Protocol no. 14 to the Convention, that allows not only states but also international organisations, therefore, also the European Union, to become signatories to the

over the opposite provisions of the national laws, in compliance with the provisions of the accession act. (3) The provisions of paragraphs (1) and (2) shall also apply accordingly for the accession to the acts revising the constituent treaties of the European Union. (4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of paragraph (2) are implemented. (5) The Government shall send to the two Chambers of the Parliament the draft mandatory acts before they are submitted to the European Union institutions for approval.";

[3] According to art. 20 of the 1991 Constitution, with the marginal title *International human rights treaties*: „(1) Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to. (2) Where any inconsistencies exist between the covenants and treaties on fundamental human rights Romania is a party to, and internal laws, the international regulations shall take precedence.";

[4] Judgment of the Constitutional Court no. 206/2012, published in the Official Gazette of Romania, Part I, no. 254 of 17 April 2012;

[5] Law no. 30/1994, published in the Official Gazette of Romania, Part I, no. 135 of 31 May 1994;

[6] Judgment of the Constitutional Court no. 146/2000, published in the Official Gazette of Romania, Part I, no. 566 of 15 November 2000;

[7] Judgment of the Constitutional Court no. 233/2011, published in the Official Gazette of Romania, Part I, no. 740 of 17 May 2011;

[8] Judgment of the Constitutional Court no. 129/1996, published in the Official Gazette of Romania, Part I, no. 158 of 16 July 1997;

[9] Source: www.ccr.ro;

[10] For details, see, extensively, Toader and Safta, 2015, page 67 and subseq.;

Convention. It is, however, necessary for the accession to be ratified by all States party to the Convention, as well as the European Union. Negotiations between representatives of the Council of Europe and those of the European Union led to the completion of a draft agreement in April 2013.

The Court of Justice of the European Union, however, considered, in its Opinion no. 2/2013 of December 18th, 2014, that the respective project is not compatible with art. 6 par. (2) from the Treaty on European Union[11] and with Protocol no. 8 on art. 6 par. (2) of the Treaty on European Union, concerning the accession of the Union to the Convention for the Protection of Human Rights and Fundamental Freedoms[12], in that:

- it is liable adversely to affect the specific characteristics and the autonomy of EU law in so far it does not ensure coordination between Article 53 of the ECHR and Article 53 of the Charter, does not avert the risk that the principle of Member States' mutual trust under EU law may be undermined, and makes no provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU;
- it is liable to affect Article 344 TFEU in so far as it does not preclude the possibility of disputes between Member States or between Member States and the EU concerning the application of the ECHR within the scope ratione materiae of EU law being brought before the ECtHR;
- it does not lay down arrangements for the operation of the co-respondent mechanism and the procedure for the prior involvement of the Court of Justice that enable the specific characteristics of the EU and EU law to be preserved; and
- it fails to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters in that it entrusts the judicial review of some of those acts, actions or omissions exclusively to a non-EU body.

As a consequence, new negotiations will be required before a potential accession. At the same time, following this decision of the Court of Justice of the European Union, European citizens will continue to be able to appeal to ECHR court for ruling on decisions of national courts and on national legislation, as well as to refer questions to the Luxembourg Court, but they will not be able to lodge a complaint concerning the institutions of the European Union or the functioning of the European Union legislation.

4. The Constitutional Court of Romania and the Luxemburg Court

The relationship between the Constitutional Court of Romania and the Court of Justice of the European Union must be seen on two levels: on the one hand, we refer to the priority of the application of the European norms, namely the provisions of the EU constituent treaties and other binding Community regulations by the contrary provisions of domestic laws[13] and, on the other hand, we are considering the procedure for the preliminary questions referred to the Court of Justice of the European Union.

It should be noted, first of all, that in 2009, through the Treaty of Lisbon[14], the Charter of Fundamental Rights of the European Union became legally binding, being given a legal value equal to that of the Treaties of the European Union, and the Union recognized the rights, freedoms and the principles laid down therein[15]. The text of the Charter was signed on December 7th, 2000, in Nice, as a reaffirmation of the conviction of the signatories that respect for human rights and fundamental values is the essential rule on which the cooperation of the European states is based upon, but, until 2009, it has functioned at a declarative level, even though, in its case-law , the Court of Justice of the European Union has used it as a source of interpretation[16]. In fact, the special significance of this document, but also the contents of its provisions have led, even since that time, for some specialists to see in

[11] See, to that extent, art. 6 par. (2) of the Treaty on European Union, the consolidated version of which was published in the Official Journal of the European Union series C no. 202 of the 7 June 2016, according to which: „(2) The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.";

[12] Source: http://curia.europa.eu/juris/document/document.jsf?text=&docid=160882&pageIndex=0&doclang=RO;

[13] See, to that extent, art. 148 par. (2) of the Constitution of Romania, republished;

[14] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, ratified by Romania by Law no. 13/2008, published in the Official Gazette of Romania, Part I, no. 107 of 12 February 2008;

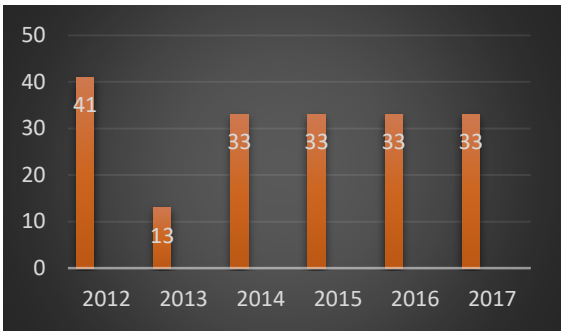
[15] See, to that extent, art. 6 par. (1) of the Treaty on European Union, the consolidated version of which was published in the Official Journal of the European Union series C no. 202 of the 7 June 2016, according to which: „(1) The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.";

[16] By way of example, for cases where provisions of the Charter of Fundamental Rights of the European Union were invoked, prior to 2009, see: Judgment of 23 October 2003, case RTL Télévision GmbH c. Niedersachsische Landesmedienanstalt für privatem Rundfunk, C-245/01 (Rec.2003, p. I−12489), par. 38; Judgment of 12 May 2005, Regione autonoma Friuli−Venezia Giulia and ERSA, case C−347/03 (Rec., p. I−3785) par. 118; Judgment of 27 June 2006, European Parliament/Council, case C−540/03 (Rec., p. I−5769) par. 38;

its adoption a step towards the drafting of the European Union Constitution[17].

From a statistical point of view, the highlighting of the case-law of the Court of Justice of the European Union, in general, and of the failure to comply with the provisions of the Charter of Fundamental Rights of the European Union, in particular, in cases pending before the Constitutional Court has constantly evolved. The beginning[18] was made in 2004, in resolving an exception of unconstitutionality concerning, *inter alia*, the provisions of Law no. 43/2003 on financing the activity of political parties and electoral campaigns[19]. Following the ratification of the Treaty of Lisbon, the number of such cases has increased, as shown in the chart below[20]:

Chart no. 2



The beginning of the concrete application of the Charter of Fundamental Rights of the European Union within the Constitutional Court's reasoning was made in 2011, when the Court expressly provided that the provisions of the Charter "are applicable to constitutional review insofar as they assure, guarantee and develop the constitutional provisions in the field of fundamental rights, in other words, to the extent that their level of protection is at least at the level of the constitutional provisions on human rights"[21].

A particular aspect of the relationship between the Constitutional Court and the Court of Justice of the European Union, as we have stated beforehand, concerns the reference for a preliminary ruling[22], a procedure open to judges of the Member States of the European Union, which may address the Court with questions on the interpretation or validity of European law in a pending case. Thus, the preliminary questions may concern two situations[23]:

a) the reference for interpretation of the European norm (as a primary and secondary law), when the national judge asks the Court of Justice to specify a point of interpretation of the European law in order to be able to apply it correctly; and
b) the reference for the assessment of the validity of a European norm as a secondary law rule, where the national judge asks the Court of Justice to check the validity of an act of European law.

Indeed, as early as 2011, the Constitutional Court stated that "it remains at the Constitutional Court's discretion to apply, within the constitutionality review, the rulings of the Court of Justice of the European Union or to address itself preliminary questions for the purpose of determining the content of the European norm. Such an attitude is related to the cooperation between the national constitutional court and the European one, as well as to the judicial dialogue between them, without calling into question issues relating to the establishment of hierarchies between these courts"[24].

Although the procedure is widely used by the common courts, the Constitutional Court appealed to it relatively recently[25], in a case brought before the Constitutional Court in early 2016, thus joining the constitutional courts in states such as Austria, Belgium, France, Italy, Lithuania or Spain[26], who have used this procedure.

The case concerns the settlement on the exception to the unconstitutionality of the provisions of art. 277 par. (2) and (4) of the Civil Code, an exception raised by Relu Adrian Coman, Robert Clabourn Hamilton and ACCEPT Association, in a file of the 5th District Court in Bucharest – The Civil Section. The European legislative act applicable to the case is Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the

[17] See, Duculescu Victor (2001), pp. 316-320;
[18] Source: www.ccr.ro;
[19] Judgment of the Constitutional Court no. 517/2004, published in the Official Gazette of Romania, Part I, no. 49 of 14 January 2005;
[20] Source: www.ccr.ro;
[21] Judgment of the Constitutional Court no. 765/2011, published in the Official Gazette of Romania, Part I, no. 476 of 6 July 2011;
[22] The basis of this procedure is found in the provisions of art. 267 of the Treaty on the Functioning of the European Union, the consolidated version of which was published in the Official Journal of the European Union series C no. 202 of the 7 June 2016, according to which: „The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay." Source: http://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:12012E/TXT&from=RO;
[23] Source: http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=LEGISSUM%3Al14552;
[24] Judgment of the Constitutional Court no. 668/2011, published in the Official Gazette of Romania, Part I, no. 487 of 8 July 20;
[25] Constitutional Court file no. 78D/2016. Source: www.ccr.ro;
[26] See, extensively, Toader and Safta, *op. cit.*, page 104 and subseq.;

Union and their family members to move and reside freely within the territory of the Member States[27].

In essence, the case is a civil one and concerns the existence of a discriminatory treatment of a couple on the basis of sexual orientation, justified on the provisions of art. 277 par. (2) of the Civil Code[28], which prohibit, in Romania, the recognition of marriages between persons of the same sex, with the consequent refusal for these people, of the rights deriving from Directive 2004/38/EC on free movement of persons, consisting in granting residence rights for the reunification of the family.

Thus, the Constitutional Court has referred the following questions to the European Court of Justice:

1. The term "spouse" in art. 2(2)(a) of Directive 2004/38/EC, in conjunction with art. 7, 9, 21 and 45 of the Charter of Fundamental Rights of the European Union includes the same-sex spouse from a non-EU country, of a European citizen with whom the citizen has legally married, under the law of a Member State, other than the host State?
2. If the answer to the first question is in the affirmative, then art. 3(1) and 7(1) of Directive 2004/38/EC, in conjunction with art. 7, 9, 21 and 45 of the Charter of Fundamental Rights of the European Union require for the host Member State to grant the right to reside on its territory for a period longer than three months to a same-sex spouse of an EU citizen?
3. If the answer to the first question is in the negative, the same-sex spouse from a non-EU Member State, of an European citizen, with whom the citizen has legally married under the law of a Member State other than the host State, may be qualified as "any other family member, [...]" within the meaning of art. 3 par. (2) letter (a) of Directive 2004/38/EC or as a "partner with whom the Union citizen has a durable relationship, duly attested" within the meaning of art. 3 par. (2) letter (b) of Directive 2004/38/EC, with the host State's correlated obligation to facilitate his or her entry and stay, even if the host State does not recognize same-sex marriages nor does it provide for any other alternative form of legal recognition, such as registered partnerships?
4. If the answer to the third question is in the affirmative, then art. 3(2) and 7(2) of Directive 2004/38/EC, in conjunction with art. 7, 9, 21 and 45 of the Charter of Fundamental Rights of the European Union require the host Member State to grant the right to reside in its territory for more than three months to a spouse of the same sex of a European citizen?

There is yet to have a ruling, at the date of this paper[29].

5. Conclusions

Currently, in Romania, just as in other member states of the European Union, the protection of the rights and fundamental freedoms is performed in a system in which they are recognized and protected by the Constitution, by the European Convention of Human Rights and by the Charter of Fundamental Rights of the European Union. The one who implements the national and international instruments, through a "judicial dialogue", is the judge, called upon to apply the legal provisions to specific case-law.

References

- Judgment of the Constitutional Court no. 129/1996, published in the Official Gazette of Romania, Part I, no. 158 of 16 July 1997
- Judgment of the Constitutional Court no. 146/2000, published in the Official Gazette of Romania, Part I, no. 566 of 15 November 2000
- Judgment of the Constitutional Court no. 517/2004, published in the Official Gazette of Romania, Part I, no. 49 of 14 January 2005
- Judgment of the Constitutional Court no. 233/2011, published in the Official Gazette of Romania, Part I, no. 740 of 17 May 2011
- Judgment of the Constitutional Court no. 765/2011, published in the Official Gazette of Romania, Part I, no. 476 of 6 July 2011
- Judgment of the Constitutional Court no. 668/2011, published in the Official Gazette of Romania, Part I, no. 487 of 8 July 2011
- Judgment of the Constitutional Court no. 206/2012, published in the Official Gazette of Romania, Part I, no. 254 of 17 April 2012
- Duculescu Victor, *Carta drepturilor fundamentale de la Nisa – un prim pas către Constituţia Europeană?*, in „Juridica", Second Year, July - August, No. 7-8 (2001), pp. 316-320
- Toader, Tudorel and Marieta Safta, 2015, *Dialogul judecătorilor constituţionali*, Bucharest: Universul Juridic

[27] Published in the Official Journal of the European Union series L no. 158 of 30 April 2004. Source: http://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:02004L0038-20110616&from=RO;

[28] Law no. 287/2009 on the Civil Code, republished in the Official Gazette of Romania, Part I, no. 505 of 15 July 2011, as subsequently amended;

[29] March 2018.

LEGAL PROTECTION OF THE RIGHT TO EDUCATION IN ROMANIA AND EUROPEAN UNION

Dan VĂTĂMAN[*]

Abstract

This year marks the 70th anniversary of the Universal Declaration of Human Rights, a document that formally recognized free and compulsory elementary education as a basic human right. Thus, the right to education is fundamental in the development of each individual and at the same time a key element in developing and enhancing wellbeing and quality of life for the whole European society. Considering the fact that education is both a human right in itself and an indispensable means of realizing other human rights, the objectives of this study are to identify barriers that need to be overcome and, at the same time, to raise public awareness on the right to education because, as is well known, if individuals knows their rights they are empowered to claim them. The importance of this study consists on the fact that the analysis is focused, in a first stage, on clarifying the essential features of the right to education as a human right, so that, in a second stage, to be presented the European and Romanian legal frameworks protecting the right to education. As a novelty, this study attempts to outline how it is implemented the right to education in Romania, highlighting achievements, but without trying to avoid weaknesses and the less pleasant aspects.

Keywords: *right to education; European legal framework; EU's Human Rights policy; human rights in Romania, legal framework of Romanian education.*

1. Introduction

The year 2018 marks the 70th anniversary of the Universal Declaration of Human Rights, a document that formally recognized free and compulsory elementary education as a basic human right, the stated purpose being to pursue the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.[1]

Since then, the right to education has been widely recognized and developed by a number of international normative instruments, among which we mention: Convention against Discrimination in Education (1960); International Convention on the Elimination of All Forms of Racial Discrimination (1965); International Covenant on Economic, Social and Cultural Rights (1966); Convention on the Elimination of All Forms of Discrimination against Women (1979); Convention on the Rights of the Child (1989).

Following global recognition of the right to education as a human right, the signatory States of these international normative instruments have a number of duties and responsibilities. Like all human rights, the right to education imposes three levels of obligation on States parties, respectively to respect, protect and fulfil the right to education.

Considering the fact that education is both a human right in itself and an indispensable means of realizing other human rights, the objectives of this study are to identify barriers that need to be overcome and, at the same time, to raise public awareness on the right to education because, as is well known, if individuals knows their rights they are empowered to claim them.

Although the specialized literature comprises many studies on this topic, I am convinced that a new study is necessary in the context in which, as evidenced by UNESCO, 264 million children and youth are still out of school around the world, the total includes 61 million children of primary school age, 62 million of lower secondary school age and 141 million of upper secondary age.[2]

Given this undesirable situation, the importance of this study consists on the fact that the analysis is focused, in a first stage, on clarifying the essential features of the right to education as a human right, so that, in a second stage, to be presented the European and Romanian legal frameworks protecting the right to education. As a novelty, this study attempts to outline how it is implemented the right to education in Romania, highlighting achievements, but without trying to avoid weaknesses and the less pleasant aspects.

2. Essential features of the right to education as a human right

Article 13 of the International Covenant on Economic, Social and Cultural Rights recognized "the right of everyone to education" and also affirmed that "education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms". In addition, Article 14 of the

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[1] Article 26 of Universal Declaration of Human Rights (UDHR)

[2] *Out-of-School Children and Youth* - http://uis.unesco.org/en/topic/out-school-children-and-youth, accessed on 18 February 2018

Covenant states that "each State Party which, at the time of becoming a Party, has not been able to secure in its territory compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all".[3]

For identified the status of the progressive realization of the right to education throughout the world, the Commission on Human Rights in its resolution 1998/33 of 17 April 1998 empowered Katarina Tomasevski (UN Special Rapporteur on the right to education) to report on the status, throughout the world, of the progressive realization of the right to education, including access to primary education, and the difficulties encountered in the implementation of this right. In her preliminary report to the Commission on Human Rights, the Special Rapporteur shown that there could be no right to education without corresponding obligations for governments. Moreover, she said that these obligations can be easily structured into a conceptual framework contain four essential features of the right to education, namely: availability, accessibility, acceptability and adaptability (also known as 4-A scheme) [4].

As a first State obligation, availability relates to ensuring that primary schools are available for all children, which necessitates a considerable investment. Accessibility requires the State to ensuring access to available public schools, most importantly in accordance with the existing prohibition of discrimination. In light of the principle of acceptability, the State is obliged to ensure that all schools conform to the minimum criteria which it has developed as well as ascertaining that education is acceptable both to parents and to children. The usual approach regarding adaptability, the fourth principle, is to review the contents and process of learning from the viewpoint of the child as future adult, that's because the best interests of the individual child highlights the need for the educational system to become and remain adaptable.[5]

As it appears from the General Comment of Article 13 adopted by the Committee on Economic, Social and Cultural Rights in 1999, while the precise and appropriate application of the terms will depend upon the conditions prevailing in a particular State party, education in all its forms and at all levels shall exhibit the interrelated and essential features establish in 4-A scheme, as follows:

a) Availability - functioning educational institutions and programs have to be available in sufficient quantity within the jurisdiction of the State party;
b) Accessibility - educational institutions and programs have to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions: Non-discrimination - education must be accessible to all, especially the most vulnerable groups; Physical accessibility - education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location or via modern technology; Economic accessibility - education has to be affordable to all;
c) Acceptability - the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents;
d) Adaptability - education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings. [6]

At the same time, Committee on Economic, Social and Cultural Rights shown that the right to education, like all human rights, imposes three types or levels of obligations on States parties: the obligations to respect, protect and fulfil. Thus, the obligation to respect requires States parties to avoid measures that hinder or prevent the enjoyment of the right to education, the obligation to protect requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to education and the obligation to fulfil requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education (the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide). [7]

3. The EU legal framework for protection of the right to education

3.1. General provisions relating to the education

Pursuant to Article 6(e) of the Treaty on the Functioning of the European Union (TFEU), the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States in several areas, including education. Moreover,

[3] International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 - http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx, accessed on 18 February 2018

[4] Preliminary report of the Special Rapporteur on the right to education, Ms. Katarina Tomasevski, submitted in accordance with Commission on Human Rights resolution 1998/33 (E/CN.4/1999/49, para. 50) - http://repository.un.org/handle/11176/223172, accessed on 18 February 2018

[5] *Ibid*, paras. 51, 57, 62 and 70.

[6] General Comment No. 13: The Right to Education (Article 13 of the Covenant), (E/C.12/1999/10, para. 6), adopted at the Twenty-first Session of the Committee on Economic, Social and Cultural Rights, on 8 December 1999 - http://www.refworld.org/pdfid/4538838c22.pdf, accessed on 18 February 2018

[7] *Ibid*, paras. 46-47

Article 9 of TFEU states that, in defining and implementing its policies and activities, the Union shall take into account, among others, requirements linked to the promotion of a high level of education.

To this end, the Articles 165 of TFEU empowers the Union to contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organization of education systems and their cultural and linguistic diversity.

3.2. Guarantee of the right to education

The European Union is based on a common set of values, including respect for human rights whether civil and political, or economic, social and cultural[8]. More than that, the Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union (hereinafter: Charter), which shall have the same legal value as the Treaties.[9]

Thus, in Article 14 of the Charter is stipulated that "everyone has the right to education", this right includes the possibility to receive free compulsory education. Also, is provided the freedom "to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right". As shown in official explanations relating to the Charter, these provisions are based on the common constitutional traditions of Member States and on Article 2 of the Protocol no. 1 to the ECHR according to which "no person shall be denied the right to education"[10].

4. Romanian legal framework protecting the right to education

4.1. Constitutional provisions

Basic principles regarding the education in Romania are established in Article 32 of the Constitution. Thus, according to the constitutional provisions, "the right to education is provided by the compulsory general education, by education in high schools and vocational schools, by higher education, as well as other forms of instruction and postgraduate improvement". In addition, it is shown that "State education shall be free, according to the law".[11]

It should be noted that in accordance with Article 11 of Constitution, the Romanian State pledges to fulfil as such and in good faith its obligations as deriving from the treaties it is a party to, that's because the treaties ratified by Parliament, according to the law, are part of national law. If we strictly refer to the provisions concerning the citizens' rights and liberties, under Article 20 of Constitution these "shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to" and "where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favorable provisions".[12]

Moreover, the Romanian Constitution provides that, as a result of the Romania's accession to the European Union, "the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act"[13]

4.2. Legal basis for ensuring the right to education

As is apparent from the first article of the Law of National Education no. 1/2011, the purpose of this law is "to provide the legal framework for the exercise, under the authority of the Romanian state, of the fundamental right to lifelong education". In addition, the law provides that "the State guarantees to the citizens of Romania equal rights of access to all levels and forms of pre-university and higher education, as well as lifetime education without any form of discrimination, the same rights being equally acknowledged for the citizens of the other EU states and the states belonging to the European Economical space and Swiss confederation"[14]. The law also contains other provisions on guaranteeing the right to education, such as "equal right to education to all people with disabilities or with special education needs"[15] and "lifelong education is a right guaranteed by law"[16].

The right to education is also provided in the Law no. 272/2004 on the protection and promotion of the rights of the child, law according to which "the child has the right to receive an education which would allow him or her to develop his or her capacities and personality, in non-discriminatory conditions". Under the law, the Ministry of Education and Research, as a

[8] Article 2 of the Treaty on European Union (TEU)
[9] Article 6 (1) TEU
[10] http://fra.europa.eu/en/charterpedia/article/14-right-education, accessed on 20 February 2018
[11] http://www.cdep.ro/pls/dic/site.page?den=act2_2&par1=2#t2c2s0sba32, accessed on 20 February 2018
[12] *Ibid*
[13] Article 148 of Romanian Constitution
[14] Article 2(4)-(5) of Law no. 1/2011
[15] Article 12(6) of Law no. 1/2011
[16] Article 13(1) of Law no. 1/2011

specialized institution of the central public authority, as well as the school inspectorates and the education institutions, as establishments of the local public administration, "must undertake all measures that are necessary for facilitating the access to pre-school education and providing regular obligatory tax-free education for all children"[17].

Law no. 448/2006 regarding the protection and the promotion of the rights of persons with disabilities states that such persons benefit, inter alia, the right to education and training[18]. It specifically provides that "disabled persons shall have a free and equal access to any form of education, irrespective of their age, according to the handicap type, degree and the educational needs thereof". More than that, "the disabled persons shall be ensured permanent education and professional training throughout their life"[19].

Hindering access to compulsory public education is incriminated by the Romanian Penal Code in Title VIII, Chapter II - Offenses against family. Thus, "a parent or a person to whom a juvenile was entrusted by law and who withdraws the juvenile from school or prevents them, by any means, from attending compulsory public education, shall be punishable by no less than 3 months and no more than 1 year of imprisonment or by a fine"[20].

5. Implementation of right to education in Romania

For a proper depiction of how it is implemented the right to education in Romania, our analysis should be focused on the way in which the Romanian government fulfils its obligations in education, in relation to 4-A scheme – making education available, accessible, acceptable and adaptable.

As Katarina Tomaševski pointed out in her work entitled *Right to education primers no. 3*, availability embodies two different governmental obligations: the right to education as a civil and political right requires the government to permit the establishment of educational institutions by non-state actors, while the right to education as a social and economic right requires the government to establish them, or fund them, or use a combination of these and other means so as to ensure that education is available. [21]

Referring to these obligations of the Romanian state, it must first of all be mentioned that there is a complete legislative framework providing adequate funding for the education. According to the provisions of the Law of National Education no. 1/2011, the State provides basic finance for all preschool children and pupils attending compulsory state, private and accredited religious education. The state also provides basic finance for the accredited vocational and high school state, private and religious education, as well as for state post high-school education. They shall be financed on the basis and within the limits of the standard cost per pupil or per preschool child, according to the methodology set by the Ministry of National Education. Public education is free of charge, in compliance with the law, but for certain educational activities, levels and curricula, taxes may be charged.[22] More than that, the Law of National Education establishes that a minimum of 6% of the Gross domestic product (GDP) of the year in question is allotted annually from the state budget and from the budgets of the local authorities in order to finance national education. The educational institutions may also get and use their own income. [23]

Despite these clear provisions, today, six years after the adoption of Law 1/2011, the Romanian state has not complied with its legal obligation to allocate a minimum of 6% of the GDP to finance national education, the term for the allocation of these funds being extended year by year through the Government Emergency Ordinance. [24]

In accordance with Education and Training Monitor 2017 – Country analysis, Romania's general government expenditure on education as a proportion of GDP remains the lowest in the EU, underfunding being evidenced by the unusually large financial burden falling on Romanian households, which spend 35 % of what the government spends on education: this is the highest proportion in the EU. [25]

The same state of affairs emerges from OECD evaluation in education (2017), according to which Romania's public expenditure on primary and secondary education is the lowest of all the EU countries, both in relative and absolute terms. In 2013, Romania had the lowest level of expenditure on education as a share of total government expenditure (7%), compared with an EU average of 11%. Also, the

[17]Articles 47(1) and 48(1) of Law no. 272/2004 on the protection and promotion of the rights of the child, Published in the Official Gazette, Part I no. 557 of 23 June 2004

[18]Article 6(b) of Law no. 448/2006 regarding the protection and the promotion of the rights of persons with disabilities, republished in the Official Gazette, Part I no. 1 of January 3, 2008

[19]Article 15 of Law no. 448/2006

[20]Article 380(1) of the New Penal Code (Law 286/2009)

[21] Katarina Tomaševski, Right to Education Primers, no 3 - Human rights obligations: Making education available, accessible and adaptable, 2001, p. 13 – http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Tomasevski_Primer%203.pdf, accessed on 23 February 2018

[22] Article 9(2) and (3) of Law no. 1/2011

[23] Article 8 of Law no. 1/2011

[24] Most recently by Emergency Ordinance no. 9/2017 on some budgetary measures in 2017, the extension of some deadlines, as well as the modification and completion of some normative acts, Official Gazette no. 79 of 30 January 2017.

[25] Education and Training Monitor 2017 - Country analysis, Romania, p. 250 – https://ec.europa.eu/education/sites/ education/files/ monitor2017-ro_en.pdf, accessed on 24 February 2018

2017 evaluation shows that Romania invests relatively less at all levels of education than other European countries, and allocates more resources to upper secondary and tertiary education than compulsory education. [26]

Accessibility requires the Romanian State to secure access to education for all children in the compulsory education age-range, but not for secondary and higher education. Thus, post-compulsory education may entail the payment of tuition and other charges and could thus be subsumed under "affordability"[27]. Access to public schools should be guided by the overriding principle of nondiscrimination, which is not subject to progressive realization but has to be secured immediately and fully. Respect of parental freedom of choice for the education of their children is also not subject to progressive realization but should be guaranteed fully and immediately. [28]

Although the existing legal framework ensures for all citizens equal rights of access to all levels and forms of pre-university and higher education, in fact there are significant discrepancies in access to quality education between urban areas and rural areas, where 45% of Romania's school population (ISCED 1-2) is studying. If we refer only to the integration of Roma people in education, a recent survey by the European Agency for Fundamental Rights (FRA 2016) shows that only 38 % of Roma children attend ECEC, while 77 % of Roma aged 18-24 are early school leavers. This indicates that ECEC participation has worsened since 2011, when the figure was 45 %.[29]

The OECD 2017 evaluation on Romania's education system shown that inequity in education overlaps closely with urban/rural disparities. Thus, students from socio-economically disadvantaged backgrounds are more likely to leave school before finishing upper secondary education. Boys in rural areas and from poorer quintiles are most at risk of dropping out before completion. Other vulnerable populations include Roma students and students with disabilities. [30]

One important aspect of the acceptability of education is the fact that, besides available and accessible, education must also be of good quality. Thus, each State should enforce minimal standards regarding quality, safety, environmental health or professional requirements for teachers.

With regard to these issues, in Romania has been developed a consistent legal framework that covers all aspects relating to quality assurance in education. Despite improvements over time, there are still a number of challenges especially that quality assurance in education is interconnected with education funding. Thus, increasing spending in education may help improve educational outcomes, support human capital development and economic growth.[31]

Adaptability of the education implies rejecting of any type of segregation or exclusion of the children with special educational needs.

As shown in National Strategy on Social Inclusion and Poverty Reduction (2015-2020), the Romanian Government's objective is that all citizens to be provided with an equal opportunity to participate in society, to feel valued and appreciated, to live in dignity and that their basic needs to be met and their differences respected. In terms of education, the Government's goal is ensuring equality of opportunity to quality education for all children, special attention should be paid to the quality of education and training and to their relevance to the needs of both the labor market and of individuals. [32]

Also, an order issued by Ministry of Education and Research regarding the prohibition of any form of segregation in schools in Romania stipulates that education policy ensuring equity in educational system, in terms of equal access to all forms of education, but also in terms of quality education for all children without any discrimination caused by ethnicity or language maternal disability and/or special educational needs, socioeconomic status families, residence or school performance of primary education of the beneficiaries. Also, were established a series of legal obligations to various structures in the education system and provides specific penalties for failure to comply with these obligations. [33]

These measures were taken as a result of general comment of the Committee on the Rights of Persons with Disabilities (CRPD) on the right to inclusive education, article 24 of the UN Convention on the Rights of Persons with Disabilities. In its comment the CRPD states unequivocally that the right to education of people with disabilities can only be adequately and effectively ensured only by inclusive education. The right to inclusive education imposes obligations on States parties to respect, protect and fulfil each of the

[26] OECD Reviews of Evaluation and Assessment in Education: Romania 2017, p. 58 - http://www.oecd-ilibrary.org/fr/education/romania-2017_9789264274051-en, accessed on 24 February 2018

[27] Katarina Tomaševski (2001), p. 13.

[28] *Ibid*, p. 27

[29] Education and Training Monitor (2017), p. 250.

[30] OECD Reviews of Evaluation and Assessment in Education, Romania 2017, p. 56 - http://www.oecd-ilibrary.org/fr/education/romania-2017_9789264274051-en, accessed on 24 February 2018

[31] Education and Training Monitor (2017), p. 251.

[32] National Strategy on Social Inclusion and Poverty Reduction (2015-2020), p. 58 - http://www.mmuncii.ro/j33/images/Documente/Familie/2016/StrategyVol1EN_web.pdf, accessed on 25 February 2018

[33] Order of the Ministry of Education and Research no. 6134 / 21.12.2016 on banning school segregation in school units, Official Gazette no. 27 of 10 January 2017

essential features of education: availability, accessibility, acceptability, adaptability. [34]

6. Conclusions

As is apparent from the above, the access to education is not a privilege, it is a human right. Thus, as defined by the United Nations Committee on Economic, Social and Cultural Rights, "education is both a human right in itself and an indispensable means of realizing other human rights" and "as an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities"[35].

In these circumstances, it can be said that the right to education is a powerful instrument for developing the full potential of each person, ensuring and respecting human dignity and, thereby, creating the premises for individual and collective wellbeing.

To overcome the perpetual crisis and achieve a state of general wellbeing, the Romanian society must pay more attention to education at all levels. During the last years, Romania has developed a range of legislative and institutional tools destined to ensure implementation of right to education, but there are still a number of barriers to be surmounted. In my opinion, in order to ensure the access to quality primary and lower secondary education for all citizens, the Romanian authorities have to tackle inequalities and promoting an inclusive education, what it means to improve access to quality mainstream education, in particular for Roma and children in rural areas.

Also, given that funding for education is very low, it should be emphasized that quality educational outcomes are not being achieved with a very low level of spending. Following the same logic, I express my conviction that only by increasing spending in education the Romanian authorities may help improve the performance of the Romanian education system and, finally, even to achieve the objectives set out in the national project "Educated Romania", initiated and promoted by the Romanian President, who proposed beginning of "the repositioning of the society on values, the development of a success culture based on performance, work, talent, honesty and integrity".[36]

References

- Education and Training Monitor 2017 - Country analysis: Romania, https://ec.europa.eu/education/sites/education/files/monitor2017-ro_en.pdf;
- National Strategy on Social Inclusion and Poverty Reduction (2015-2020), http://www.mmuncii.ro/j33/images/Documente/Familie/2016/StrategyVol1EN_web.pdf;
- OECD Reviews of Evaluation and Assessment in Education: Romania 2017, http://dx.doi.org/10.1787/9789264274051-5-en;
- UN Commission on Human Rights, Preliminary Report of the Special Rapporteur on the Right to Education, prepared by Katarina Tomasevski, E/CN.4/1999/4913 (Geneva, January 1999), http://repository.un.org/bitstream/handle/11176/223172/E_CN.4_1999_49-EN.pdf?sequence=3&isAllowed=y;
- UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 13: The Right to Education (Art. 13 of the Covenant), 8 December 1999, E/C.12/1999/10, http://www.refworld.org/docid/4538838c22.html;
- UN Committee on the Rights of Persons with Disabilities (CRPD), General comment No. 4 (2016), Article 24: Right to inclusive education, 2 September 2016, CRPD/C/GC/4, http://www.refworld.org/docid/57c977e34.html;
- UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, http://www.refworld.org/docid/3ae6b36c0.html;
- UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), http://www.refworld.org/docid/3ae6b3712c.html;
- Tomaševski, Katarina. Right to Education Primers, no 3 - Human rights obligations: Making education available, accessible and adaptable, 2001, http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Tomasevski_Primer%203.pdf;
- Treaty on European Union;
- Constitution of Romania;
- Law of National Education no. 1/2011;
- Law no. 272/2004 on the protection and promotion of the rights of the child;
- Law no. 448/2006 regarding the protection and the promotion of the rights of persons with disabilities;
- Law 286/2009 - New Penal Code;

[34] UN Committee on the Rights of Persons with Disabilities (CRPD), General comment No. 4 (2016), Article 24: Right to inclusive education, 2 September 2016 - http://www.refworld.org/docid/57c977e34.html, accessed 27 February 2018

[35] General Comment No. 13: The Right to Education (Article 13 of the Covenant), (E/C.12/1999/10, para. 6), adopted at the Twenty-first Session of the Committee on Economic, Social and Cultural Rights, on 8 December 1999 - http://www.refworld.org/pdfid/4538838c22.pdf, accessed on 28 February 2018

[36] http://www.presidency.ro/ro/romania-educata, accessed on 1 March 2018.

- Government Emergency Ordinance no. 9/2017 on some budgetary measures in 2017, the extension of some deadlines, as well as the modification and completion of some normative acts;
- Order of the Ministry of Education and Research no. 6134 / 21.12.2016 on banning school segregation in school units;
- http://www.cdep.ro;
- http://uis.unesco.org;
- http://www.ohchr.org;
- http://fra.europa.eu;
- http://www.presidency.ro.

INDONESIA AND LGBT: IS IT TIME TO APPRECIATE LOCAL VALUE?

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Abstract

This article addresses the issue on why Indonesian people cannot accept Lesbian, Gay, Bisexual, and Transgender ("LGBT"). Further, it also illustrates the reflection on how the society changes paradox in the era of globalisation. More concretely, which shows its willingness to uniform the social structure, at the same time attempts to preserve their own distinctive identity. Indonesian people who uphold Pancasila or five national ideologies would be a perfect example in this case. Pancasila, in this case, is a crystallization form of the values such as religious, social, and cultural realm which live within Indonesian society. As time passes, Pancasila is often grounded and contrasted to western cultural values like LGBT. The influx of LGBT thoughts which relies on the human rights concept spread a long time ago in Indonesia. However, this issue reemerges into the air, at the same time in different places and countries, becomes the vast spread of LGBT legalization such as in Europe and America. The resistance against Indonesian people, who mostly anti LGBT concept, is sparked by the influence of international human right law. These are recorded several times in Indonesia's history. Attempts such as submitting judicial review in the Constitutional Court about the offense of adultery contained in the criminal law case, establishing the pro-LGBT legal communities, and gathering social supports are also conducted to convince Indonesian people to accept LGBT in the society. However, both society and government agree to take steps and synergize to stand firmly to drown this effort. Then, this article will also expose some scholars' arguments, cases, jurisprudence, and journals to show the authors' standing in this context.

Keywords: *LGBT, Indonesia, Five National Ideologies, Human Right Law, Local Norms.*

1. Introduction

This paper covers the grounds of majority Indonesian people who agree that LGBT is unacceptable behavior and prohibited choice for being applied in Indonesia. It is essential to remember that having contrast culture with western countries style which putting freedom expression on its first plate, Indonesia has its own style which influencing its direction to define what freedom of expression is. Approving Pancasila and The 1945 Constitution of the Republic of Indonesia ("1945 Constitution") as its the highest norm and law in Indonesia cause the state choose not to separate between the non-religious matters, including the state matters and the religious matters. In addition, the state shows its believing in God by putting this idea as the first norm in Pancasila, which is the basic value for the acts under the 1945 Constitution. Religion, social norms, and ethnic factors also add the cause of LGBT rejection among society which has been existed for a long time in this country. Alongside, the submissions in this paper are specifically based on some of related constitutional court verdicts, domestic laws, and some domestic cases.

Aiming to show another coin side which focussing on LGBT rejection issue in Indonesia is the main purpose of this writing. Discussing LGBT rejection in Indonesia never become a small snow for Indonesian. For some people, including the human right practitioners who defending LGBT actors, the outlook of Indonesia seems unfair and sounds as a threat of intolerance and as a form of human right implementation crisis. These views spark due to the thought of distrust to the state for not being capable protecting LGBT actors as a minority group in Indonesia due to full rejection of its existence. Also, some of them expect that freedom of expression in western countries shall be considerably applied in eastern countries, including Indonesia. Therefore, this writing is essential to comprehend the international society that Indonesia has its own consideration for not legalizing LGBT implementation and showing its decision for not accepting LGBT actors and behavior in its territory without disregarding their right as human and recognizing their right as a citizen.

This paper serves as a complimentary article compares to previous articles that have been written by some previous authors about the issue of LGBT in Indonesia. Pros and cons are understandable in this case, however, this paper is not going to elaborate the pros and cons but focuses on the perspective of Indonesians in LGBT issues. International Human Rights Law are the specialized and related branch of science in this paper. Therefore, this writing will be elaborated the topic based on this areas but still focus on how and in which particular area Indonesians consider the human right law to be applied for express its human right.

Last but not least, the submissions in this paper uses paper-desk research for the research methodology. Further, collecting some data, such as articles, journals; opening some official institutional websites, and using some court verdicts, including some of the judges' dissenting opinion, are the main way for answering the

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questions in this paper. It is also going to involve some references from local laws, such as acts, Pancasila, and 1945 Constitution.

2. Indonesia and Pancasila

As consequence of placing Pancasila as *Staatsfundamentalnorm* in Indonesia[1]and as the state philosophy foundation, Pancasila holds the significant role in defining the outlook, direction, and identification of the state among international society members. Furthermore, as the highest norm in Indonesia, all the product of laws under Pancasila cannot against the value that being uphold by Pancasila. Consisting of five national ideologies concerned with local values and norms which upholding the values of religious, Indonesians put the value of believing in the one and only God as the first ideology in the order. Through the four judges' dissenting opinion for the case number 46/PUU-XIV/2016, Constitutional Court submits that the Founding Fathers of Indonesia do not comprehend the first ideology of Pancasila as theology and philosophies value only, but more interpret them as the principle or standard to live together in the society with multi-belief of religion and faith. Accordingly, this principle shall be interpreted as the standard for living among society, such as be fair to others and speak honesty as for avoiding the split among society. Based on these values, the state obtains its fundamental. Accordingly, the state stands firmly not to separate between the state matters and the religious matters. More concretely, under Pancasila perspective, the state strictly cannot allow any practicals in the daily life which keeping the distance away between the people and Pancasila values. Accordingly, protecting all the activities or daily routine practicals which decreasing the value of religious among the society under the name of freedom or basic right is unacceptable and violate the law.[2] This fact explains the reasons on why in every single Indonesia's court verdicts, it always mentions the term "In the Name of Justice Under The God Almighty" in the first order or in the local term, it is used to call as *irah-irah*, which means the head of the verdict. This consideration reflects that every legal certainty in Indonesia shall always be illuminated by religious value so that the existence of legal norms in Indonesia cannot be reduced and/or contradict the religious values.[3] This background also becomes one of the government consideration to state its citizen religious on the national identification card.

As for highlighting human rights meaning, the government of Republic Indonesia has its own interpretation, namely that the only way to view the application of human rights in Indonesia is that by seeing them through Pancasila dan 1945 Constitution's perspective.[4] That background also bring a claim that this character is a differentiator this country compare to others.

Indonesia: LGBT is human right?

In the recent years, recognition of LGBT as a part of human right – freedom of expression – has increased significantly and mostly happened in western countries. Taiwan and South Africa are only the two countries outside western countries group which recognize the existence of LGBT in its country respectively.[5] However, it can be seen that this movement is not significantly happened in eastern countries. The various causes can be the ground but religion is included as one reason behind this policy. The technology is a useful means in this globalization era, which helping the spread of LGBT thought faster than ever. At same day as many countries start recognizing the existence of LGBT people and right by legalizing same marriage or allowing adoption for same-sex couple, the other people in another countries who also support this movement are able to celebrate this victory instantly. Therefore, the same time as fast as the spreading news, the thought that LGBT as a part of human right which should to be recognized and protected by the state become wider and more powerful. However, it is always being forgotten that the idea that LGBT is a part of human right sparked around western culture countries cannot always be accepted easily in the countries which its culture and values contrast with the western countries. Since local cultures and values, histories, people, beliefs, and customs are sociology factors impacting the thought of the rejection or acceptance of any ideas in one particular area, the concept of LGBT as a part of the human right is not only uncommon but also different with their thought. Therefore, whilst some people agree with this idea, some groups of people take the initiative to prevent the influx of LGBT. The case of judicial review for Indonesia Penal Code to Constitutional Court can be an example of how some people disagree on the idea of LGBT. Briefly, the applicants submit that as the government of Republic Indonesia is not categorized as secularism country, then the state should protect its people from the danger of the LGBT influx. The applicants also use the family endurance and religious value protection as the ground of the submission. All of them agree that the potential threat caused by LGBT influence is able to be a threat for their family endurance. Although the Court rejected the application, the Court in its verdict mentioning that the Court agrees on the idea of renewal which submitted by the

[1] Maria Farida Indrati, Ilmu Perundang-undangan, Kanisius 2007, page 59
[2] Paragraph [3.34.5] the constitutional court verdict number 140/PUU-VII/2009, page 273-274
[3] Dissenting Opinion of four judges for the case number 46/PUU-XIV/2016, page 456
[4] Paragraph [3.34.10] constitutional verdict number 140/PUU-VII/2009, page 275
[5] http://ilga.org/downloads/2017/ILGA_WorldMap_ENGLISH_Recognition_2017.pdf access 19/3/2018 at 4.21 pm

applicants. In other words, the Court agree that the importance of expanding the meaning of the article is necessary needed but those authority does not on the Court's hand[6].

Four out of five judges submit their dissenting opinion which pointedly stating that:[7]

1. Under article 28J (2) 1945 Constitution, it affirms that 1945 Constitution is Godly Constitution. Therefore, the religious value and public order serve as the standard to be fulfilled in term of establishing the law. It means that the 1945 Constitution cannot permit the implementation of absolute freedom to everyone, especially to the actions which clearly against the religious value;
2. The paradigm and philosophy in those articles do not provide a place for religious values and living laws of society which being fully considered by the society. Furthermore, the ignominious nature which causes negative impact is not only considered as an individual issue but also as the communal problem due to the nature of human who is counted as a part of a group people;
3. Vigilante actions to perpetrators of sexual intercourse are occurred due to the disproportionate placing of religious values and living laws in the criminal law system in Indonesia.

Hence, based on those dissenting opinions it can be concluded that religious values and living laws have essential function and become guideline of living for Indonesians. It also can be highlighted that due to the individualism matter is not capable to apply in this system of society, then any kind of the ignominious nature which having a negative impact for the society automatically become communal matters. The framework of human right is not the same concept as the western countries, which does not connect between individualism matters and communal matters. Accordingly, the choice of life which risk the safety of religious values and living law will not affect the surroundings. This different concept in some particular occasion forgotten easily by the human rights activists who demand the right equality for LGBT people, especially to those who do not exactly understand the system of living in the eastern countries, such as Indonesia, because the different does not always have the same color.

LGBT is uncommon things to accept for most people in Indonesia. They consider LGBT is not as a part of the right, which guaranteed under 1945 Constitution, but more see it as ignominious nature, an act which against the God's will. The concept of man must marry the opposite sex and couple only be referred to marriage people grows stronger in the mindset of society instead of accepting the idea that everyone has same right to be with anyone – does not matter the gender. The LGBT action is more seen as inappropriate behavior which clearly against the religious values and leads to a commit to sin action. It is essential to remember that in Indonesia, there is only six religion and a community of ancestral believe admitted by the government. The state's rejection to accept LGBT to live together with society does not come in one side but this decision taken after having a discussion with all the religious leaders. In this stage, all of the religious leaders agree that LGBT actions are against their respectively religious values and more consider LGBT actions as a sin instead of a right. Adultery case for Indonesians is a taboo thing and considered as an inappropriate behavior. The term adultery refers to the unmarriage – man and woman – couple. Recently, the term adultery is also referred to the same-sex couple. An act can be considered as a good behavior as long it does not against the God's values, rules, and laws.[8] In this context, it is essential to understand that there is a strong connection between the society and the influx of religion values for defining the good and bad thing. For Indonesians, religion values contain many aspects, such as sociology, cultural, historical, and identity that is being a community belief. Religion values never being an individual experience but more being a social value and communal thing.[9] Therefore, it is safe to submit that in Indonesia, LGBT actions are not a part of the right and not suitable to apply due to the religious values and living laws upholding the society. In addition, this becomes a national submission for not accepting LGBT actions to ensure the fairness justice.

Restriction and Right to the freedom of expression

Under article 28E point (2) 1945 Constitution, the state protects the right to the freedom to believe people's respectively faith and express their views and thoughts, in accordance with their conscience. Through this article, the state respect, recognize and protect the right to the freedom of its people to express their views and thoughts so that people in Indonesia have open access to speak for their thought/views. However, this article cannot be a guideline to speak in public for asking people to join to the community which it's standing against the government and potentially spark the unrest.

Also, attempting to use this article to interpret as a way or permission for expressing their thought in public freely without considering other people's right, living laws, and other social norms. The freedom is limited to some boundaries, such as other people right's, religious values, living laws, security, public order, or any kind of actions which containing reduction the values that the society believes. More concretely, the views which spread full of violence

[6] Point 7, page 452, Constitutional Court Verdict for case number 46/PUU-XIV/2016
[7] Page 457-467 Constitutional Court Verdict for case number 46/PUU-XIV/2016
[8] Page 454, Dissenting Opinion four judges in the case number 46/PUU-XIV/2016.
[9] Paragraph [3.34.22] the Constitutional Court Verdict for the case number 140/PUU-VII/2009, page 278

content and against the religious values and living laws are not allowed. The Penal code is a law product which regulates the penalty. Moreover, the Constitutional Court also agree that preventive aspect is always a priority consideration in a heterogenous society[10].

Seeing from international society, this policy might be seen as a violation of the right of the freedom of expression. The limitation of express the idea or the views of themselves, the interference of government to define their identity, and the involvement society in private life matter are likely some factors to measure the standard of violence to the right of freedom to expression. However, it is safe to assume that the standard to define there is any violence caused in this case is that totally different. Human right in the western countries cannot be compared to human right in eastern countries, particularly in a country which believing in God and consider religion as a society value such as Indonesia. In addition, the term protecting the nation that written under the preamble of the 1945 Constitution which implicitly states that the general goals of society or general acceptance of the same philosophy of government shall be meant as providing full protection to cultural identity, ethnic, religion, and the characteristic of Indonesia as an individual and communal[11]. To protect the nation, the government should strive the society stability atmosphere, security, and public order. Those can be achieved by applying some restrictions for any actions which potentially sparks social unrest. In this stage, it also important to bear in mind that the restriction about the implementation of the human right is strictly enforced under law. Through its verdict for the case number 140/PUU-VII/2009, the Constitutional Court affirms that under article 1 point (3) 1945 Constitution, Indonesia declares and defines its form as the rule of law, which means that the determining factors in the implementation of state power are that supremacy of law and not the individual or specific group[12].

Then, the next question followed is that can all of these considerations lead people to the conclusion that the government and the people in Indonesia violence the right for people who support LGBT people? The author submits that the state never ignore the right the LGBT people which protected by the 1945 Constitution. Right to education, to health, to work, and some of the right are allowed to this group of people. However, the state cannot risk its goals for the specific group of people business because the state has the responsibility to protect all nation as referred under the 1945 constitution by upholding the values contained under Pancasila.

3. Conclusion

To sum up there is three points to conclude the writing, namely:

1. The implementation of human right in Indonesia, especially the freedom to expression – LGBT people and its actions – is not permitted due to the characteristic of Indonesia which upholding the religion values and living laws as consequence for placing Pancasila as *grundnorm*. Religion values cannot be seen as an individual experience but more to communal matters and the society, including the government, consider LGBT as a sin instead of a right;
2. Through this paper, the author expects that the international societies, including the LGBT activist, have a chance to see from another side of the coin about the cause of LGBT rejection in Indonesia. Although the spreading of pro LGBT community going wider, imposing another country to also support LGBT shall not to do. It does not mean that by rejecting LGBT actions in Indonesia, the government will not protect the LGBT people's right. The government recognizes its right as citizen and human, but the government strictly does not allow the support of LGBT continually exist in its territory. Another point, the author also expects that the international society, including the activist of LGBT, appreciate the local values that uphold by Indonesians. Through its values -- religious values and living laws – Indonesia becomes a solid country and respect its diversity thought as well as Malaysia, Brunei Darussalam, and Philipines;
3. It is safe to assume that this writing needs more constructive suggestion. Therefore, the author welcomes any constructive suggestions. This paper serves itself as a complimentary literature which concerned on LGBT in Indonesia. LGBT and Indonesia is an interesting topic to be concerned on because there are many aspects involved in this issue. Thus, the author suggests to the researcher to make research about this issue more comprehensive.

References

- 1945 Constitution of Republic of Indonesia
- International Covenant on Civil and Political Rights
- Universal Declaration of Human Rights
- Indrati, Maria Farida. *Ilmu Perundang-undangan.* Kanisius, 2007

[10] Paragraph [3.34.6] the Constitution Court verdict for the case number 140/PUU-VII/2009, page 274
[11] Paragraph [3.34.23] the Constitution Court verdict for the case number 140/PUU-VII/2009, page 278
[12] Paragraph [3.34.20] the Constitution Court verdict for the case number 140/PUU-VII/2009, page 278

- Cviklova, Lucie. “Advacement of human rights standards for LGBT people through the perspective of international human right law”. *Journal of Comparative Research in Antrhropology and Sociology*, volume 3, number 2 (winter 2012). http://compaso.eu
- Shannahan, Dervla Sara. “Sexual ethics, marriage, and sexual autonomy: the landscapes for Muslimat and lesbian, gay, bisexual, and transgendered Muslims”. DOI 10.1007/s11562-008-0077-4
- Constitutional Court of the Republic of Indonesia, case number 140/PUU-VII/2009
- Constitutional Court of the Republic of Indonesia, case number 46/PUU-XIV/2016
- “Map of LGBT recognition”, accessed March,19th 2018, http://ilga.org/downloads/2017/ILGA_WorldMap_ENGLISH_Recognition_2017.pdf

MOTIVATION OF ADMINISTRATIVE ACTS – GUARANTEE OF GOOD ADMINISTRATION

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Abstract

The present article deals with the aspects of motivating administrative acts, both doctrinaire and practical, of jurisprudence. The duty of the administration to motivate its decisions is submitted in the Charter of Fundamental Rights of the European Union, art. 41. In the current European legal order, the rationale for administrative acts is considered and refers to one of the most important conditions of validity of the administrative act. The Romanian Constitution ensures and emphasizes the motivation, as it is imposed by the Charter. The realization of this fundamental right to motivate administrative acts is possible by calling upon a set of values from the administration, such as transparency, professionalism and the imposition of high quality standards. Motivation is achieved where we have a good administration, and whether citizens are, among other things, respected fundamental rights and freedoms, access to information is guaranteed and motivated their decisions. Although administrative normative acts are motivated by the administration, examples that show that individual ones are unmotivated or incompletely motivated are enough, which made the various employers legally answer for the non-motivation of their decisions to terminate work relationships with several of the employees. The motivation of administrative acts is necessary, mandatory and must be done with rigor. It is highlighted that inadequate, incomplete or vicious reasoning may result in suspension or even annulment of the administrative act by the court.

Keywords: *motivation, administrative acts, essential rights, decision-making, administrative culture.*

1. Introduction. Motivating administrative acts in the context of the operationalization of the concept of the right to good administration.

A first document to which reference can be made in analyzing the concept of good administration is the **Strengthening public administration strategy 2014-2020** and the ambitious objectives contained therein. It is envisaged in a metaphorical expression that *Romania will go through a spiral of confidence* and that it wants to increase the citizen's trust as a beneficiary, in the services provided by the public administration.

It is envisaged in this strategy that the fulfillment of the objectives is done by calling and joining a set of values including transparency and professionalism, both for the civil servants and the contractual staff, by pursuing the needs of the citizens, since the ultimate goal of the administration is precisely meeting the needs of our fellow citizens. This can be achieved by imposing high quality standards.

By the right to good administration, we understand the right of every person, systemically integrated, to see their issues impartially and fairly treated, within a reasonable time, by public authorities and institutions.

In practical terms, we understand through good administration how the institutions work and this is done if citizens have access to information, if their fundamental rights and freedoms are respected and protected, if the administrative acts, their publication and the decisional transparency are ensured, all these concepts forming part of the right to good administration.

At European Union level, the concept of good administration is generally considered to protect citizens' rights against the abuses of the institutions, and in particular a form of procedural protection against such abuses.

The right to good administration can be achieved through 2 very important documents for European citizens and the institutions of the Union, which are part of its legal order:

1. The Charter of Fundamental Rights of the European Union;
2. The European Code of Good Administrative Behaviour.

The right to good administration is also a European law principle of the European law, binding on Member States, and refers to how public administration acts to achieve general interests.

The concepts included in the right to good administration are the performance and the report of the administration with those administered. Performance is characterized by the principles of decision-making efficiency and transparency. The report of the administration with the administered ones is a fundamental right of natural or legal persons, provided by art. 41 of the Charter of Fundamental Rights of the European Union.

The Charter is the document governing all political, social, economic and citizen rights, and according to art. 41, the person is entitled to impartial treatment by public authorities and institutions. This right may be interpreted as the right of any person to be heard before a decision affecting his/her individual

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rights and interests, the right of any person to his/her own file, with respect for the confidentiality of professional, commercial or other data. The last element of content of the right to good administration, with the same importance of the other, is the obligation of the public administration to motivate its decisions in the exercise of its obligations.

The last paragraph of art. 41 is the one referring to the right of any citizen to refer the European Ombudsman in the situation when he/she considers that the Romanian administration does not respect this principle of the right to good administration. The referral is done in accordance with the principle of subsidiarity, which involves solving the problems of those who are aware of the authorities/institutions closest to the citizen: the lawyer of the people or even the institutions of the public authorities under the law of administrative contentious, if it is considered to have been violated a legitimate right or interest.

Regarding the evolution of the right to good administration (efficiency, transparency, motivation), in 2000 the adoption of the Charter of Fundamental Rights of the European Union introduced the right to good administration and the right to refer the European Ombudsman to attack the decisions of a public institution.

Following the adoption of the Charter and the inclusion of the fundamental right to good administration in a European Parliament resolution, the European Code of Good Administrative Behavior, revised in 2013, was adopted in order to explain in detail the content of the right to good administration, setting multiple obligations for those working in the public administration sector. Also, the content of the code explains the attitude it has to adopt in relation to the citizens, the employees of the institutions.

The code contains several principles and rules of effectiveness that need to be respected, and in the introductory part there is a call for an administrative culture of work.

The preamble to the TFEU refers to the Charter of Fundamental Rights of the European Union and the values it has introduced.

We also have the Universal Declaration of Human Rights and the Constitution of Romania that appeal to the right to good administration. This right is fundamental because the document that enshrines it belongs to the category of documents with the same legal force as the treaties.

If we are in the presence of a fundamental right, we must also benefit from guarantees of achievement that will lead and pursue its realization.

In Romania, we have normative acts regulating decision-making transparency, and although administrative acts of an individual and judicial nature are motivated, we find many situations in which the employees have gained a case in law on the ground that the employer has failed to mention which were the reasons behind the termination of the employment contract or the decision to dismiss.

Good administration includes, based on art. 41 of the Charter of Fundamental Rights of the European Union, the following rights:

- the right of any person to be heard before taking any individual measure that could prejudice him in the field of legitimate rights and interests;
- the right of any person to have access to his/her own file, with due regard for the legitimate interests of the administration relating to confidentiality and professional or commercial secrecy;
- the obligation imposed on the administration to motivate its decisions.

Everyone shall be entitled to compensation by the Union for damage caused by its institutions or agencies in the performance of their duties in accordance with the general principles common to the laws of the member states.

Decisional transparency is closely related to the right to good administration, referred to in art. 298 TFEU and art. 42 of the Charter.

2. Content. The administrative act. Characteristics.

The administrative act is the "*main legal form of the activity of public administration bodies, which consists in a unilateral and express manifestation of the will to generate, modify or extinguish rights and obligations, in the realization of the public power, under the main control of the legality of the judiciary courts*"[1].

The constant defining elements of the administrative act and the definition of the concept refer to "*the main legal form of activity of the public administration, which consists in a manifestation of express, unilateral will and subjected to a regime of public power, as well as the control of the lawfulness of the courts, which emanates from administrative authorities or from private persons authorized by them, through which are born, altered or extinguished correlative rights and obligations*."[2]

According to the criterion of the extent of the effects of the administrative act, we have two major categories of administrative acts:

1. Administrative normative acts, which are those acts which contain rules of principle applicable to an indeterminate number of people and which produce *ergaomnes* legal effects. Ex: ministerial orders, instructions issued by the authorities of the specialized public administration, etc.
2. Individual administrative acts – representing the category of acts that produces legal effects with respect to a precisely determined subject of law. Ex: appointment/dismissal decisions.

[1] Antonie Iorgovan, Tratat de drept administrativ, Volume II, Ed. 4, Ed. All Beck, București, 2005, p 25.
[2] Verginia Verdinaș, Drept administrativ, Edition X, revised and updated, Ed. Universul Juridic, București, 2017.

One of the distinctions between the two categories is that the individual administrative acts can never violate the provisions of the normative administrative acts.

The individual administrative acts are also classified as:

- Acts establishing defined rights and obligations for the subjects to which they are addressed, named generic authorizations;
- Acts conferring a personal status, namely rights and obligations for a determined right subject: diplomas, certificates, permits;
- Acts that apply different forms of administrative constraint: contravention minutes, sanctioning decisions;
- Administrative acts of a judicial nature.

1. Acts of an internal character, which are customary to apply within a public authority or institution and produce effects on the staff of that institution. They are also opposed to other subjects of law such as citizens, natural or legal persons who request the services of an authority or institution, when they fall under the provisions of its internal rules. In turn, these administrative acts can be: normative (internal organization and functioning regulation) or individual (appointment decisions).

The legality of administrative acts is analyzed according to certain general conditions:

a) Respecting the supremacy of the Constitution;
b) Respecting the principle of legality in the adoption of the administrative act;
c) The administrative act is issued or adopted by the competent body within the limits of its competence;
d) The form of the administrative act and the issuing procedure shall be those provided by the law.

The form of the administrative act usually includes the written form, except for the warning that can also be expressed orally. This is the case with individual administrative acts.

Regulatory administrative acts always take the written form. Writing language, according to art. 13 of the Constitution, is Romanian. Another external condition related to the form of the act is motivation.

Normative acts, subject to the rule of advertising, are motivated by a substantiation note, a statement of reasons, a report, placed in the form of a preamble before the actual act. The role of this preamble is to focus on the legal and factual elements that legitimize the intervention of the respective legal act.

A particular situation appears at the administrative-judicial acts, which are always motivated.

The authorities resort to the motivation of the administrative acts, as this justifies the reasons for the legality of an administrative act, which is particularly relevant in challenging the legality of an act, and is presented as a guarantee of respect for the law and protection of citizens rights.

The realization of the motivation of all administrative acts has as consequence the reconciliation of administrative practice in Romania with the existence in other states. Prestigious French authors support the thesis that "*all administrative acts must be motivated, that is to say, the reasons of fact and law underlying their issue/adoption must be justified. The motivation of administrative acts refers to the existence of an obligation for the administration to make these reasons known in the decision*"[3].

Complying with the mandatory nature of motivating administrative acts diminishes the risk that the administration will make arbitrary, abusive, and certainly decisions by reference to the beneficiaries' legitimate interests and rights, it will improve the work of the administration.

In this respect, we have in support of the statements *Law 24/2000 regarding the legal technical norms for elaborating normative acts*, including texts regarding motivation of projects of this category of acts (including the administrative ones), in the provisions of art. 30-34.

Over time, it has been considered that the authorities are not obliged to motivate their administrative act unless the law expressly compels them, but the need to act on the grounds is recognized more and more as a guarantee of the legality of the administrative acts.

A reasoned decision sets out the reasons of fact and law for which its authority considered it to be justified, as a condition of the external legality of the act which is the subject of an appreciation in concreto, by its nature and the context of its adoption.

In the case of the administrative normative acts, according to the provisions of art. 31 of Law 24/2000, the motivation must refer to the requirements that justify the adoption of the act, the basic applicable principles and the purpose of the proposed regulation, the social, economic, political, cultural effects, the implications for the regulation in force, as well as the phases in the issuance or adoption of that act.

In the case of individual acts, the reasoning refers mainly to the factual and legal causes which required the adoption of the act in question. The motivation thus arises as a consequence of the exigency that every administrative act, whether normative or individual, has a cause, a reason that can be in fact or rightful. The factual fact consists in the necessary conditions for the public authority to issue the act, and the legal grounds are the legal norms on which the authority is based in the issuing of the administrative act.

From this point of view, the use of the motivation of the administrative act is revealed in several aspects:

- by motivation there is an explanation of the act and thus the conflicts between the administration and the beneficiaries of the services they provide;

[3] Verginia Verdinaș, Drept administrativ, Edition X, revised and updated, Ed. Universul Juridic, București, 2017, p. 341.

- obliges the administration to act in its actions according to the legal norms;
- allows for more rigorous control by all right holders to exercise control, whether by hierarchically superior control, by the court, public opinion or other holder.

A weak practice that draws attention is that, in motivating the issuance of administrative acts, an act in its entirety is invoked and not the provisions of the normative act that are applicable in the issuance or adoption of an administrative act.

The principle of the motivation of administrative acts in European administrative law.

The principle of motivating administrative acts also includes motivating those implementing the "basic acts of the European Union". In accordance with art. 296 TFEU legal acts shall state the reasons on which they are based and shall refer to the proposals, initiatives, recommendations, requests or opinions provided for in the treaties.

The obligation to motivate the EU acts is to indicate clearly and unequivocally the reasoning of the EU authority as the author of the contested act in such a way as to enable the parties concerned to know the justification of the measure adopted in order to defend their rights, and the EU court to exercise its review of legality.

The motivation must be adapted to the nature of the act in question and is appreciated by the circumstances of the case in the content of the act, the nature of the grounds relied on and the interest of the addressees or other persons directly and individually concerned by that act, to be given explanations. It is obligatory for the motivation to specify all the relevant factual and legal elements. To the extent that the issue of the statement of reasons for an act complies with the conditions imposed by Article 296, not only the wording, but also its context, and all the legal rules governing that matter, are appraised.

The obligation on the administration to motivate its decisions derives from the Charter of Fundamental Rights of the European Union, Article 41. This obligation is provided for in the Treaty of Rome[4] by art. 190. The provision was developed by the European Code of Good Administrative Behaviour, art. 18, which states that all decisions of the European institutions which may prejudice rights or private interests must indicate the reasons on which they are based, specifying the relevant facts and the legal basis for the decision.

In this way, officials are urged to avoid making decisions that are based on short or imprecise legal considerations and do not contain individual observations.

If, due to the large number of people on similar decisions, it is impossible to carry out the communication in detail on the grounds of the decision or when the answers are given as standard, the official is obliged to ensure an individual answer to each request.

Motivation is of particular importance in cases where an interested party's request is rejected. In this situation, the motivation must clearly indicate why the arguments submitted by the requested party could not be accepted.

Where there is insufficient reasoning for a regulation, we are in a situation where there is a deficiency in the annulment of the act in question, in breach of an important procedural requirement which may be invoked by way of review of the lawfulness of that regulation before the Court of Justice. The Court will object, on its own initiative, to any lack of motivation.

By sufficient justification of the act issued by an EU institution, the parties are allowed to defend their rights, the European Court of Justice to exercise its control function and the member states and interested citizens to know the conditions under which the institution has applied the Treaty.

In the Romanian legal landscape, there are numerous references to the motivation of decisions and administrative acts through:

- The public procurement law, regarding the reasons for the decisions in the tender selection procedures, the reasons for designating the winner, the reasons for which the contracting authority decided to cancel the award procedure, the reasons for the rejection, etc.
- The tax procedure code of 20 July 2015, complies with the Law no. 207 of 20 July 2015, makes numerous references to the motivation of the authorities' decisions in the reception of administrative acts: extension of the deadlines based on motivated grounds, reasoned deferment of the exercise of certain attributions, motivation of the decisions to engage the liability, motivation of the fiscal administrative act and inclusion in its content of the elements stipulated in the Fiscal Procedure Code, the factual and legal reasons for the results of the tax audit, the motivation of the decision to adopt/remove the precautionary measures, etc.
- The expropriation law no. 33/1994. Motivating the decision of the commission to analyze the complaints that were formulated regarding the expropriation proposal, this being a *sine qua no*n condition of the legality guaranteeing both the transparency of the decisional act and the possibility of its censorship by the court, based on art. 20 of Law 33/1994. In this way, the obligation to state reasons can no longer be regarded merely as a formal condition and must be regarded as a condition of legality which concerns the substance of the administrative act, the

[4] The Treaty of Rome refers to the Treaty establishing the European Economic Community (EEC) and was signed by France, West Germany, the Netherlands, Italy, Belgium and Luxembourg on 25 March 1957.

fulfillment of which depends on the very validity of that act.

Motivation for the administrative act

The Romanian doctrine of administrative law enshrines and supports, by a majority, the recognition of the principle of the motivation of administrative acts as a principle of administrative law, as well as its recognition by jurisprudential law[5].

States with a democratic tradition, such as France, have enshrined this principle of administrative law in the legislative branch, with the 1979 legislation requiring the motivation of all decisions unfavorable to the addressee as a general rule for: building permits, sanctions, decay, prescriptions, etc.[6].

Additionally, it is necessary to motivate the decisions which introduce derogations from the rules established by laws and higher normative acts. Exceptions to the motivation may intervene in the case of decisions that might disclose statutory administrative secrets, medical secrets, decisions taken in extreme or urgent situations, and in the case of implicit refusal by the authorities, but in this case, at the request of the person concerned, the administration is required to motivate its decision within one month.

In the German law, the rationale for the obligation to enforce administrative acts is imposed by a provision of a general nature in the *Code of administrative procedure*.[7] If the contested act is fully reasoned or concerns all matters of fact, the period for bringing an action for annulment is one month after notification of the contested act or from the reply to the administrative appeal, and if the contested act or the reply to the administrative appeal fails contains the required entries, the term is 1 year. Thus, for the incomplete motivation of estimates, the administration is sanctioned by dilating the terms of appeal.

Motivation of individual administrative acts issued on request

In the case of administrative acts issued on request, based on the resolution of a petition, based on some provisions of the Government Ordinance no. 27/2002, the following clarifications are required:

- the motivation established by art. 13 concerns only the legal grounds, which allow the verification of the legality of the issued administrative act;
- the full motivation of the administrative act requires the submission of the factual reasons (in particular in the exercise of the discretionary power), the legal remedies available and the indication of the competent court, the deadline for introducing the finding;

Numerous Romanian authors have supported and supported the need, through de lege ferenda proposals, to regulate the mandatory motivation of administrative acts, in particular through an administrative code, in the following respects: legal grounds, factual reasons, indication of available means of action, the competent court, the deadline for contestation.

The motivation for the refusal to communicate information of public interest to the petitioner is provided by Law no. 544/2001 by art. 22 and circumscribed in Government Ordinance no. 27/2002, being obligatory to include all the elements of the existence of full motivation.

The obligation to state reasons is also found in the case of *judicial administrative acts*, examples of which are: the decisions of the State Office for Inventions and Trademarks, the decisions of the Commission for resolving the expropriations (*Law 33/1994 on expropriation for public utility reasons*).

Motivation of normative administrative acts

The obligation to motivate the regulatory administrative acts is imposed by Law no. 24/2000 regarding the normative technical norms for the elaboration of normative acts

The law stipulates the obligation to draw up *a substantiation note* for the ordinances and government ordinances, which will accompany the normative act in the process of its adoption, after which it will be published with it in the Official Journal of Romania and published on the website of the issuing institution .

In the case of the other administrative acts issued by the central authorities, the draft normative act shall be accompanied by an *approval report*, without any provision regarding the publication of the latter with the normative act.

In accordance with Section 4 of Law 24/2000, the motivation will refer to the following aspects:

- the requirements that suppose regulatory intervention with particular reference to the shortcomings of the regulation in force;
- the existence of legislative inconsistencies or lack of regulation;
- the purpose of the legislative proposal, the basic principles with highlighting the novelties;
- what are the effects, studies, research, evaluations, etc.
- The draft normative acts will, in their motivation, have expressly mentioned in terms of compatibility with European Union law and possible future measures or circumstances regarding the necessary harmonization.

The acts adopted by the local public administration authorities in the preamble must contain a *motivation in law*, in other words, the legal norm of the local public administration Law 215/2001, which is the basis in whose power it was adopted.

Lack of motivation and legal sanction of lack of motivation for the legal act.

[5] Mircea Anghene, , Motivation of administrative acts - a factor for the strengthening of legality and the approach of citizens administration, in "Studies and legal research", no. 3/1972, pag. 504

[6] Jean Rivero, Jean Waline,Droit administratif, 18th edition, Dalloz, Paris, 2000, pag. 106

[7] Hartmut Maurer, Droit administratif allemand, traduit par M.Fromont, Librairie générale de droit et de jurisprudence, Paris, 1994, pag. 246.

In law no. 24/2000 on the normative technical norms for the drafting of normative acts does not provide legal sanctions for the situation in which the motivation is not published simultaneously with the normative act.

The constant Romanian doctrinal solution, applicable to the situation of lack of motivation, lies in considering the act as null in terms of content, if the reasons are illegal interfering absolute nullity, and if motivation is missing, the relative nullity occurs.

The legality control exercised by the administrative litigation court extends to the pleas in law and, if the reasons are required by law, these are legality issues.

The reasons invoked, when the law does not require the reasoning of the respective administrative act, represent elements of appreciation of the opportunity of the administrative decision which are not subject to the control of the administrative court.

Examples from the European Jurisprudence.

1. In **Ireland and Others v./Commission**, the annulled the Commission's decision to exempt the excise duty on mineral oils used as fuel for the production of alumina in certain regions of Ireland, France and Italy, invoking of its own motion a failure to state reasons the reference to the non-classification of this measure in the "existing aid" established by Regulation 658/1999. According to this regulation, art. 1 letter (b) point (V) is deemed to be the aid for which it can be demonstrated that at the time of implementation it was not an aid and that it subsequently became aid due to the evolution of the common market without having been modified by the member state. The Court finds that, in accordance with the community provisions governing the right to excise duty, the exemptions at issue had been authorized and prolonged by several Council decisions adopted on a proposal from the Commission. In those circumstances, the Court considers that, when the Commission excluded the assessment of the aid at issue as existing under the provisions of the Regulation, it wrongly merely stated that that provision was not applicable in the present case[8].
2. In another case, the **Salvat pere et fils and Others v./Commission** clarified the case-law of the Court on the requirement to state reasons for the Commission's decisions on the measures considered by the Commission to be State aid under Art. 87 CE (current 107TFUE). In that judgment, the Court stated that an examination of the conditions for the application of Article 87 CE cannot be regarded as contrary to the obligation to state reasons as long as the measures in question were part of the same action plan[9].
3. On another occasion, in the judgment of the **Department du Loiret v./Commission**, the Court found an insufficient statement of reasons for a Commission decision declaring state aid incompatible with the common market to be unlawfully paid to an undertaking in the form of a transfer to a preferential price of a landscaped plot. The Court stated that that decision did not contain the necessary information on the method of calculating the amount of aid to be recovered, in particular with regard to compound interest, in order to update the initial amount of the subsidy.[10]

National jurisprudence.

Decision no. 2973 dated 10 September 2012, passed on appeal by the Bucharest Court of Appeal - Section VIII Administrative and fiscal litigation having as object the annulment of the decision to dismiss from the public office).

"The Bucharest Court of Appeal ruled that the reasons for an administrative decision cannot be limited to considerations relating to the competence of the issuer or its legal basis, but must also contain factual elements enabling the addressees to know, on the one hand, and to assess the grounds for the decision and, on the other hand, to make possible the exercise of legality control. In this sense, the failure to motivate the decision to release from public office is a cause of its nullity, since the obligation to state the reasons for the administrative act is a requirement of legality, accepted both internally and at community level, as a guarantee against arbitrariness."[11]

Conclusions

Analyzing what has been said shows that the motivation of administrative acts is necessary, mandatory, and must be rigorously carried out. In order to be aware of the importance of the motivation operation for its beneficiaries, we have provided examples of European and national jurisprudence. It is highlighted that inadequate, incomplete or vicious reasoning may result in suspension or even annulment of the administrative act by the court. Civil servants are urged by the legal rules in force to avoid making decisions based on legal or imprecise motives and not containing individual observations.

References

- Adrian M. Truichici, Luiza Neagu, Jurisprudență, Anularea actului administrativ - practică judiciară, Ed. Hamangiu, 2016

[8] http://curia.europa.eu/juris/liste.jsf?num=C-272/12&language=RO
[9] http://eur-lex.europa.eu/legal-content/RO/ALL/?uri=CELEX:62005TJ0136
[10] http://eur-lex.europa.eu/legal-content/RO/ALL/?uri=CELEX:62000TJ0369(01)
[11] http://portal.just.ro/2/Lists/Jurisprudenta/DispForm.aspx?ID=1565

- Antonie Iorgovan, Tratat de drept administrativ, Volumul II, Ed. 4, Ed. All Beck, Bucharest, 2005
- Apostol Tofan, Dana, Instituții administrative europene, Ed. C.H. Beck, Bucharest, 2006
- Lazăr Teofil, Drept administrativ european, Ed. Pro Universitaria, Bucharest, 2013
- Negruț, Vasilica Drept administrativ. Partea generală. Bucharest: Ed. Didactică şi Pedagogică, 2015
- Ovidiu Podaru, Actul administrativ, vol. I, Repere pentru o teorie altfel, Editura Hamangiu, București, 2010
- Săraru, Cătălin-Silviu, Legea contenciosului administrativ nr. 554/2004, Examen critic al Deciziilor Curţii Constituţionale, 2004-2014, Editura C.H. Beck, Bucharest, 2015
- Trăilescu, Anton, Alin Trăilescu, Legea contenciosului administrativ, ed. 3, Ed. .H.Beck, 2017
- VerginiaVerdinaș, Drept administrativ, Ediția a X-a, revised and updated, Ed. Universul Juridic, Bucharesti, 2017
- CHARTER of 12 December 2007 on the fundamental rights of the European Union available through unrestricted access to the web page: http://legislatie.just.ro/Public/DetaliiDocument/111500
- Code of good administrative behavior, available through unrestricted access to the web page: https://www.ombudsman.europa.eu/ro/resources/code.faces#/page/1
- Tax procedure code, respectively Law no. 207 of 20 July 2015, available through unrestricted access to the web page: http://legislatie.just.ro/Public/DetaliiDocument/172697
- LAW no. 24 of 27 March 2000 on normative technical standards for the drafting of normative acts, available through unrestricted access to http://legislatie.just.ro/Public/DetaliiDocument/21698?isFormaDe Baza=True&rep=True.
- The Strategy for strengthening public administration, approved by G.D. 904/2004 and published in O.J., available through unrestricted access to the web page
- http://www.mdrap.ro/userfiles/strategie_adm_publica.pdf

THE SOCIAL-POLITICAL CONTEXT OF THE UNION OF BUKOVINA WITH THE KINGDOM OF ROMANIA

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Abstract

Bukovina was the second province which made the union with its motherland, after Bessarabia. 100 years ago, on November 28th, 1918, the proclamation of the union of Bukovina with Romania occurred, an important historic moment in the building of the Romanian unitary national state, together with the previous union of Bessarabia – March 27th, - and previous union of Transylvania, on December 1st, 1918. On the same date, November 28th, 1918, the General Congress of Bukovina announced the powers of the Entente that the inhabitants of this territory decided to return to old borders, respectively to the Kingdom of Romania, "in virtue of the rights of the people to decide their own fate".

Keywords: *Union, Bukovina, General Congress of Bukovina, National Council, Romanian soldiers, 100 years*.

1. Bukovina in the 18th century

The 18th century represented for the Romanian Principalities a period in which they came to play an increasingly important role in Europe's politics and diplomacy, thus becoming the subject of military disputes between Austria, Russia and the Ottoman Empire. In the beginning of the century, the Porte imposed in the Principalities the Phanariot regime, which emerged as a necessity in front of the danger posed by Christian powers. During the Phanariot area, series of wars took place between these three powers, most of the times waged on the territory of the Principalities, "by bringing their convoy of misery every time, not to mention Turkish requisitions."[1]

Following the armed conflict between Russia and Ottoman Empire, carried out between 1768-1774, the Treaty of Peace of Kuciuk-Kainardji was concluded, following which the old provisions guaranteeing the autonomy of the Principalities, in other words the return to old habits of the country were reconfirmed. However, after the peace concluded between Russians and the Ottomans, as a result of its diplomatic intervention, Austria obtained from the Porte, on May 3rd, 1775, by means of the Convention of Constantinopole, the assignment of a part of northern Moldavia, on the pretext of facilitating its passage to southern Poland, that it had acquired after the first disjunction of Poland in 1771, a part that acquired the name of Bukovina ("The Land of the Beeches", in Slave languages). Therefore, by actions of venality, blackmail and military pressures materialized in the concentration of troops of Belgrade area, almost 50,000 Romanians passed under Habsburg rule. The protests of the ruler of Moldavia at that time - Grigore the 3rd Ghica – against this decision of separating his country were useless, and, moreover, the ruler was killed two years later. In the Habsburgs view, Grigore Ghica considered himself an independent sovereign.

After Bukovina passed under the administration of Galicia, Austria pursued two objectives: to turn the province into a Slave province and the conversion of Slave population to the Greek-Catholic confession. The reasons of turning the province into a Slave one were represented by the prevention of a potential Moldavian attempt to recover this territory, while the Austrians supported the Ukrainians with their national aspirations[2]. This period is considered by the Romanian historiography as the worst in the history of Bukovina, an opinion shared by several prestigious Austrian Historians, as well as by some contemporary Ukrainian historians.

Under the Metternich regime, Bukovina evolved under the influence of Austria, but continued to be closely linked to Moldavia, the body from which it had been amputated. There have been a series of reforms in education, Church and in respect of the development of the agriculture, industry, crafts and trade.

A major problem was represented the leaving of the Church under the authority of the Metropolitan Church of Iaşi and the entry under Serb jurisdiction, which has generated many protests. This favored the creation of a so-called Ukrainian origin of the old scribes of Bukovina. In 1786 the military administration is also abolished, the attributions being transferred to the Bohemian-Austrian united chancellery of Vienna. Furthermore, the Romanian nobility failed to gain recognition of its feudal rights and the right to have a diet, which led to the withdrawal of some boyar families in Iasi. Spiritual life was making progress despite the Germanization of the Catholic Church: the traditions were preserved, transmitted and perpetuated, and the language of writing the church books remained Romanian.

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[1] Neagu Djuvara, O scurtă istorie a românilor povestită celor tineri, Bucharest, 2002, p. 147.

[2] Nicolae Ciachir, *Din istoria Bucovinei: 1775-1944*, Bucharest, 1999.

2. The main political events in Bukovina in the 19th century

As such, until 1848, Bukovina faced a more prominent Slave phenomenon, as can be seen in the census the figures of which are as follows: 209293 Romanians and 108907 Ruthenians[3].

The revolution of 1848 had consequences in what concerns the national struggle of Bukovinians. The political program of the Revolution in Bukovina included, among the 12 points, the following:

- the separation of Bukovina from Galicia and the fact that it became the "Crown Country", autonomous;
- the preservation of Romanian nationality and the creation of national schools;
- manumission of peasants - by the dissolution of the statute labor and of the teind;
- detachment from the Orthodox Metropolitan Church of Karlovac.

Therefore, these four essential aspects, formulated with tenacity, represented an obvious attempt to stop the removal of Bukovina from the Romanian nature. In their turn, the Ruthenians shared two different positions within the revolution involvement: there was the Pan-Slavism and the national-Ukrainian movement.

Yet, although the revolution was stopped, the House of Habsburg fulfilled the desires of Bukovina, which became a 'country of hereditary crown, thus forming the Duchy of Bukovina. One of the effects of the year of 1848 was the dissolution of serfdom and the apportionment of property of the fugitives, and the Ruthenians benefited the most from the promulgation of the new Constitution, whose intellectual elites propagated the idea that the Ruthenians were in fact the native population and the Romanians would have arrived here later. Although the Habsburg Empire was led by absolutism rules throughout 1849-1860, Bukovin conserved its autonomy, and in 1861 it obtained several rights.

The national struggle of the Romanians from Bukovina was again stimulated by the events of the beginning of 1859, by the union of the two Principalities, as a consequence of which the foundation of the Romanian national state was laid. Furthermore, by the return to Moldavian Principality of the counties of Ismail, Cahul and Bolgrad by the Tsarist Emire, a precedent occurred which favored Bukovina in the attempt to become a part of Moldavia, and implicitly, to return to the body from which it had been amputated. The Romanians from Bukovina studying abroad (especially in Vienna) also transmitted a national revival movement.

On April 5th, 1861, the new Diet of Bukovina met in Cernauti, where the Romanians held the absolute majority until the beginning of the 20th century. Historian Eudoxiu Hurmuzaki played an important role in supporting and defending Romanian interests, being for many years President of the Diet and captain of Bukovina. During this period, the Romanians from Bukovina and not only, will fight to detach from the jurisdiction of Karlovac, in an independent metropolitan.

The effects of the Crimean War and the subsequent events that took place at the European level led to a certain decline of the Habsburg Empire, particularly affected by the defeat before Prussia in 1866, when it ceased to play a central role in continental politics. The national struggle widened within the Empire, so that the Austro-Hungarian dualism was reached, which led to a worsening of the situation of the constituent nationalities of the Empire. Bukovina was not directly affected by this because it was to remain under Austrian rule, but Austro-Hungarian dualism caused the diminishing of its relations with Transylvania and Banat, which were to be subordinated to the Hungarian part of the Empire. The Ruthenian element was favored again in the following period, the Austro-Hungarian Empire wanted to stop the Russian penetration.

By creating the University of Cernăuți in 1875, a powerful German cultural and scientific center, a Habsburg outpost was created in Eastern Europe. A Viennese newspaper, "Neue Freie Presse", made it clear that the purpose of the University of Cernăuţi was to complete the Germanization of Bukovina and to throw civilization rays on Moldavia and Bessarabia[4]. If the Habsburgs had failed to occupy the Principalities by army means, they were attempting by economic and cultural means, thing that represented a positive aspect for the modernization and spiritual emancipation of the Romanians.

Another major event, with great importance and strong influence on the Romanians of Bukovina was represented by the Independence War, where the Bukovinian troops participated as volunteers.

On the domestic political background, the Romanian political parties of Bukovina sought to avoid a collaboration with the Ruthenians, because it was obvious that they were pursuing a policy in favor of their own claiming interests. But the claiming of Bukovina was unsubstantiated for various reasons: from the demographic point of view, the Moldavians represented the majority in this territory, and from the historical point of view the assets of the monasteries represented donation of the Moldavian vaivodes and boyars. Furthermore, after the annexation of Bukovina, the Habsburg Empire has established all laws for the new province to be translated into Romanian.

By the Treaty of Peace of Bucharest (1913), which ended the Second Balkan War, the prestige of Romania increased, representing a new impetus for the Romanians from Bukovina. On this occasion, the political, cultural and scientific contacts between

[3] Ilie Corfus, *Agricultura în Ţările Române (1848-1864)*, Bucharest, 1982, p. 21.
[4] Nicolae Ciachir, *op. cit.*, Bucharest, 1999.

Bukovina and the other Romanian provinces are amplified.

3. Participation in the First World War

Bukovina entered the stage of the Great War two years before Romania, thus becoming theatre of military operations as of August 1914, the territory being located between the two empires at war, the Austro-Hungarian and the Tsarist. In 1915, Entente tries to attract Romania at war, by offering to it the Romanian territories possessed by the Austro-Hungarian Empire, including Bukovina. This obviously benefited Russia which could not afford to lose a territory on which it had a strong influence and which, in its turn exerted a Russian influence on the other Romanian territories, materialized mainly by the activity of the University of Cernăuți. Furthermore, Bukovina represented a "corridor" to the Slavic people in the center of the continent: Czechs, Slovaks, Slovenes and Croats. Therefore, the convention signed on July 17th, 1916 provided the guarantee of the territorial integrity and the reunification of Bukovina, Transylvania and Banat to the Old Kingdom. In other words, Bukovina was recognized by Russia as a part of the Romanian unitary national state[5]. Romania's entry into war on the part of the Entente – and implicitly of Russia – triggered a genuine oppression against the Romanians of Bukovina.

Once with the outbreak of the Bolshevik revolution in Russia and the entry of the United States into war, the situation became even more complicated. The Romanian political and cultural elite stood high in favor of the American intervention. The efforts made by the Romanian diplomacy came to fruition, so that in November 1918, Romania obtained a declaration indicating that the United States approved and guaranteed the national aspirations of our country.

On October 27th, 1918 the Constitutional Assembly is set up, which decided as a main scope the union of Bukovina with the other Romanian territories. On November 11th, the Romanian units were going into Cernăuți, and on November 27th, the building of the University was flying the tricolor. One day later, the General Congress of Bukovina established the political relationship of Bukovina with the Romanian Kingdom. In other words, the Declaration of Union was read.

On September 10th, 1919, the peace with Austria is concluded at Saint-Germain, whereby "Austria recedes in favor of Romania, from all rights and titles on the part of the former Duchy of Bukovina located beyond the borders of Romania, as they will be subsequently set up by the main allied and associated powers."[6]

4. The Treaty of Saint-Germain

The Treaty of Peace of Saint Germain en Laye, known as the Treaty of Saint Germain represented the treaty of peace concluded between the Allies of the First World War and the newly created Republic of Austria. The Treaty was signed on September 10th, 1919 by the representatives of Austria and the representatives of 17 states. The treaty recognized the independence of the Republic of Austria (colloquially called at that time German Austria in order to mark the difference to Austria-Hungary), the dismemberment of the Double Monarchy was recognized de jure, by the constitution of the states of Poland, Czechoslovakia and the Kingdom of the Serbs, Croats and Slovenes, the membership of Bukovina to Romania and South Tyrol to Italy[7].

The Treaty with Austria generated great disputes between the representatives of the great powers and the representatives of smaller countries, set up or reunited, generated mainly by the territorial and ethnic issues on the agenda.

In the plenary session of May 31st, 1919, after the speech of Georges Clemenceau, the Romanian representative was heard. He stressed out that the conclusion of the peace with Austria had left no doubt on the union of Bukovina with Romania; furthermore, he made proposals on the modification of certain articles. In the text of the Treaty of Saint-Germain-en-Laye, Romania only appeared (opinion of I.I.C.Brătianu) in order to make known the conditions which violated its political independence and seriously compromised its economic freedom. He meant that Romania had to sign a "treaty of minorities", and the great powers had the right to check if their rights were met and, furthermore, to grant "free transit" on its territory for goods and persons belonging to allied powers, which affected the state income sources. The officials of Bucharest, including the royal family considered the clause of the minorities as the preamble of the treaty, contrary to "sovereign rights" of Romania, therefore they did not agree to sign it.

The English Foreign Minister, Arthur James Balfour, suggested Romania to be drawn the attention on its attitude, namely to be told that it would not receive the territory in question until it accepted the clause of the minorities and signed the treaty

I.I.C.Brătianu rejected the control of the great powers on small states, but not the control of the League of Nations. Furthermore, he pointed out that his observations were formulated "in the name of the independence of the Romanian state" and of two principles: one concerning "peace, order, brotherhood among the populations of the same state", and the other targeting "the equality of all large and small states in accordance with their domestic law rights".

[5] Idem, Gheorge Bercan, *Diplomația europeană în epoca modernă*, Bucharest, 1984, p. 480.
[6] Nicolae Daşcovici, Interesele şi drepturile României în texte de drept internațional public, Iași, 1936, p. 22.
[7] Istoria Romaniei intre anii 1918-1981,Gh.I.Ionita,Ioan Cartana,Ioan Scurtu,Gh.Z.Ionescu,Eufrosina Popescu,Vasile Budriga,Doina Smarcea,E.D.P.,Buc.1981

On June 14th, 1919, a meeting of the government was held at Cotroceni Palace presided by king Ferdinand; Iuliu Maniu, the chairman of the Conducting Council and Victor Antonescu, the minister of the country in Paris were invited. Those present had already learned that in Saint-Germain-en Laye, when the terms of the Treaty with Austria had been discussed, Romania had had to face "the accomplished facts". King Ferdinand showed that the purpose of the meeting was Romania's future attitude towards the content of the Treaty with Austria. Victor Antonescu presented a summary of the reasons why Romania could not sign this treaty. Despite the justified protest of the Romanian representatives – Antonescu informed – the treaty was handed over to the Austrian plenipotentiaries, without removing the clauses on the guarantees for minorities, the transit and the customs regime. The final decision in what concerns the attitude of Bucharest diplomacy will be made after Prime Minister I.I.C.Brătianu returns to the country.

As a reaction to the negative attitude of the Conference on the issue of the treaty with Austria, I.I.C.Brătianu left Paris on July 4th, thus considering that his country was "a sovereign state the independence of which nobody challenged."

On September 10th, 1919, the Treaty with Austria was signed at Saint-Germain-en-Laye[8].

The Treaty was divided in 14 parts:

The first part consisted of the Covenant of the League of Nations, which represented a common part of the peace treaties concluded after the First World War.

The second part defines the borders of the Republic of Austria with neighboring countries: Switzerland, Liechtenstein, Germany, Czechoslovakia, Hungary, the State of Serbs, Croats and Slovenes (subsequently Yugoslavia) and Italy. The Covenant established the independence of Czechoslovakia (the Czech Republic was part of Transleithania, the Austrian part of the former monarchy), the incorporation of South Tyrol into the territory of the Italian state of Burgenland (region which, during the monarchy, was part of Transleithania, the Hungarian part, especially populated by German ethnics) in Austria. The boarder with the state of Slovenes, Croats and Serbs was partially established, the region of Klagenfurt was to be assigned to one of the two states after a plebiscite.

This third part called "political clauses for Europe" mainly includes a series of provisions on the Austria's bilateral relations with the successor states of the Double Monarchy. Austria committed to recognize the independence of Czechoslovakia and the state of Slovenes, Croats and Serbs, as well as the territories which belonged to Russia on August 1st, 1914 (the Baltic States, Finland, Poland).

Section forth (articles 59-61) established the waiver of Austria in favor of Romania to any rights and titles on the parts of the former Duchy of Bukovina under the possession of Romania. The wording is ambiguous and was used because the borders between Romania, Czechoslovakia and Poland were established after the conclusion of the Treaty of Peace of Saint Germain, but it represents the international recognition of the union of Bukovina with Romania.

Furthermore, this section defines the area of Klagenfurt where the population was mixed (Slovenian and German) where a plebiscite was organized in order to establish the will of the majority of the population to belong either to Austria or to the State of Slovenes, Croats and Serbs.

Of particular importance was Article 88, which provided that the independence of Austria was inalienable, unless the League of Nations had consented to this effect. For this reason, Austria was required to refrain from any action that would compromise its sovereignty. This article was intended to prohibit the unification of Austria with Germany (another state defeated in war).

The fourth part (Austrian interests outside Europa) provided the waiver of the Republic of Austria to a series of treaties and rights of the former Austro-Hungarian monarchy in relations with Morocco, Egypt, Siam (Thailand) and China.

The fifth part (military clauses) provides the limitation of military capacity to 30,000 militaries, including officers.

The other nine parts of the treaty contained provisions relating to the compensations to be paid by Austria, to the Danube shipping regime for the organization of rail transport between Austria and the other states (particularly important, taking into account Austria's position in the European rail system) etc[9].

On September 12th, 1919, I.I.C.Brătianu resigned from the position of prime minister; a new government of technicians was set up, led by general Arthur Vaitoianu. There were several final notifications delivered to Romania at the Peace Conference, whereby it was required to sign the Treaty with Austria, but the authorities of Bucharest did not fulfill the requirements.

After the parliamentary elections of November 1919 the government of the "Parliamentary Block" was set up, chaired by Alexandru Vaida-Voievod. Between December 1st and 3rd 1919 various representatives of the Block were engaged in discussions with the representatives of the Entente, and on such occasion Al. Vaid a-Voievod declared that his government was going to accept the ultimatum (the 12th), under certain conditions; he called for the waiver to the "shameful preamble" of the "Special Convention" of the Treaty of Saint-Germain where it was deemed that the independence of Romania had been recognized in 1878, under the condition of the amendment of art.7 of the Constitution. Thanks to the efforts of Victor Antonescu, the deadline for the expiration of the

[8] Istoria Românilor,vol.VIII, University Professor Ioan Scurtu, coordinator.Petre Out PhD, Enciclopedica Publishing House, Buc.2003

[9] Principiul Naţionalităţilor, Romulus Seisanu, typography of newspaper "Universul", Buc.1935

ultimatum was postponed from December 2nd to December 8th, 1919 and the modification of the letter and spirit of the treaty of minorities. The allied representatives communicated their approval on the change of the treaty of minorities, provided that the ultimatum was accepted.

The recognition of the union of Bukovina with Romania raised a low number of issues, but its registration with the Treaty of Saint-Germain was postponed; the registration was to be made after the set up of the boarders with the State of Serbs, Croats and Slovenes.

During the negotiations for the conclusion of the Treaty of Saint-Germain, the British and the French resisted the desires of the Americans of not to grant Romania the whole Bukovina, based on the decision of the General Congress of Cernăuţi. The Americans forced Romania to separate the basin of Ceremus river which economic interests were in the direction of Galicia.

The Romanian diplomacy, when informed on the division of Bukovina, refused to accept the solution and preferred a common border with Poland in Eastern Galicia. Its efforts were focused on the rewording of art.59 which, in the original text, did not recognize Bukovina as a territory belonging to the Romanian state. In its new wording, the article provided: "Austria waivers in favor of Romania all rights and titles on the part of the former duchy of Bukovina, located beyond the borders of Romania", the boarders being those set out in the Unification Decision of November 15/28, 1918. Although the amendments did not abolish the principle under which the great powers (the Council of the League of Nations) assumed the right to "protect" the interests of the minorities of Romania, removed or diminished other clauses affecting the national dignity and sovereignty of the Romanian state.

The representative of Romania at the Peace Conference, general C. Coandă signed, on December 10th, 1919, 6 p.m., the Treaty with Austria and the treaty of minorities. The document was dated December 9th. The positive part of the Treaty of Saint-Germain concerned the dissolution of the Austro-Hungarian dualist monarchy and the recognition of the revolutionary processes that had taken place in the territory of the former empire in 1918. This was also noted by deputy Ion Nistor, who, on the occasion of the ratification of the Treaty by the Assembly of Deputies of Bucharest, declared: "I believe that the abolition of Austria (dualist monarchy) and the ratification of this treaty does not only entail the return of Bukovina to the motherland but, moreover, this treaty has a much greater significance. The dismemberment of the Austro-Hungarian kingdom gave us back Bukovina, Transylvania and Banat, this long-awaited dismemberment made possible our national unification."

5. Application and consequences of the treaty

The boarders of Austria with neighboring countries were delimitated in the following years. The territory of Burgenland entered under the possession of Austria, but in Șopron (Odenburg in German), together with other eight villages, a new referendum was organized in 1921 where the membership to Hungary was decided.

The plebiscite organized in Klagenfurt showed that most of the inhabitants wanted to remain in Austria.

After the economic crisis which followed the end of the war, the Austrian state was not able to pay the damages established under the peace treaty.

Austria, unlike the all the other states defeated in the first world war, did not seek to challenge the peace treaty and return to the previous situation. The majority of the population and political class would have preferred, during the first years after the war, to join the German state, but this possibility was forbidden by the winners who did not want to strengthen Germany.

The issue of the union with Germany remained on the Austrian internal political agenda until 1938, when Austria was annexed to Nazi Germany of Adolf Hitler.

After the World War II, Austria was again recognized as an independent state (full sovereignty was recognized by the State Treaty of 1955), within the borders established by the Treaty of Saint Germain[10].

References

- Bărbulescu, Mihai; Deletant, Dennis; Hitchins, Keith; Papacostea, Serban; Teodor, Pompiliu, *Istoria României*, , Corint Publishing House, Buc.2005
- Chis, Ioan, *Istoria statului si dreptului romanesc,* Universul Juridic Publishing, Bucharest, 2013
- Ciachir, Nicolae, *Din istoria Bucovinei: 1775-1944*, Bucharest, 1999
- Idem, Gheorge Bercan, *Diplomaţia europeană în epoca modernă*, Bucharest, 1984
- Corfus, Ilie, Agricultura în Ţările Române (1848-1864), Bucharest, 1982
- Dașcovici, Nicolae, Interesele și drepturile României în texte de drept internațional public, Iași, 1936
- Djuvara, Neagu, O scurtă istorie a românilor povestită celor tineri, Bucharest, 2002
- http://foaienationala.ro/bucovina-istoricaevoluti.html
- ***, *Istoria românilor*, vol. VI, Românii între Europa clasică şi Europa luminilor (1711-1821), Bucharest, 2002

[10] Istoria României, Mihai Barbulescu, Dennis Deletant, Keith Hitchins, Serban Papacostea, Pompiliu Teodor, Corint Publishing House, Buc.2005

- *Ibidem*, vol. VII, tom I, Constituirea României moderne (1821-1878), Bucharest, 2003
- *Ibidem*, vol. VII, tom II, De la independenţă la Marea Unire (1878-1918), Bucharest, 2003
- Ioniţă, Gheorghe; Cartana, Ioan; Scurtu, Ioan; Ionescu, Gheorghe Z.; Popescu, Eufrosina; Budriga, Vasile; Smârcea, Doina, *Istoria României între anii 1918-1981,* , E.D.P., Buc.1981
- Univ. Prof. Scurtu, Ioan; coordinator Out, Petre PhD., *Istoria Românilor*, vol. VIII, Enciclopedică Publishing House, Buc.2003
- Seişanu, Romulus, *Principiul Naţionalităţilor*, typography of newspaper "Universul", Buc.1935

THE LIABILITY OF THE PHD CANDIDATE AND OF THE MEMBERS OF THE DOCTORATE PUBLIC SUSTENANCE COMMISSION FOR INFRINGEMENTS OF DEONTOLOGY RULES IN THE ACTIVITY OF THESIS ELABORATION

Gheorghe BOCȘAN[*]

Abstract

The present paper proposes an analysis of the liability of PhD candidates and members of the doctorate commission for infringements of the deontology and ethics of the elaboration of a PhD thesis.

In last years, Romania toughened the control over the compliance of PhD researchers and the professors monitoring this compliance with the rules of deontology and ethics of scientific research accomplished in the process of formulating the doctorate thesis. These legal standards are regulated mainly by Law on National Education no. 1/2011 and Government Decision no. 681/2011for the approval of the Code on PhD Studies.

This kind of control passes many filters inside the university organising the doctoral studies but also an extern evaluation conceived in two rounds, one before the conferral of the PhD title and another afterwards, by the National Council on Attestation of Titles, Diplomas and University Certificates (CNATDCU).

The form of liability of PhD candidates when infringing deontology rules in the process of elaboration of doctorate thesis is mainly disciplinary, though in certain cases could be based upon non-compliance with the contractual obligations. The liability of the doctorate commission members is predominantly administrative-disciplinary and in some specific situations based on the law of torts.

The study compares the Romanian model of regulation of the matter with the legal provisions on the same topic from France, Italy and the United Kingdom. Reference are made on the role of the state organisms on research evaluation, such as CNATDCU (in Romania), Hcéres (in France), UKRIO (in the United Kingdom) and ANVUR (in Italy).

Keywords: *deontology and ethics of doctoral scientific research, integrity of research, liability of the PhD candidate for deontology and ethics infringements, liability of the doctorate commission members, administrative-disciplinary liability, contracts, law of torts, thesis evaluation.*

1. Introduction

In the process of analysing the liability for deontology of doctoral research infringements in the process of elaboration of the PhD thesis it is necessary to start from the scope of the doctorate scientific studies, as it is defined by the provisions of art. 158 par. (6) (a) of the Law on National Education no. 1/2011[1], respectively the production of original scientific knowledge, institutionally relevant, on the basis of scientific methods. Therefore, the fundamental elements of the scope of thesis are the scientific originality and the use of scientific methods with a view to produce innovatory knowledge.

The use of scientific methods of research presupposes ipso facto the attendance of deontology and ethics norms which forms the integrity in research. So, in our opinion, there couldn't constitute a valid method of scientific research the one which doesn't respect deontology and ethics (such as if plagiarism, the falsifying of scientific data and the elimination of results that contradict the hypothesis which must be proved through research are used).

In the following study we shall use the notion of ethics of research in the strictest term, even when the rules which regulate it are not legally sanctioned, in contrast with the notion of deontology, which are based upon legal norms which are raised from ethics and moral considerations. Another notion that is used extensively in this area of reflection is that of the integrity of scientific research, representing a cumulus of deontology and ethics. The Romanian laws regards ethics of research as a legally sanctioned domain, as we will see bellow in this study, but that fact does not change however the primary meaning of expression of the moral imperative, of Kantian origin, deprived however of the coercion provided by positive law.

Legal liability could be defined as the legal relation who constitutes itself as a consequence of committing an illicit fact, which represents an act forbidden by a legal norm, action or inaction constituting in the same time a trespass of a legal obligation.

For determining the content of a legal liability relation who appears as a consequence of infringing deontology rules in scientific research conducing to elaboration of the PhD thesis, as regulated for the moment by Law no. 1/2011 and Government Decision no. 681/2011, we shall identify first the legal obligations whose noncompliance is sanctioned by the two mentioned pieces of law.

Legal nature of liability is dependent on the one of the infringed obligation, on the quality of the subject

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of rights and correlative obligations implicated in the liability relation and on the form of guilt demanded by law for engendering liability, as we will see below.

2. The obligation of a PhD candidate of respect for deontology rules in elaborating the doctorate thesis

The liability of the PhD candidate in the context illustrated above in the study's title is based upon his or her obligation to respect deontology rules. By this term we understand, primarily, those norms which set off the interdiction of committing the acts which are defined as infringement of academic ethics and deontology by the Code on university's deontology and ethics, referred by art. 306 (3) of Law no. 1/2011 on national education, code on whose elaboration has contributed the commission on academic ethics, proposed to the university's senate for adoption and then incorporated in the University's Chart.

In the same context, the commission on academic ethics and deontology is habilitated, by dispositions of art. 306 (3) (d) of the same law to exercise the attribution set out by the Law no. 206 from 27th of May 2004 regarding the good practices in scientific research, technologic development and innovation activity[2].

According to provisions of art. 20 from the Academic Doctorate Studies Code, approved by Government Decision no. 681 from 29th of June 2011[3] :

"(1) The doctoral school together with the doctorate director have the obligation to inform the PhD candidate about the scientific, professional and university ethics and to verify the respect for those, including: a.) the respect of deontological provisions on the whole realization of doctoral research; b.) the respect of deontological provisions in the writing of the thesis.

(2) The doctoral school and IOUSD[4] take measures on prevention and sanctioning of infringements of norms of scientific, professional and university ethics, according to the code on professional ethics and deontology of the organization.

(3) In the case of academic frauds, of certain infringements of university's ethics or of certain infringements of rules on good conduct in scientific research, including plagiarism, the PhD candidate and/or the director of thesis are liable in the law's terms."

We notice that the infringements of deontological rules in the elaboration of doctorate thesis, comprising both activities set out by points a.) and b.) of article 20 paragraph (1), above cited, could be subject to sanctions applied by the doctoral school and IOUSD. The last paragraph of art. 20 of the Academic Doctorate Studies Code sets out expressly the liability of the PhD candidate and the doctorate director for academic frauds, infringements of university's ethics and infringements of good practices in scientific research, including plagiarism.

This legal text, which applies also to the liability for deontology infringements in the activity of thesis elaboration, identifies also another category of acts which conduces to engaging of this type of liability, namely the infringement of norms regarding the good practices in scientific research, provided by Law no. 206/2004. On this respect, the mentioned text corroborates to the one in art. 306 par. (3) of Law no. 1/2011, to which we referred above.

Art. 2 and art. 2^1 of Law no. 206/2004 as amended to the present date sets out the acts which constitutes infringements to the good practices in scientific research activity which could be committed by the PhD candidate in the activity of realization of the thesis, among others:

- fabrication of results and data and their presentation as experimental data, data obtained by calculus and computer numeric simulation or as data or results obtained through analytic calculations or deductive reasoning;
- falsification of experimental data, of data obtained by calculus and computer numeric simulation or as data or results obtained through analytic calculations or deductive reasoning;
- plagiarism;
- auto plagiarism;
- unauthorized publication of certain results, hypothesis, theories or scientific methods unpublished yet.

The law defines the main concepts used in text.

Thus, art. 4 par. (1) (d) sets out that plagiarism means "*presentation in a written work or an oral communication, including in digital format, of texts, ideas, demonstrations, data, hypotheses, theories, results or scientific methods extracted from written works, including those in digital format, belonging to other authors, without mentioning that and without sending to the original sources" and art. (4) (d) defines auto plagiarism as "presentation in a written work or an oral communication, including in digital format, of texts, ideas, demonstrations, data, hypotheses, theories, results or scientific methods extracted from written works, including those in digital format, belonging to the same author or authors, without mentioning that and without sending to the original sources*".

Plagiarism and auto plagiarism could be found as such only in Law no. 206/2004 on good practices in scientific research, technologic development and innovation. Law no. 8/1996 regarding the author's rights and connected rights doesn't mention plagiarism or auto plagiarism as forms of infringement of rights regulated by that law because: "*Law no. 8/1996, art. 9 (a) excludes clearly from the protection ideas, theories,*

[2] Published in the Official Journal of Romania, part I, no. 505 from 4th of June 2004.
[3] Published in the Official Journal of Romania, part I, no. 551 from 3rd of august 2011, amended by Government Decision no. 134/2016.
[4] IOUSD = acronym with the meaning Institution Organizing University Studies of Doctorate;

concepts, discoveries and inventions contained in a work. As all those are representing the work's scientific originality, we could sustain only the second opinion which says that the protection's object in the case of a scientific work is the form exposing the result of the author's scientific research activity. But, in scientific research should be respected the rules established by Law no. 206/2004 on good practices in scientific research, technologic development and innovation activity, which by art. 4 confers protection to ideas too"[5].

According to art. 1 par. (4) of Law no. 206/2004, PhD candidates doesn't appear as addressee of the law, excepting perhaps the situation when they receive public funding for their research. However, we express the opinion that practicing forbidden acts constitutes an infringement of deontology rules. This conclusion is based upon the Law on education texts regarding the doctoral activity, among them, art. 306 referred before in the study and the direct dispositions aiming the same, such as those of art. 20 of the Academic Doctorate Studies Code also referred to above.

Thus, in the area of norms regulating good practices in scientific research (the activity of elaboration of the PhD thesis being such an activity), there are legal provisions included in Law on National Education, in Academic Doctorate Studies Code and in Law no. 206/2004, which refers to the other two mentioned laws, constructing a complex legal framework that stands at the basis of the liability for infringements of university and scientific research deontology. Regarding this, we notice also the provisions of art. 4 par. (2) from Law no. 206/2004, according to those "*gross infringements of good practices in research and development activity are those set out by art. 310 of Law no.1/2011*" and this last article says "*gross infringements of good practices in scientific research and academic activity are: a.) the plagiarism of results and publications of other authors; b.) fabrication of results or substitution of results with fictive data; c.) using fake information in demands for grants and funding*".

Art. 65 of the Academic Doctorate Studies Code establishes the principle of solidarity in liability between the PhD candidate and the director of the thesis for "*the respect of quality standards and professional ethics, including the assurance of content originality, as regulated by art. 170 of the Law no. 1/2011*".

More, in conformity with the provisions of art. 9 (h) of "*The evaluation methodology of PhD thesis*", constituting Annex no. 1 of Minister of National Education and Scientific Research Order no. 3482/2016 from 24th of March 2016 regarding the approval of the Regulation of establishment and functioning of the National Council on Attestation of Titles, Diplomas and Academic Certificates[6], the doctorate case should contain "*a scanned copy of the declaration signed by both by the PhD candidate and the director of thesis regarding the assuming of liability for the content originality of the doctorate thesis and for the conformity with the quality and professional ethics standards established by art. 143 par. (4) and art. 170 from the Law on National Education no. 1/2011, amended to date and art. 65 par. (5) – (7) from the Government Decision no. 681/2011, amended to date*". The necessity of such a declaration highlights once more the legal obligation of the PhD candidate, under the scientific supervision of the director of thesis, to respect the ethics and deontology standards in the doctoral scientific research activity. Moreover, this declaration opens the way to possible criminal liability for lying in an official statement committed by the PhD student in the situation where he or she perpetrated acts of infringement of scientific research ethics in the doctoral studies.

As we proved above, the obligation of the PhD candidate to follow the rules of deontology in the activity of thesis elaboration is established ex legge, but also through the internal regulations of the doctoral school or of IOUSD, mainly by the Code on academic ethics and deontology.

3. The engaging of PhD candidate's liability for violation of deontology rules in the elaboration if thesis activity

The director of the thesis, responsible together with the PhD candidate for the quality and respect of ethics and deontology in scientific research conducing to the thesis, is the first one called upon by the law to take measures in the situation of infringements of deontology rules by the candidate. He or she has the legal possibility to seize the ethics commission when the acts perpetrated by the PhD candidate take the form of a specific violation set out by law or by the University's Code of Ethics and Deontology. Moreover, the director of thesis, as any member of the guidance commission, has the choice to oppose the official deposal and the public sustenance of the thesis, according to art. 67 par. (2) (c) from the Academic Doctorate Studies Code.

The members of the public sustenance of the thesis have the obligation, based on the provisions of art. 68 par. (2) of the Academic Doctorate Studies Code:" *a.) to seize the ethics commission of the university in which the PhD student is matriculated and the ethics commission of the university in which the director of thesis is an employee for the investigation and finalizing of the case, including by the expulsion of the PhD student, according to art. 306-310, art. 318-322 of Law no. 1/2011 and to the provisions of Law no. 206/2004 on good practices in scientific research, technologic development and innovation, amended to*

[5] V. Ros, Dreptul proprietății intelectuale. Vol. I. Drepturile de autor, drepturile conexe și drepturile sui-generis, Editura C. H. Beck, București, 2016, p. 226, my translation.

[6] Published in the Official Journal of Romania, part I, no. 248 from 4th of April 2016.

date; b.) to notify the infringements to all members of the doctorate commission and to propose the rating « unsatisfactory»" when "*identifying in the framework of thesis evaluation prior to the public sustenance or in the sustenance time of gross infringements of good practices in scientific research and academic activity, including plagiarism of the results or publications of other authors, fabrication of results or substitution of results by fictive data*".

Each person has the legal possibility to claim the infringement of deontology rules in the activity of elaboration of a doctorate thesis, following mainly the disclosure of the thesis by depositing one exemplary of it at the IOUSD library and in the case when the author doesn't plan to publish the thesis, by posting it on an electronic platform, specially conceived by the Ministry of National Education and Scientific research with this scope.

Another situation of engaging PhD candidate liability for the infringements of deontology in the thesis is the one in which the infringement was detected by CNATDCU[7] following a complaint or ex officio, according to the provision set pot by art. 68 par. (6) and art. 69 par. (5) from the Academic Doctorate Studies Code.

4. The legal nature of the liability of PhD candidate for infringement of deontology rules in the elaboration of thesis

As we have seen before, the regulation of the acts which engender this kind of liability is realized by the law, so the infringement of deontology rules by the PhD candidate when elaborating the thesis represents an infringement of the law; however, this kind of infringement could be detrimental to the doctorate contract too. We have to keep in mind also that the PhD candidate isn't necessary employed on a contract basis by an organization which takes part of an IOUSD or constitutes an IOUSD.

Bearing in mind all these consideration, we establish that the legal liability that we referred to is of administrative nature. This isn't a contractual liability from the point of view of the PhD candidate because it has as legal basis mainly the law itself, even so there could be a repetition of this provisions in the doctoral contract. In the same time, there couldn't be a disciplinary liability because such a liability characterizes an employment relation, or the doctoral activity and the elaboration of the thesis are not realized on an employment basis. The possible employment relation binding the candidate to an IOUSD does not have as an object the thesis elaboration, but a teaching activity subsidiary to the doctoral studies.

For infringements of good practices in the scientific research, technologic development and innovation activities, Law no. 206/2004, in art. 2^1 par. (6) sets out that the nature of liability is "*ethical*". Subject of this responsibility could be also the PhD candidate. We appreciate that this form of liability represents a particular form of administrative liability.

Separately of the above qualification, when deontology infringements are a result of responsibility situations derived from the doctoral studies contract and could be sanctioned only by the ethics commission of a doctoral school or of a university part of an IOUSD or being an IOUSD because they are not established through the law, we appreciate that the liability of the PhD student could be, exceptionally, of civil contractual nature.

5. Sanctions applicable to the PhD student for infringement of deontology in the elaboration of the thesis and the consequences of liability

According to art. 319 of the Law on National Education no. 1/2011, "*The sanctions there could be applied by the university ethics commission to students and PhD candidates for university ethics infringements are: a.) written reprimand; b.) expulsion; c.) other sanctions set out by the University Code on Ethics and Deontology*."

Another sanction for deontology infringements perpetrated by a PhD candidate is the refusal of the accept for public sustenance of the thesis, according to art. 67 par. (3) of the Academic Doctorate Studies Code, which stands: "*Following identification of infringements of good practices in research and development, including plagiarism of results and publication of other authors, fabrication of results or substituting results with fictive data, in the framework of thesis evaluation by the director of the thesis or by the consulting commission, the approval of public sustenance of thesis shall be denied*".

When the doctorate public sustenance commission identifies infringements of deontology in the elaboration of the thesis, besides the notification of the ethics commission, there is the possibility to note the thesis as "*unsatisfactory*" and to show the elements of content that should be revised or completed in the thesis (including those that are the product of infringement of deontology), also the possibility to demand a new public sustenance of the thesis, followed by a new eventual "*unsatisfactory*" note, which will automatically conduce to denial of the doctorate title and expulsion of the PhD student (art. 68 par. 4 of the Academic Doctorate Studies Code).

Also, another possible sanction could be the invalidation of the thesis by CNATDCU whenever the conditions established by art. 68 par. (6) of the Academic Doctorate Studies Code: "*In the case of detection of misconduct in professional ethics, including plagiarism, by CNATDCU members of an*

[7] CNATDCU = acronym used for the National Council of Attestation of Titles, Diplomas and University Certificates, which is part of the Ministry of National Education and Scientific Research.

evaluation commission of a thesis, these members should invalidate the thesis, communicate the conclusions to the other members of the evaluation commission and should seize the General Council of CNATDCU for the analysis of director of thesis responsibility or of the doctoral school liability and for the application of art.69 par. (5)".

In case that CNATDCU is seized by an interested person with allegation of deontology infringement after the conferral of the PhD title, the General Council of CNATDCU shall ask the point of view of IOUSD in the case. In the situation where IOUSD confirms the infringements, a decision regarding the proposal of the withdrawal of the PhD title, signed by rector and legally advised by the university shall be send to CNATDCU.

The PhD title shall be withdrawn from the one which obtained it by infringing the deontology, when this fact is detected by the General Council of CNATDCU, at the proposal by its President, by the Ministry of National Education and Scientific Research. After evaluation of the director of thesis guilt or of the doctorate school liability, the same Ministry, at CNATDCU's President proposal, could apply sanctions such as the withdrawal of the quality of director of thesis and the withdrawal of the accreditation of the doctoral school (according to art. 69 par. 5 from the Academic Doctorate Studies Code.

Also, art. 170 par. (1) from Law no. 1/2011 on National Education sets out that "*In case of infringements of quality or professional ethics standards, the Ministry of National Education, on the basis of external evaluation reports, done by CNATDC, the National Council on Scientific Research, the Ethics and University Management Council or the National Council of Scientific Research, Technologic Development and Innovation Ethics could undertake the next sanctions, alternatively or simultaneous: a.) the withdrawal of the quality of director of thesis; b.) the withdrawal of PhD title; c.) the withdrawal of the accreditation of the doctoral school, which measure is implying also the withdrawal of the doctoral school right to organize admission examination for matriculation of new PhD candidates*".

In conclusion, we appreciate that the liability of the PhD candidate for infringements of the deontology rules in the process of elaboration of the thesis, as set out by Law no. 1/2011 and Government Decision no. 681/2011 is an administrative liability, which attracts mainly the sanction of expulsion, the one of the withdrawal of PhD title, but could generate for other persons the withdrawal of the quality of director of thesis, or other sanctions (based on an administrative liability) and the withdrawal of the accreditation of the doctoral school.

6. The liability of the members of public sustenance commission for the deontology infringements perpetrated by the candidate in the elaboration of the thesis

The public sustenance commission is composed by: the president, as representative of the IOUSD, the director of thesis and at least three official referends, specialists on the thesis domain. At least two of them should be external of the IOUSD.

In the framework of paragraph II.) of this article we showed that the members of the public sustenance commission have the obligation, according to art. 68 par. (2) of the Academic Doctorate Studies Code: " *a.) to seize the ethics commission of the university in which the PhD student is matriculated and the ethics commission of the university in which the director of thesis is an employee for the investigation and finalizing of the case, including by the expulsion of the PhD student, according to art. 306-310, art. 318-322 of Law no. 1/2011 and to the provisions of Law no. 206/2004 on good practices in scientific research, technologic development and innovation, amended to date; b.) to notify the infringements to all members of the doctorate commission and to propose the rating « unsatisfactory»*" when "*identifying in the framework of thesis evaluation prior to the public sustenance or in the sustenance time of gross infringements of good practices in scientific research and academic activity, including plagiarism of the results or publications of other authors, fabrication of results or substitution of results by fictive data*".

According to art. 68 par. (4) of the Academic Doctorate Studies Code, when the doctorate public sustenance commission identifies infringements of deontology in the elaboration of the thesis, besides the notification of the ethics commission, there is the possibility to note the thesis as "*unsatisfactory*" and to show the elements of content that should be revised or completed in the thesis (including those that are the product of infringement of deontology), also the possibility to demand a new public sustenance of the thesis, followed by a new eventual "*unsatisfactory*" note, which will automatically conduce to denial of the doctorate title and expulsion of the PhD student.

Thus, we appreciate that the obligation of the public sustenance commission regarding the infringement of deontological rules by the candidate in the elaboration of the thesis are the following:

1. to abstain from participating to the works of the commission when a conflict of interest appears;
2. to discover the infringements – this constitutes an obligation of prudence for the commission's members; the failure to detect infringements of research deontology when this activity requires extraordinary and rare abilities, even compared to the very high scientific standards specific to the members of the commission could not entail their liability;
3. to seize the ethics commission of the university where the PhD candidate is matriculated and the

ethics commission of the university where the director of thesis is employed;
4. to notify the findings to all the members of the commission;
5. to propose the note "*unsatisfactory*" for the thesis;
6. to publicly present the elements of the thesis which are the product of deontology infringements and demand for their reformation or completion;
7. to note "*unsatisfactory*" the thesis at the second sustenance if the consequences of deontology infringements were not eliminated; this event shall entail automatically the expulsion of the candidate and the refusal of conferral of the title.

The infringement of any of the above obligations attracts the commission member liability.

Concerning the problem of establishing the liability's nature of the commission member who did not abstain in case of conflict of interest, we appreciate that this is an administrative liability, generated by the perpetration of the transgression set out in art. 2^1 par. (3) (a) of Law no. 206/2004, consisting in "*non-disclosure of the conflict of interest situations in elaboration or participation in evaluations*".

Regarding the liability in case of non-completion of obligation stated in point 2.), we express the opinion that the liability exists only in the situation of intent or gross negligence in evaluation because, as we state before, the obligation of ethics infringement detection could not be absolute neither operant beyond a reasonable level of expectations.

Taking in consideration all mentions made above, if the deontology infringement non-detection was caused by intent or gross negligence from the part of the commission members, this may attract a form of tort liability aiming to the repair of the damages caused to IOUSD, if such damages were caused.

Because nor the Law on national education no. 1/2011 neither the Academic Doctorate Studies Code doesn't provide sanctions for non-completion of point 3.) – 7.) obligations, we distinguish between the following situations:

a) If the infringement of the obligation constitutes itself a transgression of ethics rules or of good practices in scientific research, the liability shall be administrative as legal nature.

This is the case, beyond conflict of interest, of the obstruction of an ethics committee or analysis commission activity (art. 2^1 par. (6) (e) of Law no. 206/2004), of the infringements of legal provisions aiming to assure the respect for good practices norms in scientific research (letter f. of the same article) or of the knowledge of the perpetration by others of the infringements and refusal to seize the ethics commission (letter b. of the same article).

For such infringements, the management or the ethics commission of the university or of the scientific research institute where the commission member is employed shall apply to him/her one or more of the sanctions set out in art. 11^1 of Law no. 206/2004, the most appropriate for such situations being: written reprimand or suspension for one to ten years of the right to participate in an examination commission. In the situation where the doctorate commission member is employed of a university or scientific research institute, some of the mentioned deeds could entail a disciplinary liability under the labor law, producing the consequence of a disciplinary sanction.

b) If the infringement of the obligation constitutes itself a transgression of ethics rules or of good practices in scientific research, the liability shall be established under the law of torts if a damage has been caused to the doctoral school or to IOUSD.

As we have already seen, in case of infringement of ethics, including plagiarism, the Ministry of National Education, on the proposal made by CNATDCU, could undertake the sanction of the withdrawal of the doctoral school's accreditation, which measure is implying also the withdrawal of the doctoral school right to organize admission examination for matriculation of new PhD candidates. Such a measure is highly damageable to the university morally and materially. In the situation where that could be established a causality nexus between the damages and the perpetration with intent or by negligence of a tort by a doctorate commission member, a civil liability based on the law of torts could be entailed. The sanction for such a deed consists in the recuperation of caused damages.

For infringements of norms on good practices in scientific research, technologic development and innovation, Law no. 206/2004, art. 21 par. (6) sets out an "*ethic liability*". The subjects of such a liability could also be the doctorate commission members. We appreciate that this liability form represents a particular typology of administrative liability, precisely of an administrative-disciplinary liability.

In synthesis, the liability of doctorate commission members for infringements of deontology rules by PhD candidates in the activity of thesis elaboration, as set out by Law no. 1/2011 and Government Decision no. 68/2001 is mainly of an administrative nature, namely administrative-disciplinary, as the doctrine of administrative law has called it[8]. Separately, it is possible to entail a liability based on the law of torts where the acts caused a material or moral damage to the doctoral school or to IOUSD. Both liabilities could be cumulated.

Another consequence of the PhD candidate's liability or of a doctorate commission member who perpetrated serious violation to the rules of scientific research and university's activity consists in the interdiction of occupying academic and scientific positions, established by art. 325 of Law no. 1/2011 on national education.

[8] Concerning the administrative-disciplinary liability, see V. Vedinaș, Drept administrativ, Ediția a X-a, revăzută și actualizată, Universul Juridic, București, 2017, capitolul XXV – Răspunderea în dreptul administrativ. Răspunderea disciplinară., § 6 – Răspunderea administrativ-disciplinară, p. 533 și urm.

7. Comparative law elements

The principal variable on which depends the liability for ethics and deontology infringements in scientific research in different legal systems is the level of real autonomy conferred to universities. This principle is universally claimed in the western world, but however it has a concrete content more or less solid.

The degree of de facto academic autonomy is influencing the regulatory mechanisms of the liability for infringement of scientific research ethics and deontology, meaning that to a real autonomy of the universities is corresponding a maximum regulation and procedure transfer in the area that we are referring to, with very few possibilities of state centralized control.

In such an ideal model, the infringements of ethics and deontology in scientific research are regulated exclusively through academic charts documents, realized upon good practices models, proposed by state agencies, but also by NGO's and academic think-tanks. Such models are not imperative, representing more of a kind of soft law.

Observing the positive law of France, Italy and the United Kingdom of Great Britain and Northern Ireland, we notice that the law is rather minimal in establishing the ethics and deontology rules, leaving a very large space to universities and public or private research institutes for regulating themselves ethics and deontology, in conformity with the universal standards.

7.1. Italian law on university professor's liability for ethics and deontology of research infringements – a relevant example of positive re-evaluation of academic autonomy

The most important piece of Italian legislation in this domain is Law no. 240 from 30 December 2010 on norms regarding the organizing of universities, the statute of academic personnel and the recruitment of the personnel and for Government empowerment for improving the quality and efficiency of the academic system, named also Gelmini Law[9], after the name of the Italian Minister of education from Berlusconi's Government who proposed the law to Parliament, Mariastella Gemini.

This law brought to major novelties from the point of view of sanctioning ethics and deontology transgressions of academic personnel, including directors of thesis and members of public sustenance commissions, but also for PhD candidates.

For understanding this legislative reform it should be said that academic personnel in Italy has the basic statute of a public servant, thus it applies to the members of this professional corpus all disciplinary regulation generally applicable to all public servants, which, initially were regulated through collective employment conventions (traditionally containing a part called "disciplinary code"), and nowadays more and more regulated through legal dispositions pertaining to administrative law, having a sectorial character[10].

The first novelty mentioned above consists in the regulation of substantial law which assures the basis for ethics and deontological liability solely by each university's ethics code, without the existence of a generic law on ethics norms applicable in all situations[11]. Thus, art. 2 par. (4) of Law no. 240/2010 contains the obligation for universities to adopt a code of ethics in a maximum of 180 days from the moment of the application of the law. The ethics code should be applicable to the whole academic community, meaning academic teaching stuff, administrative personnel, students and PhD candidates. This ethics code should establish also the interdiction of any form of discrimination or abuse, regulation of conflict of interest and infringement of intellectual property. The same article of the law establishes that the procedure for detecting, proving and application of sanction should be in the competence of the university's Senate, at the rector's proposal.

The second notable type of provisions in the domain of ethics liability is the one set out by art. 10 of Law no. 240/2010 about disciplinary competence. These dispositions are applicable in the case of infringement by university professors, including directors of thesis and members of the public sustenance commission of the thesis of the rules provided for by collective employment conventions or administrative law provisions. If certain obligations set out in the ethics academic codes contains disciplinary sanctions provided also by laws and collective employment conventions, the infringements should be submitted to art. 10 of Law no. 240/2010 and not to art. 2 par. (4) of the same law. There is an area where ethics illicit intersects disciplinary illicit, becoming under the law only disciplinary illicit.

Thus, according to art. 10 of the law, in each university should function a disciplinary college, formed entirely by university professors and scientific researchers based in that university. The disciplinary proceedings are based on the justice among peers' principle and referred only to the gross infringements which have the potential to entail disciplinary consequences. The disciplinary college could be seized only by the university's rector. The investigated person

[9] Legge 30 dicembre 2010, n.240 Norme in materia di organizzazione delle universita`, di personale accademico e reclutamento, nonche` delega al Governo per incentivare la qualita` e l' efficienza del sistema universitario, Gazzetta Ufficiale della Republica Italiana, Serie Generale n. 10 del 14-01-2011-Suppl. Ordinario n. 11, my own translation.

[10] B.G. Mattarella, La responsabilità disciplinare dei docenti universitari dopo la legge Gelmini: profili sostanziali, legal on-line publication "ROARS", Return on Academic ReSearch, at internet address https://www.roars.it/online/la-responsabilita-disciplinare-dei-docenti-universitari-dopo-la-legge-gelmini-profili-sostanziali/ , accessed on 10 February 2018, my own translation.

[11] L. Ferluga., La responsabilità disciplinare dei docenti universitari, article published on an on-line legal portal „*diritto.it*" on 29 July 2017, accessed at internet address https://www.diritto.it/la-responsabilita-disciplinare-dei-docenti-universitari/ , on 10 Februry 2018.

could be assisted by a "*confidence defender*" or by a lawyer.

The disciplinary college takes a decision in 30 days from initiation of the procedure (which is the day when the rector officially seized the college). Next, in another interval of 30 days, the university's Administration Council applies a sanction.

As we can see, the Italian regulation of PhD candidate, director of thesis and members of the public sustenance commission liability for ethics and deontology infringements in scientific research aiming to the elaboration of thesis is a generic one, superposing itself to university's ethics and administrative rules containing disciplinary sanctions in academic activity, without special provisions dedicated to doctoral studies.

Concerning the legal nature of such a liability, we should distinguish between the following situations:

- the university's ethics code infringement by a PhD student entails an ethic liability, established by university's Senate;
- the university's ethics code infringement by the director of thesis or by a member of public sustenance commission, when the infringement acts are not regulated by administrative law as entailing disciplinary liability, attracts also ethics liability;
- the university's ethics code infringement by the director of thesis or by a member of public sustenance commission, when the infringement acts are regulated by administrative law as entailing disciplinary liability or other infringements, even so they are not regulated by the university's ethics code, but their perpetration attracts disciplinary liability applicable to a public servant based on an administrative law, entails administrative-disciplinary liability.

Thus, the administrative-disciplinary liability for infringements situated in our debate area is common to both Romanian and Italian law.

7.2. United Kingdom and the code of practice for researchers as model which could be transposed to academic regulations

The Government agency of the UK in matters in matters od ethics and deontology of scientific research is UKRIO – UK Research Integrity Office. One of the main function of UKRIO is the elaboration of models for deontological codes, which will be integrated and adapted afterwards by universities and research institutes.

Thus, two of the main documents produced by UKRIO are: "*Code of Practice for Research. Promoting good practice and preventing misconduct*"[12] and "*Procedure for Investigation of Misconduct in Research*"[13].

The Code insists on definition and classification of ethics and deontology infringements in scientific research, enumerating infringements such as: fabrication, falsification, misrepresentation of data and/or interests and/or involvement, plagiarism, failures to follow accepted procedures or to exercise due care in carrying out responsibilities for: avoiding unreasonable risk or harm to humans, animals used in research and the environment and the proper handling of privileged or private information on individuals collected during the research (point 3.16 of the Code).

As point 1.2. of the Code sets out "*recognising that many forms of guidance already exist, the intention is that research organisations may use the principles and standards outlined in this Code as benchmarks when drafting or revising their own, more detailed, codes of practice*".

With the aim to facilitate the drafting of universities Codes of research integrity, UKRIO has elaborated also the second document that we mentioned above, the Procedure for Investigation of Misconduct in Research. Thus, the universities and research institutes implement this procedure and adapts it to their structure and internal organisation. As an example, London's Global University (UCL) has elaborated at 1st of January 2017 a "*Procedure for investigating and resolving allegations of misconduct in academic research*"[14].

Paragraph 1 of the UCL Procedure stands that: "*this Procedure follows closely the model procedure prepared by the UK Research Integrity Office (UKRIO), although some necessary minor adaptations have been made to reflect UCL's local circumstances and terminology. However, these adaptations are not so significant as to mean that UCL is not adhering to the key features of the UKRIO model procedure*". The adaptations have been operated by the Committee on Research Governance of UCL.

The UKRIO model procedure uses a generic terminology, comprising abstract terms, such as "*named person*" for the individual designated to receive the complaints. The university is the entity which designates that person. In the UCL case, the "*named person*" is the Registrar.

Also, the university's rules send to the disciplinary procedure of the university, procedure which is regulated distinctly by each university. All these rules apply also to scientific doctoral research.

What is really impressive in the model procedure of UKRIO is the legal accuracy. The procedure is divided in three phases. In the first phase, one of the main activity is directed to the establishment of the fact that the complaint for integrity in research infringements has been made in good faith, that "*the*

[12] UK Research Integrity Office, *Code of Practice for Research. Promoting good practice and preventing misconduct*. September 2009, internet address http://ukrio.org/wp-content/uploads/UKRIO-Code-of-Practice-for-Research.pdf , accessed 12 February 2018.

[13] UK Research Integrity Office, *Procedure for Investigation of Misconduct in Research*, August 2008, internet address http://ukrio.org/wp-content/uploads/UKRIO-Procedure-for-the-Investigation-of-Misconduct-in-Research.pdf , accessed at 12 February 2018

[14] London's Global University (UCL), Procedure for investigating and resolving allegations of misconduct in academic research, 1 January 2017, internet address https://www.ucl.ac.uk/srs/governance-and-committees/resgov/research-misconduct-procedure-jan-2017.pd , accessed at 12 February 2018.

allegations are not mistaken, frivolous, vexatious and/or malicious". This activity should be completed in 10 working days (point C.15 of the Procedure).

C. 16. of the Procedure says: "*If the named Person decides that the allegations are mistaken, frivolous, vexatious and/or malicious, the allegation will then be dismissed. The decision should be reported in writing to the Respondent and the Complainant (…)*". In such a case "*the Named Person should consider recommending to the appropriate authorities that action to be taken under the Organisation's disciplinary process against anyone who is found to have made frivolous, vexatious and/or malicious allegations of misconduct in research (…)*" (C.17.).

Another scope of this preliminary phase is to take all necessary measures for preventing or removing any danger for persons, animals and/or the environment (C.6.a.). In the same phase, there is the possibility to seize government agencies responsible of different aspects of human activity which could be endangered by infringement of ethics and deontology in research (such as, for example, the Department for Environment, Food and Rural Affaires, Department of Health and Social Care etc.). In the same phase, the Named Person takes all necessary measures for conservation of evidence about the facts.

In the next phases, the Screening Panel shall consider if the allegations are sufficiently credible, serious and made in good faith as to justify a thorough investigation. Then, at recommendation of the Screening Panel, the Named Person forms an Investigation Panel, which will conduct proper investigation of the facts, based upon administered evidence, respecting also the right of defence for the Respondent, the presumption of innocence, the right to an equitable process etc. The standard of proof is that of "*the predominance of probability*", an intermediary standard, which is higher than the one characterising civil procedure: "*the predominance of proofs*" but lower that the criminal procedure uses: "*beyond a reasonable doubt*".

In the situation of proving the infringements of research integrity, the Investigation Panel draws up a report, comprising mediation solutions and, if the case, send the report to the disciplinary organism of the university or research organisation. The disciplinary procedure is differently structured for students, including PhD students and academic personnel because of the inexistence/ existence of an employment contract under labour law. All the way to the finalising of the disciplinary process, the university has to fill up periodic reports to UKRIO.

The link between the procedure of investigation allegation of misconduct in academic research and the disciplinary procedure, which are distinct, is very well delineated in point C.6.b. of the Procedure: "*Where allegations include behaviour subject to defined sanctions in the Organisation's disciplinary process, then the Named Person should take steps to implement the disciplinary process. As above, the Procedure may continue in parallel with the disciplinary process but may have to be suspended, to be concluded later, or to be declared void by the Named Person*".

Certain UK universities of great tradition and name have a single academic document regulating both the substantial and the procedural law in the case of integrity in research infringements, which could be extremely brief and concentrated, but accompanied by numerous academic custom[15].

Thus, we appreciate that in UK law, the liability for infringement of integrity in scientific research is mainly disciplinary, regulated and conducted by the universities and for some infringements that are not encompassed in disciplinary procedures, there is only a liability for integrity, a kind of "*ethics liability*", set out by universities on the model Code and procedure elaborated by UKRIO.

7.3. France – the accreditation of universities for doctoral studies as guarantee of respect for the ethics and deontology rules in doctoral scientific research

The regulation of doctoral studies in France in very similar to that of Romania, but certainly presents certain notable particularities.

The most important piece of legislation in this domain is the Ministry's of National Education and Science Decision from 25thof May 2016 for the establishment of national framework for the formation and modalities conducing to the awarding of national doctorate diploma[16].

Very alike the Romanian Law on national education no. 1/2011, the French ministerial decision shows in art. 1 that: "*doctoral formation is a formation by and for research*" and "*conduces to production of new knowledge*".

Art. 5 of the above-mentioned Decision sets out that the accreditation decision of a university signifies empowerment to deliver the PhD diploma in specialities that were authorised for this aim and the accreditation of doctoral schools is realised by the High Council of Research and Superior Education Evaluation[17] (Hcéres).

The accreditation of doctoral schools and universities makes that the definitive decision over the

[15] It is the case of Oxford University, which has adopted "Academic integrity in research: Code of practice and procedure", that could be found at internet address http://www.admin.ox.ac.uk/personnel/cops/researchintegrity/ , accessed at 14 February 2018.

[16] Arrêté du 25 mai 2016 fixant le cadre national de la formation et des modalités conduisant à la délivrance du diplôme national de doctorat, JORF no. 0122 du 27 mai 2016, NOR: MENS 1611139A, my own translation.

[17] Haut conseil de l'évaluation de la recherche et de l'enseignement supérieur (Hcéres), established by the Research Code, whose art. L. 114-3-1, point. 3 sets out evaluation functions in the area of scientific formation and of the diplomas emitted bu superior education and, where the case, the validation of evaluation procedures realised by other, Code de la recherche, internet address https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006071190 , accessed on 16 February 2018, my own translation.

conferral of the PhD title pertains only to the university and not, by any means, to Hcéres. This is a difference to the situation in Romania where CNATDCU, the equivalent agency of Hcéres, decides itself on a preliminary basis if the thesis complies to the ethic and deontology standards before the conferral of the title. In France, the university's accreditation is regarded as a sufficient guarantee for the assurance of respect for ethics and deontology rules, meaning that the doctoral schools and the universities have made in place the organisational mechanisms for detection and sanctioning of infringements, regulated mainly by the Chart over the Thesis (Charte des thèses) of a Doctoral Chart.

Another important difference of the French regulation compared to the Romanian one could be notice regarding the liability of the director of thesis (directeur de la thèse), because unlike the case of Romanian law, the French one establishes that this university professor is not liable for the content of the thesis, that is considered as the sole product of research activity of the candidate, to whom entire liability for the content belongs.

Somehow similarly, the public sustenance commission, called in France "*the thesis jury* "(le jury de la thèse) does evaluate solely the following aspects of the thesis: the quality of doctoral thesis, it's novelty, the aptitude of the PhD candidate to situate the thesis in a scientific context and the quality of thesis sustenance (art. 19 of the Ministerial Decision).

The thesis jury is designated in accordance to the provisions of art. 18 of the Ministerial Decision by the chief of superior education institution, approved by the director of the doctoral school and the director of thesis. The number of jury's members is between four and eight with the condition that at least half of them should be external to the university and the doctoral school. At least half of the jury members should be university professors or persons assimilated by the law to those (such as scientific researchers of a certain degree). The jury members elect from their part a president of the jury and a rapporteur over the thesis. The director of thesis takes part in the jury but does not participate to deliberations and decisions of the jury.

The majority of doctoral charts of French universities contain separate chapters on scientific research deontology, ethics and integrity and separately of the Chart over the Thesis there is a Deontology Chart.

Thus, as an example, strengthening the idea of academic autonomy, the Doctoral Chart of Paris-Saclay University sets out, within the section dedicated to the thesis jury, that: "*the doctorate national diploma is realised by the chief of the accredited institution at the conform proposal of the jury of thesis sustenance*"[18]. As a matter of fact, no administrative authority of the state interposes itself in the procedure of conferral of the PhD title, such as it is the case in Romania at the moment.

Finally, the PhD candidate, the director of thesis and the members of public sustenance commission liability for the infringement of ethics, deontology and integrity rules in scientific research in the French law is disciplinary.

According to art. L. 712-6-2 of the Code of Education[19], the disciplinary power over the academic personnel-researchers, scientific researchers, professors and students (including PhD students) is exercised by the Academic Council of the university, sitting in Disciplinary Section.

8. Conclusions

In the Romanian regulatory model, but also in the French, Italian and British one, analysed in this article, the liability of the PhD candidate and of the members of the public sustenance commission for infringement of scientific research deontology oscillates between an administrative and a disciplinary dimension, being rather administrative-disciplinary (for the academic personnel and scientific researchers that take part in such commissions). Function of the nuances and the complexity of the facts in cause, there is also a possibility of contract liability (in the PhD candidates case) or of tort liability (in the commission's members case).

The administrative-disciplinary liability hypothesis is well reasoned in Italian and Romanian law, systems which establish for academic personnel a position similar to the public officials with special status (at least when speaking of public superior education).

Thus, generally, the findings on the Romanian law on the domain are valid also in other systems, we notice some administrative differences being linked directly to the degree of academic autonomy conferred by different states, reflected mainly in the powers vested in national organisms established for the accreditation and evaluation/control over the doctoral schools and universities, powers that could be very important (the case of Romanian CNATDCU) or limited (such as the case of UKRIO).

Nowadays, Romania, by the most extended powers conferred to CNATDCU, marks a veritable summit of restriction on academic autonomy in the area of the control and evaluation of doctorate thesis. This may however correspond to a real necessity raised by the concrete situation on the matter. CNATDCU verifies the thesis both before the conferral of the PhD title and afterwards, at the complained of any person or ex officio. The university and doctoral school arrived at

[18] La Charte de doctorat de l'Université Paris-Saclay, internet address https://www.universite-paris-saclay.fr/fr/la-charte-du-doctora , accessed at 16 February 2018, my own translation.

[19] Code de l'éducation, (Dernière modification : 17 février 2018), internet address https://www.legifrance.gouv.fr /affichCode.do?cidTexte=LEGITEXT000006071191&dateTexte=20180217 , accessed on 17 February 2018, my own translation.

the stage of having a purely formalistic role in the releasing of the PhD diploma. The final decision on that matter is pertaining to the Ministry of National Education and Scientific Research. By comparison, in France, the equivalent of the Romanian CNATDCU, Hcéres, performs ulterior verification only on complaint. We appreciate that a single procedure of thesis verification by a state organism should be sufficient to guarantee the observance of ethics and deontology in doctoral scientific research. There is here also a problem of stability and predictability of the legal relations generated by the conferral of the PhD title – this fact should not be doubted perpetually. There should be a final and definitive decision on the matter because otherwise the PhD researcher will always be treated as a dubious candidate. The presumption of innocence must prevail here ones again.

The accreditation of a university and of a doctoral school by Hcéres, submitted undoubtedly to pretentious criteria, values in France absolute confidence accorded to the university hosting doctoral studies in its power to organise a proper functioning system for the prevention, detection, sanctioning and generally fighting the infringements of research integrity.

In the UK, the power to establish and operate such a system pertains also to universities and other research institutes. UKRIO, the British equivalent of the Romanian CNATDCU, produces models of integrity in research codes and procedures for the investigation of ethics and deontology infringements in scientific research. These models do not have an imperative character. What is really interesting in the UK regulation on the domain is the refusal to investigate allegations of integrity in research infringements if they have been made in ill faith (vexatious, malicious etc.). The British thinking in research integrity considers a contestation of the scientific activity of a researcher (including a PhD candidate) only when this is made in good faith, meaning in an ethical way. Adhering ourselves to this line of ethical thinking and regulations, we appreciate that such a practice is empowering the good faith legal principle in all areas of law enforcement.

Finally, the Italian legal instrument on the matter, Legge Gelmini from 2010, promotes a direct transfer from the state to universities of competencies in evaluation and liability for deontological infringements in doctoral studies. The Italian regulatory framework provides only for an ethic liability in the case of PhD students and for both an ethic liability and an administrative-disciplinary liability for the members of the public sustenance commission.

The government organism similar to the Romanian CNATDCU in Italy is the National Agency for Evaluation of University System and of Research (ANVUR)[20], having concrete attributions in the matter of universities accreditation for doctoral studies.

References

- Ferluga, Loredana, La responsabilità disciplinare dei docenti universitari, article published on an on-line legal portal „*diritto.it*" on 29 July 2017
- Mattarella, Bernardo Giorgio, La responsabilità disciplinare dei docenti universitari dopo la legge Gelmini: profili sostanziali, legal on-line publication "ROARS", Return on Academic ReSearch
- Ros, Viorel, Dreptul proprietății intelectuale. Vol. I. Drepturile de autor, drepturile conexe și drepturile sui-generis, Editura C. H. Beck, București, 2016
- Vedinaș, Virginia, Drept administrativ, Ediția a X-a, revăzută și actualizată, Universul Juridic, București, 2017
- France. Arrêté du 25 mai 2016 fixant le cadre national de la formation et des modalités conduisant à la délivrance du diplôme national de doctorat, JORF no. 0122 du 27 mai 2016, NOR: MENS 1611139A;
- France. Code de la recherche, at address https://www.legifrance.gouv.fr/affichCode.do?cidTexte= LEGITEXT000006071190 , accessed on 7.03.2018
- France. Code de l'éducation, at address https://www.legifrance.gouv.fr/affichCode.do?cidTexte= LEGITEXT000006071191 , accessed on 7.08.2018
- Italia. Legge 30 dicembre 2010, n.240 Norme in materia di organizzazione delle universita`, di personale accademico e reclutamento, nonche` delega al Governo per incentivare la qualita` e l' efficienza del sistema universitario, Gazzetta Ufficiale della Republica Italiana, Serie Generale n. 10 del 14-01-2011-Suppl. Ordinario n. 11
- La Charte de doctorat de l'Université Paris-Saclay, at address https://www.universite-paris-saclay.fr/fr/la-charte-du-doctorat , accessed on 7.03.2018
- Oxford University, "Academic integrity in research: Code of practice and procedure" at address http://www.admin.ox.ac.uk/personnel/cops/researchintegrity/ , accessed on 7.03.2018
- London's Global University (UCL), Procedure for investigating and resolving allegations of misconduct in academic research, 1 January 2017, at address https://www.ucl.ac.uk/srs/governance-and-committees/resgov/research-misconduct-procedure-jan-2017.pdf , accessed on 7.03.2018
- UK Research Integrity Office, *Code of Practice for Research. Promoting good practice and preventing misconduct*. September 2009, at address http://ukrio.org/wp-content/uploads/UKRIO-Code-of-Practice-for-Research.pdf , accessed on 7.03.2018

[20] ANVUR = Agenzia Nazionale di Valutazione del Sistema Universitario e della Ricerca, internet portal at address http://www.anvur.org/index.php?option=com_content&view=article&id=55&Itemid=103&lang=it , accessed on 17 February 2018.

- UK Research Integrity Office, *Procedure for Investigation of Misconduct in Research*, August 2008, at address http://ukrio.org/wp-content/uploads/UKRIO-Procedure-for-the-Investigation-of-Misconduct-in-Research.pdf , accessed on 7.03.2018
- Romania. Academic Doctorate Studies Code, approved by Government Decision no. 681 from 29th of June 2011 Published in the Official Journal of Romania, part I, no. 551 from 3rd of august 2011, amended by Government Decision no. 134/2016
- Romania. Law on National Education no. 1/2011, Published in the Official Journal of Romania, part I, no. 18 from 10th of January 2011
- Romania. Law no. 206 from 27th of May 2004 regarding the good practices in scientific research, technologic development and innovation activity Published in the Official Journal of Romania, part I, no. 505 from 4th of June 2004

SOME ISSUES CONCERNING JURISDICTION ON CLAIMS FOR PRELIMINARY RELIEF FOR INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS

Paul-George BUTA*

Abstract

The article deals with some issues surrounding the assertion of jurisdiction on claims for preliminary or provisional relief for infringement of intellectual property rights in Romania. Starting with the sources of the national provisions on provisional measures which were the result of implementation of international and EU law, the article then analyzes the relvant provisions in both the Code of Civil Procedure and the laws concerning the protection of intellectual property rights. In the very end, some more strange possible factual situations are analyzed in order to demonstrate the need for further legislative and judiciary guidance on the matter.

Keywords: *intellectual property rights, provisional relief, preliminary relief, enforcement of intellectual property rights, jurisdiction, procedure.*

1. Introduction

1.1. Importance and International Regime

Claims for preliminary relief in matters of infringement of Intellectual Property Rights are essential tools for the protection of these rights.

The overall importance of enforcement through the courts of such rights has caused some in the literature to affirm that intellectual property rights are only as good as the procedures and remedies by which they are enforced[1].

The overall importance of court enforcement of such rights was expressly recognized with the adoption of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) in 1994. Part III of the Agreement deals specifically with this issue with the aim to create procedural means by which to insure that the level of protection achieved at material level (the purpose of the Agreement having always been to provide and grant the highest possible degree of protection to intellectual property rights) is matched and rendered practical[2].

In this context, art. 41 par. (1) of TRIPS provides that "Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements". We can note the fact that preliminary relief claims are referred to as "expeditious remedies to prevent infringements"[3]. Par. (2) of art. 41 further requires (with respect to all procedures for enforcement of intellectual property rights and not just with respect to claims for preliminary relief) that such procedures be "fair and equitable. […] not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays".

However, the Agreement explicitly indicates that it does not amount to an obligation for the Member States to create or amend their existing judicial system, nor to allocate additional resources or prioritize the enforcement of intellectual property rights over enforcement of other rights (par. 5). Art. 41 does however require that all decisions (even administrative) be open for judicial review, at least, with respect to judicial first instance decisions, on issues of legality (par. 4). Also, reasoned decisions and the right to be heard only apply to decisions on the merits, not claims for preliminary relief (par. 3).

Art. 50 of the Agreement provides the detailed procedural for the enforcement of provisional measures in correlation with the general tenets of art. 41.

These detailed procedural rules do not also provide guidance with respect to what court holds jurisdiction over such claims.

1.2. IPR Enforcement Directive

Because of the importance of enforcement to intellectual property rights and the fact that TRIPS did not manage to align the Member States on their policies for the enforcement of Intellectual Property Rights, the issue was taken up again by means of a European Directive dedicated to this very issue: the enforcement in the EU of intellectual property rights. It is Directive 2004/48/EC of the European Parliament and of the

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[1] C. Greenhalgh, J. Philips, R. Pitkethly, M. Rogers and J. Tomalin, *Intellectual Property Enforcement in Smaller UK Firms* (2010), p. 3 cit. in Lionel Bently, Brad Sherman, *Intellectual Property Law*, 4th ed., OUP (Oxford, 2014), p. 1201;

[2] S. Vander, „Before Articles 41–61" in P-T Stoll, J. Busche and K. Arend, *WTO – Trade-Related Aspects of Intellectual Property Rights*, Martinus Nijhoff Publishers (Leiden, 2009), p. 679;

[3] Idem, p. 740;

Council of 29 April 2004 on the enforcement of intellectual property rights (Directive 48/04)[4].

Importantly, Preamble 3 to the Directive, reads as follows: "without effective means of enforcing intellectual property rights, innovation and creativity are discouraged and investment diminished. It is therefore necessary to ensure that the substantive law on intellectual property, which is nowadays largely part of the acquis communautaire, is applied effectively in the Community. In this respect, the means of enforcing intellectual property rights are of paramount importance for the success of the Internal Market". The intimate link between substantial provisions related to intellectual property rights and the procedural rules for their enforcement is further emphasized in preamble 9[5] which also justifies action at Union level.

Directive 48/04 also indicates that there are major disparities between the means of enforcement of Intellectual Property Rights provided by the Member States, among others also with regard to provisional measures (preamble 7), such disparities being prejudicial to the functioning of the Internal Market since there is no level ground of enforcement of such rights throughout the Union (preamble 8).

The overarching objective of Directive 48/04 is summarized in preamble 10 as being "to ensure a high, equivalent and homogeneous level of protection in the Internal Market", its scope being defined "as widely as possible in order to encompass all the intellectual property rights covered by Community provisions in this field and/or by the national law of the Member State concerned" (preamble 13).

Therefore the purpose of Directive 48/04 is to complement and harmonize existing enforcement measures implemented by Member States pursuant to TRIPS and/or other international applicable conventions or other such measures enacted by local law, the principle of application being that the more favorable (to the right holder) provisions would apply (art. 2 (1) of Directive 48/04).

1.3. The issue of jurisdiction

Jurisdiction to try a case on the merits is a component of the right to a fair trial protected by art. 6 par. (1) of the European Convention for Human Rights, as established by the European Court of Human Rights in, among others, *Arlewin v. Sweden*[6].

The court held that "The Court reiterates that Article 6 § 1 secures to everyone the right to have any claim relating to his or her civil rights and obligations brought before a court or tribunal. In this way it embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect (see *Golder v. the United Kingdom*, 21 February 1975, §§ 35-36, Series A no. 18). This right presupposes that the case brought can be tried on its merits" [7] and that any limitations to such "must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved [cit. ommit.]" [8].

Therefore there is an obligation that the state provide possible claimants, pursuant to art. 6 par. (1) of the Convention, with an effective access to court, such not being insured where the alternative would not be "reasonable and practical for the applicant" thereby depriving the claimant from pursuing the "only viable option for an effective examination" of his claim[9].

1.4. Preliminary view

Having regard to the objectives pursued by the enactments aimed at securing means of enforcement of intellectual property rights and the requirement, pursuant to the European Convention on Human Rights, that access to court be insured also by securing a jurisdiction where no reasonable and practical alternative for the claimant exists, it seems that the procedural rules governing the procedures for preliminary relief in Romania ought to secure a very high and wide level of protection for right holders. Given the fact that an obvious component of the high and wide level of protection is access to fast preliminary relief proceedings (such being derived from the provisions of art. 50 TRIPS and preamble 22 of Directive 48/04[10]), this would presuppose, in turn, access to Romanian courts whenever this is the reasonable and practical alternative.

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[4] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, *OJ* L 157/30.04.2004

[5] „The current disparities also lead to a weakening of the substantive law on intellectual property and to a fragmentation of the Internal Market in this field. This causes a loss of confidence in the Internal Market in business circles, with a consequent reduction in investment in innovation and creation. [...] Effective enforcement of the substantive law on intellectual property should be ensured by specific action at Community level. Approximation of the legislation of the Member States in this field is therefore an essential prerequisite for the proper functioning of the Internal Market".

[6] European Court of Human Rights, 3rd ch., case of *Arlewin v. Sweden*, decision of 1 March 2016, Application no. 22302/10;

[7] Par. 66

[8] Par. 67

[9] Par. 73

[10] „It is also essential to provide for provisional measures for the immediate termination of infringements, without awaiting a decision on the substance of the case, while observing the rights of the defence, ensuring the proportionality of the provisional measures as appropriate to the characteristics of the case in question and providing the guarantees needed to cover the costs and the injury caused to the defendant by an unjustified request. Such measures are particularly justified where any delay would cause irreparable harm to the holder of an intellectual property right [emphasis added]".

2. Analysis of the relevant provisions

2.1. The general procedural regime

Directive 48/04 was implemented in Romania by means of Emergency Government Ordinance 100/2005[11] (GEO 100/05) with respect to industrial property rights, while the enforcement regime for copyright and related rights was implemented by means of Emergency Government Ordinance 123/2005[12]. The regime for industrial property rights and copyright and related rights respectively are, for all purposes of the present article, identical and therefore we will refer to both by common reference to GEO 100/05.

Both regmies were subsequently amended pursuant to the adoption of the New Civil Procedure Code and both provide that provisional relief is to be ordered by „the competent judicial court" pursuant to the rules in the Civil Procedure Code relating to provisional measures for the protection of intellectual property rights.

The Code of Civil Procedure (CPC) provides, at art. 978, that the regulations in articles 978 and 979 concern the enforcement of provisional measures for the enforcement of intellectual property rights, irrespective of their content (economic or moral) and irrespective of their source.

The provisions are silent with respect to the jurisdiction for such claims, solely indicating that the measures envisaged by these provisions are to be taken by courts according to the provisions governing the procedure of the presidential ordinance.

In the title dedicated to the procedure of the presidential ordinance, art. 998 of the CPC specifically provides that „the claim for a presidential ordinance shall be filed with the court having first instance jurisdiction over the claim on the merits of the case".

The issue of jurisdiction over claims for preliminary relief for infringement of intellectual property rights seems therefore to be linked to jurisdiction over claims for the (main or on the merits) claims for infringement of intellectual property rights.

2.2. Jurisdiction over the main/merits claim

After some debates in the literature[13] and some uncertainty in the practice of the courts is was clearly established that jurisdiction in first instance for claims of infringement of any intellectual property rights rests with the Tribunals, irrespective of the monetary value of the claim[14].

In terms of the territorial jurisdiction, the CPC provides for the rule that the claim is under the jurisdiction of the court where the defendant is domiciled/headquartered or, alternatively, for claims under tort, the court where the tortious act was committed or the damage has occurred. Several additional rules are applicable where the domicile/headquarter is not known, where the claim concerns acts committed by the subsidiary of a company, where the claim is against a person without legal personality or against a public entity.

The CPC also provides some rules concerning jurisdiction where there is a foreign component to the claim. Romanian courts hold jurisdiction over claims where defendant has in Romania, at the moment of filing of the claim, his/her domicile, usual seat of residence, headquarter, secondary headquarter or goodwill. Romanian courts also hold preferred jurisdiction (absent a convention on the forum) on claims regarding the protection abroad of the intellectual property rights of a natural person domiciled in Romania (either a Romanian citizen or stateless person).

For 'regular' claims for infringement of intellectual property rights therefore, the jurisdiction would rest with the Tribunal at the defendant's headquarter or the Tribunal where the infringement was committed or where the damage has occurred. Within the Tribunals, it is the civil divisions that handle the cases concerning infringement of intellectual property rights (even where the parties are professionals, the jurisdiction rests with the 'purely' civil divisions and not with those handling disputes involving professionals. The Bucharest Tribunal has specialized intellectual property panels within its 'purely' civil divisions.

The High Court has held[15] that territorial jurisdiction ought to be established based on a predictable criterion and therefore the place where the damage has occurred is not mean the place where payment of remunerations for use of copyright was due to the collective management organization. As the CJEU has itself found in Pinkney[16], "in the event of alleged infringement of copyrights protected by the Member State of the court seised, the latter has jurisdiction to hear an action to establish liability brought by the author of a work against a company established in another Member State and which has, in the latter State, reproduced that work on a material

[11] Government Emergency Ordinance no. 100 of 14 July 2005 concerning the Enforcement of Industrial Property rights in *Monitorul Oficial* no. 643/20.07.2005

[12] Government Emergency Ordinance no. 123 of 1 September 2005 for the modification and amendment of Law no. 8/1996 concerning copyright and related rights in *Monitorul Oficial* no. 843/19.09.2005 as amended by Law no. 329 of 14 July 2006 regarding the approval of Government Emergency Ordinance no. 123/2005 for the modification and amendment of Law no. 8/1996 concerning copyright and related rights in *Monitorul Oficial* no. 657/31.07.2006

[13] Gh.-L. Zidaru, „Commentary to art. 95" in V. M. Ciobanu, M. Nicolae (coord.) *Noul cod de procedură civilă comentat și adnotat. Vol. I – art. 1 -526*, Universul Juridic (Bucharest – 2013), p. 282, 278-279

[14] See, for example, Curtea de apel Cluj, s. I civ., decision no. 68 of 14 May 2015, in Curtea de apel Cluj, *Curtea de apel Cluj. Secția I civilă. Decizii relevante trimestrul II 2015*, Înalta Curte de Casație și Justiție, s. I civ., decision no. 3393 of 28 November 2014;

[15] Înalta Curte de Casație și Justiție, s. I civ., decision no. 2571 of 17 November 2015;

[16] CJEU, decision of 3 October 2013, *Peter Pinckney v. KDG Mediatech AG* (C-170/12);

support which is subsequently sold by companies established in a third Member State through an internet site also accessible with the jurisdiction of the court seised" [17]. Such jurisdiction does not mean that the court may order payment of damages for what occurred on a different national market but it may determine the prejudice as for that Member State.

In the same case mentioned above, the High Court has held that since the unauthorized communication to the public of the copyrighted works was undertaken on buses traveling between Bucharest and Vâlcea, these acts are continuous acts of infringement (each or the entire duration of the trip)and are considered to have taken place both in the Vâlcea county and in Bucharest and therefore either of the two Tribunals could assert jurisdiction over the claim of infringement.

2.2. Jurisdiction over the main/merits claim in some special cases

Where the claim concerns infringement of EU rights (EU trademark or EU design), the first instance jurisdiction over the claim is with the Bucharest Tribunal (art. 71 of Law no. 84/1998[18] and art. 47 of Law no. 129/1992[19]).

These national enactments would appear inapplicable due to the fact that their provisions come within the scope of art. 124 of Regulation 1001/2017[20] and art. 81 of Regulation 6/2002.

The latter grant exclusive jurisdiction on the courts designated by Member States as EU Trade Marks Courts and, respectively, Community Design Courts for (i) all claims of infringement (and, where possible, threatened infringement) of such rights, (ii) for actions for declaration of non-infringement of such rights, (iii) for counterclaims for a declaration of invalidity of such rights. Moreover, EU trade mark courts have exclusive jurisdiction on claims for compensation for infringement of provisional rights pursuant to the publication of the EU trade mark application and Community designs courts have exclusive jurisdiction over actions for a declaration of invalidity of an unregistered Community design.

Interestingly, the two Regulations provide that the EU trade mark courts and Community design courts have jurisdiction to decide in respect of infringements or threatened infringements in any Member State except where jurisdiction is asserted due to the infringing act being committed in a certain Member State, in which situation the EU trade mark or Community Design court only has jurisdiction on the infringement or threatened infringement in that Member State (where the court vested with the claim is).

3. Discussion

As mentioned before, the rule is that jurisdiction for the claim for preliminary relief follows jurisdiction for the main (on the merits) claim for infringement.

However, in some situations, given the urgent nature of the preliminary/provisional relief sought, Romanian courts will assert jurisdiction on the preliminary relief claim even where they would be more reluctant to do so in respect of the claim on the merits.

On such situation is encountered in the context of article 1075 of the CPC which provides for the emergency jurisdiction of Romanian courts in matters concerning provisional measures, conservation and enforcement measures concerning persons or goods in Romania at the date of filing, even where the Romanian court would not hold jurisdiction over the case on the merits.

Another situation concerns cases where the main claim for relief would be subject to arbitration (either national or international). The existence of a valid arbitration clause normally excludes the possibility that a court would retain jurisdiction over a claim it has been seised with.

Romanian courts have held[21] that the existence of the arbitration clause seems to exclude even the application of exclusive jurisdiction as provided by the EU Regulations (e.g. for EU trade marks). The court has also established that, even where the jurisdiction over the case on the merits rests with an arbitral tribunal, Romanian courts still have jurisdiction over the claim for provisional measures based on art. 35 of Regulation 1215/2012[22] and the test established by the CJEU's decision in *Van Uden*[23].

References

- Greenhalgh, C. Philips, J. Pitkethly, R. Rogers M. and Tomalin, J., 2010, *Intellectual Property Enforcement in Smaller UK Firms*
- Bently, Lionel Sherman, Brad, 2014, *Intellectual Property Law*, 4th ed., Oxford: Oxford University Press

[17] Idem;

[18] Law no. 84 of 15 April 1998 concerning trademarks and geographical indications, in *Monitorul Oficial* nr. 161/23.04.1998, as subsequently amended;

[19] Law no. 129 of 29 December 1992 concerning the protection of designs and models, in *Monitorul Oficial* nr. 1/8.01.1993, as subsequently amended;

[20] Regulation 2017/1001 of 14 June 2017 on the European Union trade mark in *OJ* L154/16.06.2017;

[21] Curtea de apel București, s. IV civ., decision no. 456 of 11 May 2016;

[22] Regulation 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;

[23] CJEU, decision of 17 November 1998, *Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another.* (C-391/95);

- Stoll, P-T. Busche J and Arend, K., 2009, *WTO – Trade-Related Aspects of Intellectual Property Rights*, Martinus Nijhoff Publishers : Leiden
- Ciobanu, V. M. Nicolae, M. (coord.), 2013,*Noul cod de procedură civilă comentat și adnotat. Vol. I – art. 1 -526*, Bucharest: Universul Juridic

CHALLENGES OF INTERPRETING THE NOTION OF SOFTWARE COPYRIGHTS IN THE CURRENT ECONOMIC AND SOCIO-POLITICAL CONTEXT

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Abstract

Every country has it' s own interpretation and enforcement of copyrights. The challenge is in case of a conflict of interpretations to create a common structure accepted by all parties as a base of mutual understanding and agreement. ESCIA guidelines seek to provide a scalable assessment framework which in turn can be a tool for research and development of structures to deal with the different cultural and social economic circumstances of the different countries / the assessment of which system is dominant is an ongoing, ever-changing debate for which you need the guideline tools to steer the discussion in the right direction which is a challenge on it's own.the digital economy is the most important part of the global economy.The digital transformation of international production requires regulation,governing, investor behaviour. The negative impact of manipulation of data obtained from consumers by global powerfull multinationals is to be considered a major insentive for a rigourus monitorization and regulation of international productions. The diversity of interests, political and finacial, make fair regulations covering all aspects of the situation, extremlely difficult, in addition to the ever chainging parameters governing the subject as such. The complexity of the matter should not prevent an indepth assassement and solution seeking policy.

Keywords: *software, piracy, computer, economic effects, challenges.*

1. Introduction

Intellectual property rights (IPR) are assuming an increasingly important role in international trade, in investment and in economic relations and are valuable commercial assets and a driving force in technological progress leading to increasing competitive capability and resultant empowerment in the international marketplace.

The globalization or universalization or internationalization of trade and economy, and the multilateral rules that most of us have accepted to be bound by, require us to adopt a post approach regarding IPR through close interaction between government, industry and the creative / inventive segment of society.

The international norms and national laws on copyright and related rights, while recognizing that the promotion of creativity and cultural and information production is an important public interest, also take into account other public interests, such as those which relate to the availability to the public of all the information necessary for the participation in social and political activities, public education, scientific and scholarly research, etc. For these purposes, these norms and laws contain appropriate exceptions to and limitations on the rights of copyright and related rights owners.

2. Content

The intellectual property system might play the main role in modern economic policy, and even though a decade ago it was thought that protecting IP rights for software might determine the chances of an economy to recover or to become competitive, the reality we live in proves that society is becoming more and more global, linking people together by their needs and interests and yet still leaving room for national or regional specificity without creating a conflict in between the two areas, but proving that there are natural ways of evolving in your specificity and yet be connected and be a part of the global.

Software industry and IP is increasingly becoming an important tool for sustainable development. Understanding and appreciating the social, cultural and the economic foundations of intellectual property and the copyright system, is a prerequisite for comprehending its increasing importance and role in national strategies for enhancing competition.

In software solutions, intellectual property is not and should not become the end in itself, but a catalyst for accelerating social, cultural and techno-economic growth and development and it's evolution in offering effective protection and use has proven spurs socio-economic growth through providing the necessary incentives for increasing creativity, inventiveness and competitive capability. It is (was) believed that a quality conscious approach towards economic management would generate higher growth and greater

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resources for social programs although this approach might increase the gaps between humans, communities, interests.

Intellectual property comprises creations of human mind, of the human intellect. It consists mainly of two branches, one dealing with industrial property comprising technological inventions, utility models, trademarks for goods and services, industrial designs, etc. and the other being copyright. The existence of such exclusive rights is also the legal basis for contractual arrangements between the creators or the ones developing the idea, on the one hand, and the institutions or entrepreneurs wishing to use those ideas in the manufacturing process, on the other. The recognition of the creator, the protection of his rights and the rights of those who invest in the making of his creations, contributed positively to socio-economic development of a developing country and yet now we can see some of the side effects and forsee possible questionable consequences.

With the extension of this system during the last two decades to the protection of computer software, a considerable size of commercial activity of a country involves use of rights protected by copyright. Until recently, one did not have a real idea as to the extent of the economic dimensions of the copyright or cultural industry. In the last two decades, however, independent surveys and studies in certain industrialized countries have indicated how sizeable the industry is. All these studies indicated the contribution of the copyright or cultural industries to their GNP, in Australia 3.1%; Germany 2.9%; India 5.06%; Netherlands 4.5%; New Zealand 3.2%; Sweden 6.6% (although Jennifer Skilbeek in the economic importance of copyright published by the International Publishers Association places it at 3.16%, which seems more likely); the United Kingdom 3.6%; the United States 3.3% for the core industry and 5.8% for the total copyright including the dependent industry.

Computer software industry is a classic example of what effective intellectual property protection can do to ensure economic growth. Protected as a literary work under copyright law since 1984, the industry has grown to be of the foremost in the world with a compounded growth more than 50% between 1990 and 1997, and is increasingly becoming the driving force in information technology. Exports of software increased from US $225 million in 1992-1993 to US $1760 million in 1997-1998, to US $2650 million in 1998-1999 and up 57% to over US $4 billion in 1999-2000; the projection was that this wioud go up to US $9 billion by 2001-2002, to US $25 billion by 2004-2005 and to US $50 billion by 2007-2008[1] and it was confirmed. By then the country's software industry is expected to earn an annual revenue of US $85 billion. The exports, for example, in 1998-1999 were 61 billion to the USA and North America and 23% to Europe. The compound advantage of the software industry is based on its cost effect world class quality, high reliability and rapid delivery of all of it powered by the state-of-the-art technologies.

China's software industry, has made a substantial contribution to the country's economic development. This industry has created more than 60.000 jobs. The average annual growth rate of the software industry was expected to be 28% in the 5 years, 2000 to 2005. It was also estimated that China will by become one of the world's largest Internet markets and that estimation was confirmed. The number of Internet users in China increased, for example from 2.1 million in 1998 to 8-9 million in 1999. The websites were expected to grow to e-commerce activities and their e-commerce turn over was expected to reach US $1.2 billion by 2002[2].

The digital economy is becoming an ever more important part of the global economy. It offers many new opportunities for inclusive and sustainable development. It also comes with serious policy challenges – starting with the need to bridge the digital divide. Both the opportunities and challenges are top policy priorities for developing countries. The digital economy is fundamentally changing the way firms produce and market goods and services across borders. Digital multinationals can communicate with and sell to customers overseas without the need for much physical investment in foreign markets. Their economic impact on host countries is thus more ethereal and less directly visible in productive capacity generation and job creation. And, today, the digital economy is no longer just about the technology sector and digital firms, it is increasingly about the digitalization of supply chains across all sectors of the global economy. The digital transformation of international production has important implications for investment promotion and facilitation, and for regulations governing investor behavior. Rules designed for the physical economy may need to be reviewed in light of new digital business models. Some countries have already taken steps to modernize policies; others face the risk of letting rules become obsolete or of unintentionally slowing down digital development. Many countries around the world have development strategies for the digital economy. Yet most of these strategies fail to adequately address investment issues. And those that do tend to focus exclusively on investment in telecommunication infrastructure. The investment policy dimension of digital development strategies should be broadened to enabling domestic firms to reap the benefits of digitalization and easier access to global markets. The World Investment Report 2017 makes a cogent argument for a comprehensive investment policy framework for the digital economy. It demonstrates how aligning investment policies with digital development strategies will play a pivotal role in the

[1] Shahid Alikhan, The Role of Copyright in the Cultural and Economic Development of Developing Countries, in Journal of Intellectual Property Rights, 7, 2002, p. 489-505.

[2] Ibidem.

gainful integration of developing countries into the global economy and in a more inclusive and sustainable globalization in the years to come. This is an indelible contribution to the discourse on how to narrow the digital divide and meet the enormous investment challenges of the 2030 agenda on sustainable development[3].

The most attractive industries include services and technology-based activities. The annual parallel survey of IPAs in 2017 provided a ranking of the most promising industries for attracting Foreign Direct Investment in their region. The results for 2017 are broadly in line with responses from past years, with IPAs in developed economies focusing on IT and professional services, while those in developing economies all mention agribusiness among the most attractive industries. Information and communication – which includes telecommunication, data processing and software programming – is emerging as an attractive industry in selected developing regions, confirming that the digital economy is growing in importance beyond developed economies[4].

Of all suppliers of copyrightable works, suppliers of computer software generate by far the greatest added value. Markets for business software and entertainment software (for example video games) are much younger than other copyright industries and as a rule, they have grown rapidly over recent years. Software is also unique because in contrast to literary texts, movies or sound recordings, the market for software has been subject to unauthorized, digital copying for as long as it exists.

In 1980, software has enjoyed copyright protection in the USA, analogous to literary texts. In many other countries, software also falls in the realm of copyright law but enforcement varies, as will be discussed below. In contrast to other types of copyright works, machine-readable software can also be patented if it is accepted as non-obvious (or considered to constitute an 'inventive step' in many European countries). Suppliers of software thus have a choice. Copyright protection concerns the code itself, requires no registration fee, lasts longer and allows for the software itself to remain a trade secret[5]. Patent protection prevents others from putting software with equivalent functions to use, requires complete disclosure, a test of non-obviousness and a registration fee.

There may be a particularly great rift between legal arrangements regarding copyright protection and protection in practice. For example, peer-to-peer file-sharing of copyright works is illegal in most major economies today, but it still occurs on a massive scale. Part of the problem is that in contrast to patents, benefitting from the ideas and works protected by copyrights does not require much expertise or capital. Copyright infringements occur more frequently and often in the private domain, which inhibits effective enforcement of copyright law. This is one reason why most studies on unauthorized, digital copying use measures of copying rather than measures of the strength of copyright law to assess IP protection.

One problem in research on copyright is that most research on innovation has deliberately ignored the types of aesthetic and intellectual innovations covered by copyright law. To be sure, in the copyright industries technical innovations do occur as well. The adoption of new media technologies is a case in point. However, much innovation in the copyright industries concerns the creation of new media content. In order to measure innovation in copyright industries, it is useful to distinguish between more conventional 'humdrum innovation' and 'content creation'. Humdrum innovation concerns all facets of technological innovations and can be assessed with the familiar instruments of empirical research on innovation. 'Content creation' concerns aesthetic and intellectual variations that distinguish different copyright works from each other. To measure content creation, it seems necessary to adapt traditional methods of innovation research. Innovation input is traditionally measured by the size of R&D departments. Regarding content creation, there are two outstanding problems. First, much content creation occurs in relatively small firms and particularly volatile organizational set-ups. Second, content creation is not usually conducted in formally defined R&D departments. Other measures of innovation input are necessary to deal with innovation in small enterprises, with self-employed creators, or with user / amateur innovation that seems to play an important role in the cultural sector (e.g. regarding user-generated content)[6].

Empirical studies concerned with so-called 'piracy' of computer software often deal with copyright and patent infringements at the same time, and the authors rarely bother with this distinction. Many empirical studies on software piracy precede the current interest in copying of other types of copyright works. The bulk of this literature takes a business and management perspective. It is less concerned with social welfare and implications for public policy but with the interests of private business, in particular suppliers of software. Furthermore, in contrast to research on unauthorized, digital copying of recorded music or movies, the extensive literature on software 'piracy' features few original assessments of the impact on sales and rights holder revenues. Estimates of lost sales due to piracy come from software suppliers and their representatives.

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[3] Mukhisa Kituyi, *Foreword*, in *Word Investment Report 2017, Investment and the Digital Economy*, United Nation Conference on Trade and Developement, Geneva, 2017, p. IV.

[4]. *Ibidem*.

[5] Christian Handke, *Economic Effects of Copyright. The Empirical Evidence So Far*, Rotterdam, 2011 p. 8-9.

[6] *Ibidem*, p. 15.

The academic literature mostly discusses piracy rates (the ratio of users utilizing legitimate software and users of pirated software) but does not quantify the likely impact on rights holder revenues. There may be several reasons why academic researchers hesitate to forward estimates of lost sales due to piracy. The rapid rate of product innovation in the industry makes it hard to isolate the effect of unauthorized use on sales. There may have been few sudden and substantial changes in the de facto level of copyright protection for software, which could have been analyzed as natural experiments. Furthermore, the rapid growth of the market for computer software could reduce the concern for sales displacement from piracy[7]. The coincidence of rapid revenue growth, great innovation intensity and extensive piracy seems to have motivated many studies on how network effects may mitigate any adverse effects of piracy[8].

The role the protection of copyright and related rights is above all the promotion literary, musical and artistic creativity, the enrichment of national cultural heritage and the dissemination of cultural and information products to the general public. Such protection offers the indispensable incentives for the creation of new valuable works and for the investment into production and distribution of cultural and information goods. This is done through granting appropriate economic and moral rights to authors, performer, producers and publishers, through establishing adequate framework for the exercise of these rights, and through providing efficient mechanisms, procedures, remedies and sanctions that are necessary for their enforcement in practice.

It was accepted that an efficient and well-balanced system for the protection of copyright and related rights is necessary for the preservation of national culture and identity. Experience shows that for this, it is not sufficient to grant protection to national creators, producers and publishers. Without adequate protection also for them, foreign works and cultural products may inundate the markets of the given country and create a kind of unfair competition for any domestic creations and publications[9]. Yet again, one cannot stop wondering nor question, g iven the today market, how it was possible for the software protection of certain products to motivate and chalenge a fearcefull competition provoked by markets like Vietnam or China.

It is / was accepted and embraced by a large part of the academic community the idea that an appropriate copyright system is also indispensable for the participation of international cultural and economic cooperation. Without this, a country may not be able to attract foreign investment in a number of important fields, and may not get access to certain cultural and information products and services in such an obstacle-free manner as it would be desirable for the acceleration of the social and economic development. Yet, the paradox faced by the economic development for areas that use world heritage inovations to provide alternatoves without trademarks for disproportional law prices that allow the consumers south east Asian markest to benefit of the same technology as western Europe or American markets for sometimes less then 10 percent of the EU or US market price.

The protection of IP is based on many examples to prove that an appropriate, well-balanced copyright regulation may contribute both to the survival and to the success – sometimes spectacular success – of smaller and medium-sized enterprises.

One example is an old story- but the example is from an early period of its history when, on the basis of the present criteria, it still could have been regarded a kind of developing country: the United States of America from the period when it had just obtained its independence and was in the stage of establishing its own economic, social and legal system. As far as copyright was concerned the first idea – which, at the first sight, perhaps seemed to be attractive and clever – was to promote local culture and creativity through granting copyright protection for the works of domestic authors, leaving, however, foreign works – first of all works published in England – unprotected. The results proved to be catastrophic from the viewpoint of what the isolationist approach to copyright was believed to serve. Those publishers – according to our present comparative scale, certainly small or, at least, medium-sized ones – that had chosen to invest in the publication of some still less well-known American authors were unable to compete with the others which achieved easy and safe success by publishing unprotected works of famous and popular English writers and poets without any need whatsoever for bothering with obtaining authorization and paying remuneration to them. The then “SME” publishers supporting local creativity either went bankrupt or changed publishing policy in abandoning their patriotic extravaganza.

Another example is from a developing country, and quite a huge one, which just as a consequence of the success story involved, is emerging as one of the most important players in the field concerned: India. The great success of the Indian software industry has even started its dynamic extension also to the European and U.S. markets (and not only through “exporting” its excellent experts). There is general agreement that, in the success story of the numerous software SMEs of that huge country – some of which, of course, in the meantime, have grown out this category – in addition to certain other factors (such as a well-thought governmental development strategy and an

[7] *Ibidem*, p. 19.
[8] *Ibidem*, p. 19.
[9] Mihály Ficsor, *The Importance of Copyright and Related Rights for Economic Development with Special Reference to the Position of SME'S,* In *Wipo National Seminar On Copyright, Related Rights, And Collective Anagement*, organized by the World Intellectual Property Organization (WIPO) in cooperation with the Ministry of Culture, Khartoum, February 28 to March 2, 2005, p. 2

advantageous educational structure), the early introduction of a well-balanced copyright protection for computer programs played a decisive role.

Another one is from a country which, at the time of the story was still a reluctant member of the group of the so-called socialist countries (although, as the Western press put it, the merriest barrack in the camp), which then happily became a "transition country", and in 2004, became a member of the European Union: Hungary. Copyright protection was recognized in the statutory law (the first time in Europe) in 1983. This alone would not have been sufficient in a so-called socialist country to become the basis for an SMEs success story. By that time, however, certain economic and political changes allowed the establishment of small private enterprises (or sometimes even medium-sized ones). The carrier of the small software houses established in that period became truly a great success story, bringing Hungary into the frontline of software development in Central and Eastern Europe and contributing – along with many other factors – to a smooth transformation of the (ever less) centrally planned economy into a full-fledged market economy.

At the end of the 70's and the beginning of the 80's, there were still a lot of heated debates at the international level on what kind of intellectual property protection might be adequate for computer programs**,** the growing importance of which at that time was becoming evident. During those debates, patent protection – which now, in certain countries, has started a spectacular, although in some aspects controversial, new carrier – was, in general set aside and rejected as a major option. The possibility of a sui generis system was considered more or less seriously (of which still there are some very much articulate arrière-guard advocates), but copyright was emerging as the most ready-made and most easily applicable option. The breakthrough towards copyright as a generally accepted option took place in February 1985, at a meeting organized in Geneva at the WIPO headquarters. It was due to the excellent working paper, to the thorough discussion at the meeting, but also to the existing positive examples to which the working paper had been able to refer. At that time, in addition to some positive developments in the case law of some countries, there were already five countries where statutory law explicitly recognized the copyright protection of computer programs.

It may not be a surprise that the United States of America was among the first five. In the case of that country, the contribution of copyright protection might not be so easily and evidently identified as the single key factor for the enormous success of the software industry, although its important role could hardly be neglected. However, India and Hungary were also among those first five countries, and, in the case of these countries it is easier to identify what kind of impact copyright protection had made.

Yet again, one cannot ignore the history and the lessons that past times emphasize: the main basis and premises for some of the national economies to emerge was, at least at a certain point, the ability to use freely, without financial restraints, the world heritage of the best creation of human kind. My wonder: how will the evolution of the world software development is going to be influenced by the lack of reglementation / zero recognition for IP on markets like east south Asian markets. Furthermore: is it possible that overprotective regulations that focus on the software's author s financial rights might turn into a subtle, masked brake for triggering the creativity and the evolution from public usage? And how well is the example of decompilation of computer programs is actually being taken seriously.

There is no need to elaborate on some very well known examples where the breathtaking success of certain software enterprises – which at the beginning were born even not just as small or medium-sized ones but as micro-enterprises – has led. They have obtained quite an extensive market dominance with the possibility of their proprietary products obtaining the status of de facto world-wide standards relegating by this their potential competitors (among them all software SMEs) into the depending status of simple clients.

This evolving scenario was recognized and duly taken into account in the European Community in the framework of the preparation and adoption of the directive on the legal protection of computer programs. The directive (Council Directive No. 91/250/EEC of 14 May 1991) contains certain provisions to protect users of computer programs against the dangers of overprotection in favor of software developers: such as the ones guaranteeing for the lawful owners of copies of computer programs to be able to use it for the intended purpose, including error protection (Article 5(1)), to make back-up copies (Article 5(2)) and to observe, study or test the functioning of the program in order to determine the ideas and principles underlining any element of the program (Article 5(3)).The latter provision has already quite a substantial relevance also for the possible competitors – among them many small medium enterprises – in the software markets. However, what is particularly important for them – especially for the more vulnerable SME's of the field – is the regulation of the issue of "reverse engineering" or "decompilation" of programs in Article 6 of the directive. This regulation became necessary in order to eliminate the possibility of some anti-competitive practices of owners of certain widely used computer programs based on the exclusive right of reproduction and / or the exclusive right of adaptation (and translation) granted to them by Article 4 of the directive. In the absence of an appropriate regulation, owners of rights in such programs would have been able to prohibit the transformation of the programs (only made available by them in object code form) into source code form (this transformation is called "decompilation" – or "reverse engineering" of the program). And without such decompilation, the potential competitors would not have been able to develop and make any computer programs that would have been able to function together –

"interoperate" – with the existing and widely used, quasi standard programs. Such a consequence would have been, of course, particularly disastrous for SMEs of the software development sector. The regulation was not easy. There was quite an important resistance against any specific rules authorizing decompilation, since some major software houses were afraid that the new norms may be used also for simple piratical activities. It seems, however, that the provisions in Article 6 of the directive have established an appropriate balance between conflicting legitimate interests and eliminated the possible dangers as much as possible. The said Article of the directive provides that the authorization of the rightholder is not required where reproduction of the code and "translation" of its form are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, provided that certain conditions are met. These conditions serve as guarantees that the limited freedom granted in this field does not prejudice the legitimate interests of owners of rights. The conditions are as follows: (a) these acts are performed by the licensee or by another person having a right to use a copy of a program, or on their behalf by a person authorized to do so; (b) the information necessary to achieve interoperability has not previously been readily available; (c) these acts are confined to the parts of the original program which are necessary to achieve interoperability; (d) the information obtained must not be used for goals other than to achieve the interoperability of the independently created computer program; (e) it must not be given to others except when necessary for the interoperability of the independently created computer program; and (f) must not be used for the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright[10].

It was proven that software piracy determined economic development. Most leading studies on software piracy are cross-sectional or panel studies with countries (or US states) as the unit of analysis: there were explored explanations for different piracy rates for business software, there were resoults that suggested highly developed countries exhibit lower piracy rates, there were conclusions stating inverse relationship between development and the extent of software piracy as well.

Next to income / economic development, the literature discusses a number of other factors determining software piracy, like the fact that culture that puts greater emphasis on individualism rather than collectivism correlates with less business software piracy . Also, it was stated that various indicators of the strength of the legal and judicial system are associated with less piracy.

While dealing with official, secondary data is usually considered to be preferable among economists, existing data does not address many specific phenomena related to unauthorized copying. Surveybased studies on the determinants of software piracy confirm that increasing retail prices are associated with greater piracy rates, consistent with what economic theory predicts for relative prices of close substitutes. Unauthorized copies seem to be inferior goods in the sense that demand for them decreases with wealth. Also, it was concluded that the type of education mattered.

It seems clear enough that unauthorized copying occurs in part because of financial incentives. With access to some widely diffused ICT, the pecuniary costs of acquiring an unauthorized copy are usually much lower than retail prices[11].

Unauthorized copies are no perfect substitutes for authorized copies, however, in software domain, it might be that the quality of the the unauthorized copy is just as good as the original. Also, decompliation and the ability to modify, adapt a nd improve a software might have better consequences for the consumer

3. Conclusions

This well-balanced and precise regulation *has made it possible* – not only in the European Community but also in other countries where this model has been taken over and applied – *for software-developers to continue and extend their creative activities with a chance to succeed***,** and many of them have used this opportunity with great efficiency. The big chalenge is still to be ruled by the free market, a natural consequence of globalization, and that will still provoke major debates with no certain forseeble effects on software intellectual property rights.

References

- Shahid Alikhan, The Role Of Copyright In The Cultural And Economic Development Of Developing Countries, in Journal Of Intellectual Property Rights, 7, 2002, p. 489-505
- Mukhisa Kituyi, Foreword, in Word Investment Report 2017, Investment and the Digital Economy, United Nation Conference on Trade and Developement, Geneva, 2017
- Christian Handke, Economic Effects of Copyright. The Empirical Evidence so Far, Rotterdam, 2011
- Mihály Ficsor, The Importance of Copyright and Related Rights for Economic Development with Special Reference to the Position of Sme's, in Wipo National Seminar on Copyright, Related Rights, and Collective Anagement, organized by the World Intellectual Property Organization (WIPO) in Cooperation with the Ministry of Culture, Khartoum, February 28 to March 2, 2005;

[10] *Ibidem*, p. 5-6.
[11] Christian Handke, *op. cit.*

REGISTERED vs. UNREGISTERED TRADE MARKS IN THE EUROPEAN UNION

George-Mihai IRIMESCU[*]

Abstract

This paper aims at analyzing the possibilities of protection of unregistered trademarks in the European Union. Although the European legislation mainly focuses on the protection of registered trademarks, specific provisions provide for the opposabiity of unregistered trademarks that are protected according to the national legislation. The first chapter analyzes the relevant legal provisions, highlighting the European legislator's approach with respect to the protection of unregistered trademarks, from the perspective of the applicable regulations and directives. Then, the main provisions regarding the opposability of national unregistered marks at European level and the conditions they have to meet are also analyzed, also reviewing the relevant case-law. The paper focuses on fulfilling the condition of use, which must meet both the criteria set by the national legistaion and the „Europena criteria". The notion of „use in the course of trade" is also analysed from the perspective of the applicable case-law. Moving further, the article continues with short considerations on the opposability of well-known trademarks at European level, and, more specifically, regarding the opposability of unregistered trademarks by Romanian holders. Last but not least, the protection of trademarks with reputation is briefly analysed. In conclusion, the paper raises the question wether protection of European unregistred trademarks should concern the European legislator in future amendment of the EU Trade Mark Regulation.

1. The European legal provisions

Regarding the current provisions established at EU level, the trademark protection system implemented is undoubtedly the first-to-file system.

However, the European legislator's optics introduced with the new regulation on the European Union trade mark seems to have mitigated the categorical approach set up under the previous legal provisions.

Thus, Article 7 of the preamble of the Council Regulation (EC) No. 207/2009 of 26 February 2009 on the Community trade mark (hereinafter „Community trade mark regulation") ha the following content: „ *The rights in a Community trade mark should not be obtained otherwise than by registration, and registration should be refused in particular if the trade mark is not distinctive, if it is unlawful or if it conflicts with earlier rights*"[1]. Such a rule expressly excluded the existence of a possible 'unregistered Community trade mark' which could confer exclusive rights to its proprietor. However, the Community trade mark regulation does not suppress the rights of Member States to confer trade mark rights in a manner other than registration, Article 6 of the preamble having the following content: „*(...) The Community law relating to trade marks nevertheless does not replace the laws of the Member States on trade marks (...)*[2]". The main purpose of this article is not imposing the obligation of registration of a Community trade mark if the economic needs of the proprietor impose only the registration of a (or some) national trade mark(s): „*It would not in fact appear to be justified to require undertakings to apply for registration of their trade marks as Community trade marks. National trade marks continue to be necessary for those undertakings which do not want protection of their trade marks at Community level*[3]". However, at least indirectly, the first sentence of this article allows Member States to grant trade mark rights under their own legislation, including allowing acquiring of rights in unregistered trade marks. This is also relevant for the registration of European trade marks, since the rights acquired under national laws in the Member States may be opposed to the registration of such marks, as will be further detailed.

As regards the new legal provisions, Article 9 of the preamble of the Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (hereinafter the EU trade mark regulation) establishes that „*The rights in an EU trade mark should not be obtained otherwise than by registration, and registration should be refused in particular if the trade mark is not distinctive, if it is unlawful or if it conflicts with earlier rights*"[4]. Permissibility with regard to the possibility for Member States to grant trade mark rights under their own legislation is also maintained in the new regulation, in Articles 7-8 of the preamble: „*The Union law relating to trade marks nevertheless does not replace the laws of the Member States on trade marks. It would not in fact appear to be justified to require undertakings to apply for registration of their trade marks as EU trade marks (...). National trade marks continue to be necessary for those undertakings which do not want protection of their trade marks at Union level, or which are unable to obtain Union-wide protection while national protection does not face any*

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[1] Article 7 of the Preamble of 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;

[2] *Idem*, article 6;

[3] *Idem*;

[4] Article 9 of the preamble of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, published in OJ from June 16, 2017;

obstacles. It should be left to each person seeking trade mark protection to decide whether the protection is sought only as a national trade mark in one or more Member States, or only as an EU trade mark, or both"[5].

However, „UE trade marks" are still defined in relation to the registration procedure, as being „*A trade mark for goods or services which is registered in accordance with the conditions contained in this Regulation (...)*"[6], while Article 6 states that „*An EU trade mark shall be obtained by registration*"[7]. Therefore, the provisions of the preamble remain only provisions in principle that could eventually pave the way for discussion of accepting the notion of "European unregistered trademark" in a future amendment of the European trade mark regulation.

As regards the harmonization of the legislations of the Member States through directives, the evolution of the legal provisions followed the same approach. Thus, the recently repealed directive, namely Directive No. 2008/95/EC of the European Parliament and the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (hereinafter „The old directive") provided in Articles 4 and 5 of its preamble the following: „ *It does not appear to be necessary to undertake full-scale approximation of the trade mark laws of the Member States. It will be sufficient if approximation is limited to those national provisions of law which most directly affect the functioning of the internal market.*"; „ *This Directive should not deprive the Member States of the right to continue to protect trade marks acquired through use but should take them into account only in regard to the relationship between them and trade marks acquired by registration*"[8]. This directive therefore has a neutral position on the protection of unregistered trade marks by the Member States. The Directive neither establishes the obligation to accept unregistered trade marks by Member States nor does it suppress this right. Thus, the Directive did not intend to harmonize the national legislations with respect to unregistered marks, probably considering that that such harmonization does not *directly affect the functioning of the internal market*. Keeping the same neutral approach, the directive continues: „ *This Directive should not exclude the application to trade marks of provisions of law of the Member States other than trade mark law, such as the provisions relating to unfair competition, civil liability or consumer protection*"[9]. The provisions on unfair competition are, in turn, relevant in the matter of unregistered trade marks.

Although the new directive has been adopted to narrow the discrepancies between Member States' legislative provisions, it maintains a similar approach. Directive (EU) 2015/2436 of the European Parliament bad of the Council of 16 December 2015vto approximate the laws of the Member States relating to trade marks (hereinafter „The new directive") states that „*This Directive should not deprive the Member States of the right to continue to protect trade marks acquired through use but should take them into account only with regard to their relationship with trade marks acquired by registration*"[10]. Further, Article 40 of the preamble states that „ *This Directive should not exclude the application to trade marks of provisions of law of the Member States other than trade mark law, such as provisions relating to unfair competition, civil liability or consumer protection*"[11], keeping the provisions of the repealed directive.

In conclusion, the Member States remain free to decide on the grant of rights to unregistered trade marks, while European regulations is limited to establishing the relationship between those rights and those obtained through registration.

Thus, there are situations, regulated as exceptions, where rights deriving from unregistered trademarks may represent obstacles to the registration of a subsequent European marks, as we will be shown below.

2. Protection of unregistered trademarks under Article 8 (4) of the European Trade Mark Regulation

The main exception under the European Trade Mark Regulation, which confers protection on unregistered rights, reads as follows:

„ 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 Union legislation or the law of the Member State governing that sign:

a) 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;
b) that sign confers on its proprietor the right to prohibit the use of a subsequent trade mark."[12]

[5] *Idem*, art. 7-8 of the preamble;
[6] *Idem*, art. (1) para. (1);
[7] *Idem*, art. (6);
[8] Articles 4 and 5 of the preamble 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;
[9] *Idem*, art. 7 of the preamble;
[10] Artile 11 of the preamble 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;
[11] *Idem*, art. 40 of the preamble;
[12] Article 8 para. (4) of the Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, published in OJ from June 16, 2017;

This legal provision is completed by the provisions of Article 60, which reads as follows:

An EU trade mark shall be declared invalid on application to the Office or on the basis of a counterclaim in infringement proceedings:

(…)

(c) where there is an earlier right as referred to in Article 8(4) and the conditions set out in that paragraph are fulfilled[13]*;*

The existence of the above articles is the result of the fact that the European trade mark system was designed to coexist with national trade mark systems. Such coexistence cannot not imply respecting the priority of prior rights acquired by a holder, irrespective of whether that right has been acquired at national or European level. Thus, even if the European legislator chose not to regulate the existence of unregistered European marks (not even of well-known European marks), he can not ignore the regulation in various forms in the Member States of the European Union of the protection granted to such marks .

In relation to the system of protection of European trade marks, the doctrine stated that although this system is classified as an international one, it differs significantly from other international systems such as the Madrid Arrangement and Protocol, being closer to a national system, as it implies filing an application for a trade mark before an office in order to obtain registration under the applicability of a set of laws, rules and procedures. According to the quoted authord, the only difference from a national office is that this jurisdiction covers a collectivity of states, namely the Member States of the European Union, and not a single state[14].

Regarding the coexistence of the two trade mark protection systems (namely the European and national systems), we wish to make the following specification. In the light of the European regulations, the proprietor of a trade mark filed before the Alicante Office, which has received an opposition on the basis of an unregistered national mark, has the possibility to continue the registration procedure before other national offices (of any of the other Member States of the Union European), keeping the filing date of the European mark originally filed. This system of conversion of the European mark into national marks takes into account the fact that, although the registration conditions of the marks are, in principle, harmonized at the level of the Member States, there are still sufficient differences which could, for example, allow the registration of a mark at the level of the national jurisdictions but not at European level, or vice versa[15]. We are of the opinion that the same logic subscribes to the possibility of registering a mark in the other Member States of the Union after it has been rejected fllowing an opposition based on an unregistered mark valid in a Member State. Although the European system is regarded as covering a unitary jurisdiction, namely the European Union, the unitary character of the European mark being one of the basic principles of the relevant legislation, it should be remembered that, if there is a barrier to registration deriving from a single Member State, it would be inequitable for the proprietor of the trade mark not to have the possibility to continue the registration procedures in the other Member States of the European Union, keeping the filing date of the European mark. Thus, the European system is weighted and balanced by national systems, as long as there is no complete harmonization at European level of Member States' trademark law with respect to trademark protection. Moreover, as stated above in the preamble to the European trade Mark regulation „*National trade marks continue to be necessary for those undertakings which (…) are unable to obtain Union-wide protection while national protection does not face any obstacles*[16]".

Consequently, these provisions are intended to balance European provisions with the national ones, giving effect to national rules protecting unregistered trade marks, but adding its own criteria for their applicability, as will be seen below.

Returning to Article 8 (4) of the European trade mark regulation, several conclusions can be drawn from the economy of these legislative provisions. First, the procedural framework in which rights relating to an unregistered sign can be invoked is clearly delimited in opposition proceedings, cancellation actions and counterclaims in infringement proceedings. It follows from the strict analysis of these provisions that the rights deriving from the use of a sign in compliance with the conditions of Article 8 cannot be invoked in a direct infringement action at European Union level. These may, however, be invoked to put an end to the use of a later European trademark at national level, as further detailed in this article.

Also, for a complete analysis of the proceedings before the EU IPO, we mention that the proprietor of such a sign can bring both a cancellation action based on absolute grounds and an action for revocation of a trade mark on the grounds of non-use. This is possible because filing these actions does not involve the justification of any earlier rights of the party who initiates them, nor the justification of an interest, as is the case before the national courts, according to the relevant civil legislation. In this respect, for example, the EU IPO Guidelines provide the following: „*As regards applications for revocation or for invalidity based on absolute grounds, the applicant does not need to demonstrate an interest in bringing proceedings (…).This is because, while relative grounds for*

[13] *Idem*, art. 60 para. (1);

[14] Tina Hart, Linda Fazzani, Simon Clark, *Intellectual Property Law*, Ediția a 4-a, Palgrave Macmillan, Londra, 2006, pages 153 – 154;

[15] *Idem*, pages 154-155;

[16] *Idem*, art. 8 of the Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, published in OJ from June 16, 2017;

invalidity protect the interests of proprietors of certain earlier rights, the absolute grounds for invalidity and for revocation aim to protect the general interest (including, in the case of revocations based on lack of use, the general interest in revoking the registration of trade marks that do not satisfy the use requirement)"[17].

As regards the conditions for the applicability of Article 8 (4), one of the essential conditions is that the use of the sign "*more than mere local significance*". Therefore, although it is necessary, it is not sufficient for the unregistered trade mark to enjoy protection under national law. Thus, according to established case-law, the evaluation of the use of the sign is subject to a dual system, both from the point of view of the applicable national legislation and the criteria established at European level: „ *In order to successfully invoke Article 8(4) EUTMR in opposition proceedings, the earlier rights must be used. There are two different use requirement standards which must be taken into account: • national standard • European standard. The two use requirement standards, however, clearly overlap. They must not be viewed in isolation but have to be assessed together. This applies, in particular, to the 'intensity of use' under the national standard and 'use in trade of more than mere local significance' under the European standard*"[18].

However, we consider that the explanations provided by the EU IPO Guidelines do not provide a clear explanation of those aspects of use for which the national filter is applied and those for which the European standard is being analyzed. The concept of 'intensity' of use is very broad, which may include territorial or temporal variables or the market-share of the goods / services designated by the mark in question. On the other hand, there is no doubt that the notion of '*use in trade of more than mere local significance*' implies an analysis of the intensity of use of the opposed mark.

However, in order to determine the notion of "*use in the course of trade*", the European case law has laid down several criteria. The European Court of Justice held that the meaning of the phrase "*use in the course of trade*" should not have the same meaning as "serious use" within the meaning of the provisions on proof of use which may be sought in opposition proceedings or a revocation action[19].

Instead, the European Court of Justice has established other criteria for determining use in accordance with Article 8. Thus, the European Court of Justice has held that the '*use in the course of trade*' refers to the use of the sign '*in the course of a commercial activity with a view to economic advantage and not as a private matter*". In the cited case, Mr. Reed, supporter of the Arsenal football club in London, has sold unofficial souvenirs that have been bearing the sport club's signs for more than 30 years. In April 2001, Mr. Reed convinced the national judge that, when he used it on replicas and other commodities, the Arsenal name did not function as a trade mark in the traditional sense, as the ARSENAL trademark did inform to the buyers on where the goods came from. The ARSENAL mark served only as a "sign of support, loyalty or affiliation." Since the law provides protection to trade mark owners to prevent consumers from misrepresenting the origin of the products, Mr. Reed argued that the use of Arsenal marks, which did not distort the place of origin of the goods, was lawful. However, the European Court of Justice has stated that the use of Mr. Reed's Arsenal brand was likely to give the impression that there is a material link between his replica products and the Arsenal club. The defendant argued that there could be no such link because the sign displayed above his stand informed the buyers that the goods are unofficial, but the Court of Justice held that when these products are seen by third parties away from its stand, those third parties would not know that the products are unofficial and would assume the opposite. In that context, the Court has established in that decision the scope of the concept of '*use in the course of trade*'[20], having as reference rather the identification function of the mark.

An interesting aspect highlighted by the doctrine about the Arsenal case is that the European Court did not use as criterion the well-known phrase "use as a trademark". On the contrary, the court has approached a very generous view of the types of use which, in that context, could have adversely affected the essential functions of the trade mark, namely to guarantee the commercial origin of the products to which it was applied[21].

Further analyzing the conditions for the applicability of Article 8 (4), concerning the period of use, the Court of Justice held that the opponent must show that the use of the opposed mark took place prior to the filing of the trade mark application against which the opposition was filed, or its priority date. Although such a conclusion seems prima facie obvious, it occurred in the context where the Court has dealt with whether the use of an unregistered mark made exclusively or to a large extent between the filing of the application and its publication is sufficient to satisfy the requirement of its use. To this end, the Court concluded that such use „*will not be sufficient to establish that the use of the sign in the course of trade has been such as*

[17] Guidelines for Examination of European Union trade marks, European Union Intellectual Property Office, (EUIPO), Part D, Cancellation, Section 1, Proceedings; page 4;

[18] Examination of European Union trade marks, European Union Intellectual Property Office, (EUIPO), Part C, Opposition, Section 4, Rights under article 8(4) and 8(6) EUTMR; page 16;

[19] Judgment of the General Court (Seventh Chamber) of 30 September 2010, Granuband BV v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), para 24-27;

[20] Judgment of the Court of 12 November 2002, Arsenal Football Club plc v Matthew Reed, para. 12-40;

[21] Jeremy Phillips, Ilanah Simon, *Trade Mark Use*, Oxford University Press, New York, 2005, pages 170 – 171;

to prove that the sign is of sufficient significance"[22]. Although the time elapsed between the filing of a trade mark application and its publication may be considerable, the Court has held that only use prior to the date of filing of the application can guarantee that the use was real and not only for the purpose of challenging the new mark[23].

Moreover, according to the applicable case-law, the use must be continued until the time of filing the opposition or the cancellation action. In that regard, in one of the decisions of the Cancellation Division of the EU IPO (at that time, OHIM), the Commission stated that, by analogy with the requirement that an earlier mark be still valid or renewed at the time of the filing the cancellation, the same condition must also apply to unregistered marks. As long as the use of these marks is the premise (in fact) justifying their existence, the same premise must be proven and exist at the time of filing the opposition or the cancellation action[24].

Another condition set for the by the analyzed article of the European trade mark regulation is that the use of the mark should be mere than local. This is a condition that adds to any requirements set under national law. For this reason, we consider that, if the use of a sign at a local level confers rights under national law, this use will not automatically confer rights also at European level. In assessing whether that condition has been fulfilled, the case-law has laid down a number of criteria in order to prevent, according to the Court, that *„an earlier sign, which is not sufficiently important or significant, from making it possible to challenge either the registration or the validity of a Community trade mark*". Also, according to the cited decision, although there are no clear territorial delimitation standards to meet the requirement to overcome local use of the sign, it is normally the use in one town or in a single province, it should not be enough[25].

„Furthermore, the significance of a sign used to identify specific business activities must be established in relation to the identifying function of that sign. That consideration means that account must be taken, first, of the geographical dimension of the sign's significance, that is to say of the territory in which it is used to identify its proprietor's economic activity, as is apparent from a textual interpretation of Article 8(4) of Regulation No 40/94. Account must be taken, secondly, of the economic dimension of the sign's significance, which is assessed in the light of the length of time for which it has fulfilled its function in the course of trade and the degree to which it has been used, of the group of addressees among which the sign in question has become known as a distinctive element, namely consumers, competitors or even suppliers, or even of the exposure given to the sign, for example, through advertising or on the internet"[26].

Therefore, the fact that the use must go beyond the local sphere requires both a territorial, geographical interpretation, as well as a qualitative, active interpretation, representing the economic relevance of this use. More than a mere geographical examination of this use, it is necessary to examine the intensity of use, which can be translated, for example, by the market share of the products / services designated by that mark or, in other words, the economic dimension of this use.

As mentioned above, as regards the territorial dimension, the same decision shows that the use of the mark within a single town, even of a large size, without showing that the relevant public outside that territory could have had contact with the mark, is not sufficient for the purposes of Article 8 (4) of the Regulation[27].

The doctrine emphasized that the purpose of these provisions is to prevent a person from opposing the registration of a European trade mark on the basis of a right which does not have a real presence on the relevant market. For this reason, the role of the jurisprudence has been to determine how proof of use of the opposing mark is to be analyzed in each conflict[28].

However, although an exclusively local use of a sign cannot be opposed to the registration of a European trade mark, it may be opposed to the use of that sign in that territory. We take into account the provisions of Article 136 of the Regulation, which reads as follows: „*The proprietor of an earlier right which only applies to a particular locality may oppose the use of the EU trade mark in the territory where his right is protected in so far as the law of the Member State concerned so permits*"[29].

We understand from the economy of this text that the application of a European standard on the use of the opposed mark is no longer necessary. The following article penalizes the passivity of the holder of the earlier right, since he will no longer be able to oppose such use if he has tolerated for 5 years the use of the European mark in that territory. However, the proprietor of the European trade mark cannot oppose the use of this right[30], thereby creating the premises of forced coexistence, which has as reason both respecting the rights acquired locally under national law and the rights

[22] Judgment of the Court (Grand Chamber) of 29 March 2011, Anheuser-Busch Inc. v Budějovický Budvar, národní podnik, para. 166-168;
[23] *Idem*;
[24] Decision of the Cancellation Division of July 30, 2010 in the proceedings between Dimian AG v. Bayer Design Fritz Bayer, page 6;
[25] Judgment of the Court of First Instance (Second Chamber) of 24 March 2009, Alberto Jorge Moreira da Fonseca, Lda v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), para. 36-42;
[26] *Idem*, para. 37;
[27] *Idem*, para. 44;
[28] Lionel Bently, Brad Sherman, *Intellectual Property Law*, 4th Edition, Oxford University Press, Oxford, 2014, pages 1012 – 1013;
[29] Article 138 alin. (1) of the Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, published in OJ from June 16, 2017;
[30] *Idem*, art. 138 para. (2) and (3);

acquired by virtue of the registration of a trade mark at European level.

The doctrine names these provisions as the 'Emmental' provisions, given that the proprietor of an earlier unregistered mark may choose not to oppose the registration of a European mark but may oppose its use in the territory of that state. According to the author, the European mark is valid in the territory of the other Member States, except in the territory covered by the earlier unregistered trade mark, "like a piece of cheese with holes"[31].

However, we believe that it would be more rigorous to assert about the European mark, although valid at European Union level, as the principle of its uniqueness cannot be formally infringed, that its validity is either devoid of content or neutralized by the action of the proprietor of the earlier unregistered trade mark.

Another reason for the existence of these provisions identified by the doctrine is the expansion of the European Union from 15 states to 28 in the year 2013. These rules are therefore a protection offered to holders of unregistered trade marks of newly admitted Member States (if such marks are protected under national law) in the face of a "devastating" effect of the automatic extension of the protection of European trademarks to these new territories[32]. We consider that this reasoning justifies the exclusive application of the national standard relating to the use of the opposed mark, since what is protected is the interest of such a proprietor who is in a position to defend himself against a new mark valid on his territory and the legislation subsequent to his use, which it could not have foreseen when it began to use its mark.

To sum up, the national provisions providing for the protection of the sign, the requirements to obtain such protection, the existence of a right to the sign, if the right has been validly acquired (e.g. by use), the legal protection condition (for example in case of misuse, use of identical or similar signs, likelihood of confusion), the scope of protection (the right to prohibit use, etc.) are elements that must be demonstrated under national law, whereas the commercial use of the sign and the demonstration of the incidence of more than mere local significance are elements that are analyzed according to the "European standard"[33].

It is also very important that the opponent is required to demonstrate before the European office that the unregistered marks are protected under national law. In this respect, the "BUD judgment" established that in this respect the burden of proving that this condition had been fulfilled lies with the opponent before the EU IPO. „*(...) the General Court allegedly made an error there in holding that, in the present case, the Board of Appeal was required to acquaint itself of its own motion with the outcome of proceedings brought by Budvar before the Oberster Gerichtshof, the court of last instance in Austria, against a judgment whose consequence was that Budvar had not been able to prohibit use of a subsequent trade mark on the basis of the appellation 'Bud' as protected under the relevant bilateral treaties. Furthermore, (...),the burden of proving that that condition is met lies with the opponent before OHIM. Under these circumstances and regarding the previous rights invoked in the matter, the General Court correctly held (...) that regard must be had, in particular, to the national rules advanced in support of the opposition and to the judicial decisions delivered in the Member State concerned and that, on that basis, the opponent must establish that the sign concerned falls within the scope of the law of the Member State relied on and that it allows use of a subsequent mark to be prohibited*"[34].

Further on, the case „Elio Fiorucci" establishes that the opponent has the burden to „ *to provide OHIM not only with particulars showing that he satisfies the necessary conditions, in accordance with the national law of which he is seeking application, in order to be able to have the use of a Community trade mark prohibited by virtue of an earlier right, but also particulars establishing the content of that law*"[35].

Consequently, the opponent is required to submit a complex line of argument by which he must show to the Office the content of the national legislation and also to argue that the invoked legal provisions give him the right to oppose an unregistered national mark.

3. Protection of well-known trademarks according to Article 8 para. (2) letter. c) of the European Union trade mark regulation

A second exception is the opposability of trade marks that are well known at national level. While listing the prior rights that can be invoked in an opposition, The European Union trade mark regulation provides that „*For the purposes of paragraph 1, 'earlier trade mark' means: (...) (c) trade marks which, on the date of application for registration of the EU trade mark, or, where appropriate, of the priority claimed in respect of the application for registration of the EU trade mark, are well known in a Member State,*

[31] Hector MacQueen, Charlotte Waelde, Gramae Laurie, *Contemporary Intellectual Property, Law and Policy*, Oxford University Press, Oxford, 2008, page 554;

[32] Lionel Bently, Brad Sherman, op. cit., 4th Edition, Oxford University Press, Oxford, 2014, p. 1076;

[33] Examination of European Union trade marks, European Union Intellectual Property Office, (EUIPO), Part C, Opposition, Section 4, Rights under article 8(4) and 8(6) EUTMR; page 27;

[34] Judgment of the Court (Grand Chamber) of 29 March 2011, Anheuser-Busch Inc. v Budějovický Budvar, národní podnik, para. 187-190.

[35] Judgment of the Court (Grand Chamber) of 5 July 2011, Edwin Co. Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), para. 50

in the sense in which the words 'well known' are used in Article 6bis of the Paris Convention"[36].

From the economy of this text we understand that this legal provision does not regulate a well-known European trade mark, but only refers to the protection of well-known trade marks in a particular Member State of the European Union.

However, there are substantial differences from the previously analyzed legal provisions. Firstly, the opponent is no longer required toprove the national legislation protecting the well-known marks. Moreover, it is presumed that Member States protect well known trade marks in their own legislation, since the Directive aimed at approximating and harmonizing Member States' legislations requires them to protect well-known under the Paris Convention[37].

Therefore, by analyzing the legal text, the opponent or the applicant in a cancellation action is required to indicate the mark whose well known status he is going to demonstrate and also to indicate the goods and / or services for which it is well-known and the Member State in which the well-known status is invoked.

Regarding the intensity of use to be demonstrated, the applicable legal provisions do not regulate this issue. As far as case-law is concerned, it offers a wide range of possibilities to demonstrate the well-known status of a mark: „*In order to determine the mark's level of recognition, all the relevant facts of the case must be taken into consideration, including, in particular, the market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investment made by the undertaking in promoting it*[38]".

4. Is it possible to file an opposition based on an unregistered trademark used in Romania?[39]

To establish if Romania unregistered trademarks could be opposed to the registration of an European trade mark, it must first be established to what extent unregistered marks are protected at national level.

Without going into detail, one of the main exceptions to the principle of the first to file system, set out in the national legislation, is the protection of well-known trade marks.

To this end, Article 6 para. (1) letters a) and b) from the *Trade marks law*, coroborated with para. (2) letters f) have the following content: *registration of a trademark shall also be refused or shall be susceptible to being cancelled, as the case may be, if it is identical with an earlier trademark, and the goods and services for which registration is applied or the trademark has been registered are identical with the goods and services for which the earlier trademark is protected or if, because of its identity with or similarity to the earlier trademark and because of identity or similarity of the goods or services covered by the two trademarks, there exists a likelihood of confusion in the public perception, the likelihood of association with the earlier trademark included*. Para. 2 establishes that the category of prior marks, in the sense of para. 1, comprises marks that, at the filing date of the trademark application or, as the case may be, at the date of the invoked priority, are well known in Romania, in the sense of art. 6 bis of the Paris ConventionAlin. (2)[40].

The doctrine considers that obtaining the rights for a trademark through proving its well known status has the same effects as registration thereof. 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[41].

Further on the conditions of protection, is the likelihood of confusion a condition for successfully opposing a well known mark? Without going into discussions on the national legislative developments, at this moment, the amendment of the Trade Marks Law in 2010 has, however, led to the amendment of the article on the opposability of the well known trademark, making, like the Directive, a reference to Art. 6bis of the Paris Convention. We therefore consider that arguing of the likelihood of confusion, including the risk of association, became a condition for succesfully opposing a well known trademark, taking into consideration as a relevant factor in the overall assessment of the likelihood of confusion the fact that a higher degree of distinctive character favors the likelihood of confusion, including the likelihood of association.

Moreover, the same conclusion can be drawn from the legislative technique used by the legislator. Thus the well known mark substitutes the notion of prior mark in the sense of art. 6 letter b) of the *Trademark Law*, which is the article that imposes the likelihood of confusion as an essential condition for

[36] Article 8 para. (2) letter c) of the Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, published in OJ from June 16, 2017;

[37] Article 5 para. (2) letter d) 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;

[38] Decision of the EU IPO Opposition Division in the matter B 2 752 866 of October 13, 2017, regarding the trademark between the trademarks ARIA vs. ARIA, page 3;

[39] A detailed analysis of the protection of well-known trademarks, as well as passages of this chapter were published in the Romanian Intellectual Property Law Magazine, no. 2 / 2016, in the article *Regimul juridic al mărilor notorii*, George-Mihai Irimescu, pages 139 – 154;

[40] Article 6 para. (1) letters a) and b) and para. (2) letter. f) of Law no. 84 / 1998 regarding Trademarks and Geographical Indications, republished in the Official Gazette no. 337 from May 8, 2014;

[41] Viorel Roș, Octavia Spineanu-Matei, Dragoș Bogdan, Dreptul Proprietății Intelectuale. Dreptul Proprietății Industriale. Mărcile și indicațiile geografice, All Beck Publishing, Bucharest, page 103;

opposing a prior mark. The same considerations apply to the European Union trade mark regulation, which replaces the well known mark to a prior mark in the sense of its opposability, provided that the likelihood of confusion exists.

Concretely, the need to prove the likelihood of confusion was also underlined in a recent decision of the Romanian Patent and Trademark Office, which established the following: *The Board finds that the provisions of art. 6 para. (2) letter f) are not applicable in this matter, as the conditions required by the art. 6 bis of the Paris Convenion are not fulfilled (The countries of the Union undertake, ex officio if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well known mark or an imitation liable to create confusion therewith[42]).* We mention that the same words were underlined by the editors of the decision.

At EU level, the same the same considerations were supported in one of the EU IPO decisions according to which: „*In the context of Article 8(2)(c) EUTMR, the requirements for applying Article 6bis of the Paris Convention and Article 8(1)(b) EUTMR are the same, although the terminology used is different. Both provisions require similarity between the goods or services and similar or identical signs (…). Both articles also require a likelihood of confusion („liable to create confusion" is the wording used in Article 6bis)*[43]".

As regards the use of the well known trademarks, according to the provisions of Law no. 84 / 1998 on Trademarks and Geographical Indications, republished, the well known trade mark 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*[44]. Therefore, what is essential under national law is the degree of knowledge, and not the use of the well-known mark itself, although the doctrine, case law and even national consultative documents have issued many recommendations on the evidence of use that should be made to demonstrate such a degree of knowledge. However, it must be remembered that, in order to oppose a well-known trade mark under the European Trade Mark Regulation, it is necessary to fulfill the "European criteria" for the use of the mark, as described above.

We thetefore conclude that Romanian well-known trade marks may be successfully opposed to a subsequent European mark, provided that the opponent clearly mentions the trademark whose well-known status is invoked, the products and / or services for which the mark is notorious, the territory in which the trademark is well-known and, not least, to provide sufficient evidence to that effect.

5. European trade marks with reputation

The European Union trade mark regulation states that „*Upon opposition by the proprietor of a registered earlier trade mark within the meaning of paragraph 2, the trade mark applied for shall not be registered where it is identical with, or similar to, an earlier trade mark, irrespective of whether the goods or services for which it is applied are identical with, similar to or not similar to those for which the earlier trade mark is registered, where, in the case of an earlier EU trade mark, the trade mark has a reputation in the Union or, in the case of an earlier national trade mark, the trade mark has a reputation in the Member State concerned, and where the use without due cause of the trade mark applied for would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark*"[45].

We consider that the protection of trade marks with reputation is a mechanism which, to a certain extent, confers rights to the proprietor of a trade mark outside the scope of the protection of a registered trade mark. This is a conclusion we can draw solely from the point of view of the protection of trade marks with reputation. However, the premises of protection are different. Firstly, the protection of the marks with reputation has as its starting point a registered trade mark and not an unregistered trade mark. From this perspective, the similarity is only partial, in the sense that trade marks with reputation are also protected against goods or services which are not designated by the earlier registered mark. It should also be noted that both the marks with reputation and the unregistered marks require proof of use of the earlier mark. However, without going into the details of the quantitative and qualitative criteria that the evidence of use to be made should meet, these criteria being different including in the case of unregistered trade marks from different territories, we mention that the legal nature of the use is different. In the case of unregistered trade marks, use is constitutive of rights, whereas in the case of the trade marks with reputation,

[42] Decision of the Romanian PTO's Board of Appeal no. 210 from October 14,.2014 in the matter Mineral Quantum SRL vs. Rewe (România) SRL, page 8;

[43] Decision of EUIPO's Cancellation Division in the matter 11 232 C from July 14, 2017, page 14;

[44] Article 3 letter d) of Law no. 84 / 1998 regarding Trademarks and Geographical Indications, republished in the Official Gazette no. 337 from May 8, 2014;

[45] *Idem*, article 8 para. (5);

their reputation widens the scope of protection, the intensive use being only the instrument by which that reputation is demonstrated.

6. Conclusions

As the doctrine has underlined, European intellectual property regulations *"must be understood, first of all, by the desire to create a single European market* [46]". Thus, although the European Union is a jurisdiction that operates by applying the principle of registration priority, the legislator can not ignore the reality of the national jurisdictions it covers. Thus, under certain conditions, the proprietors of unregistered marks may oppose both the registration and the use of subsequent European marks.

However, we conclude by asking the following questions - is it advisable in a forthcoming regulation, a possible future Directive on the approximation of national trademark laws to harmonize their provisions on the protection of unregistered trade marks? Would such a regulation provide an increased predictability to trade mark owners in the internal market? Or, on the contrary, would create imbalances in the national jurisdictions where such changes would bring essential changes?

We do not have an answer at this time. However, we believe that the European legislator has relaxed its approach in this regard, opening the way for a stronger protection of unregistered brands in the future.

References

- Viorel Roș, Octavia Spineanu-Matei, Dragoș Bogdan, Dreptul Proprietății Intelectuale. Dreptul Proprietății Industriale. Mărcile și indicațiile geografice, All Beck Publishing, Bucharest
- Mihaela Daciana Boloș, Mărcile și indicațiile geografice în sistemul relațiilor internaționale, Universul Juridic Publishing House, Bucharest, 2013
- Lionel Bently, Brad Sherman, Intellectual Property Law, 4th Edition, Oxford University Press, Oxford, 2014
- Tina Hart, Linda Fazzani, Simon Clark, Intellectual Property Law, 4th Edition, Palgrave Macmillan, London, 2006
- Jeremy Phillips, Ilanah Simon, Trade Mark Use, Oxford University Press, New York, 2005
- Romanian Intellectual Property Law Magazine, no. 2 / 2016, Regimul juridic al mărilor notorii, George-Mihai Irimescu
- Hector MacQueen, Charlotte Waelde, Gramae Laurie, Contemporary Intellectual Property, Law and Policy, Oxford University Press, Oxford, 2008
- Guidelines for Examination of European Union trade marks, European Union Intellectual Property Office, (EUIPO), Part D, Cancellation, Section 1, Proceedings
- Examination of European Union trade marks, European Union Intellectual Property Office, (EUIPO), Part C, Opposition, Section 4, Rights under article 8(4) and 8(6) EUTMR
- Judgment of the Court (Grand Chamber) of 29 March 2011, Anheuser-Busch Inc. v Budějovický Budvar, národní podnik
- Decision of the Cancellation Division of July 30, 2010 in the proceedings between Dimian AG v. Bayer Design Fritz Bayer
- Judgment of the Court of First Instance (Second Chamber) of 24 March 2009, Alberto Jorge Moreira da Fonseca, Lda v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)
- Judgment of the Court (Grand Chamber) of 5 July 2011, Edwin Co. Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)
- Decision of the EU IPO Opposition Division in the matter B 2 752 866 of October 13, 2017, regarding the trademark between the trademarks ARIA vs. ARIA
- Decision of EUIPO's Cancellation Division in the matter 11 232 C from July 14, 2017
- Law no. 84 / 1998 regarding Trademarks and Geographical Indications, republished in the Official Gazette no. 337 from May 8, 2014
- Decision of the Romanian PTO's Board of Appeal no. 210 from October 14,.2014 in teh matter Mineral Quantum SRL vs. Rewe (România) SRL
- 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
- 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
- Judgment of the General Court (Seventh Chamber) of 30 September 2010, Granuband BV v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)
- Judgment of the Court of 12 November 2002, Arsenal Football Club plc v Matthew Reed
- 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
- Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, published in OJ from June 16, 2017

[46] Mihaela Daciana Boloș, *Mărcile și indicațiile geografice în sistemul relațiilor internaționale*, Universul Juridic Publishing House, Bucharest, 2013, page 133;

DATABASES AND THE SUI-GENERIS RIGHT – PROTECTION OUTSIDE THE ORIGINALITY. THE DISREGARD OF THE PUBLIC DOMAIN

Monica LUPAȘCU[*]

Abstract

This study focuses on databases as they are regulated by Directive no.96/9/EC regarding the protection of databases. There are also several references to Romanian Law no.8/1996 on copyright and neighbouring rights which implements the mentioned European Directive. The study analyses certain effects that the sui-generis protection has on public domain.

The study tries to demonstrate that the reglementation specific to databases neglects the interests correlated with the public domain. The effect of such a regulation is the abusive creation of some databases in which the public domain (meaning information not protected by copyright such as news, ideas, procedures, methods, systems, processes, concepts, principles, discoveries) ends up being encapsulated and made available only to some private interests, the access to public domain being regulated indirectly. The study begins by explaining the sui- generis right and its origin. The first mention of databases can be found in "Green Paper on Copyright (1998)," a document that clearly shows, the database protection was thought to cover a sphere of information non-protectable from the scientific and industrial fields.

Several arguments are made by the author, most of them based on the report of the Public Consultation sustained in 2014 in regards to the necessity of the sui-generis right. There are some references made to a specific case law, namely British Houseracing Board vs William Hill and Fixture Marketing Ldt. The ECJ's decision în that case is of great importance for the support of public interest to access information corresponding to some restrictive fields that are derived as a result of the maker's activities, because in the absence of the sui-generis right, all this information can be freely accessed and used.

Keywords: *databases, sui-generis, copyright, lack of originality, public domain, free uses, Directive on databases.*

1. Introduction.

Legal ground:

- Directive 96/9/EC regarding the legal protection of databases;
- Romanian Law no.8/1996 regarding copyright and neighbouring rights – chapter VI – articles 122^1 – 122^4

The copyright legislation offers protections to certain materials even outside of the originality criteria. As far as databases are concerned, law identifies a double protection, because databases are protected not only by copyright but also by the **sui-generis right**, correspondent not only to exceptional (original) collections, but also, apparently, to any database. We can, in this context, take into consideration the sui-generis protection for databases that benefit from this hybrid legal formula also, which is granted as an additional measure of protection for collections, also called compilations of materials resulted from qualitative and quantitative investments.

Protection outside originality was conferred on the European front to any "collection of works, data, or other independent elements," whose characteristic is indicated as being "disposed in a systematic or methodical manner," being "individually accessible through electronic or other means." Directive no. 96/9/EC regarding legal protection of databases identifies in its preamble, paragraph (38), the reasons that justified the creation of this system of protection of databases aside of copyright, as being:

"Whereas the increasing use of digital recording technology exposes the database maker to the risk that the contents of his database may be copied and rearranged electronically, without his authorization, to produce a database of identical content which, however, does not infringe any copyright in the arrangement of his database;"

If databases with content protected by copyright could have benefited from all the prerogatives of copyright law, previous to the uniformity of the sui-generis right at a European level, collections with **unprotected content** were, in the eyes of the Community legislator, exposed to risks of its duplication and electronic adaptation, through the creation of the so-called parasite products and services.

The sui-generis protection is motivated, therefore, by the need to protect databases with content that is free to use, since it's the only type of content that does not benefit from copyright protection and this is the only type of content to which there cannot be imposed any limitations and obligations regarding a correct usage. We mention this because treating the subject of databases in this study will be explained exactly by the analysis of certain effects that the sui-generis protection has on the public domain.

We consider also that, despite the internal and European regulation regarding this type of protection through copyright law, databases that fall under the sui

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generis protection cannot be integrated in the sphere of copyright.

2. Protection outside originality

If the basis of copyright is originality, the creation of intellectual source, the sui generic protection has a purely economic basis, being tied to the investment and the resources allocated by certain companies to create some databases. The sui-generis protection has to be extremely well understood as referring exclusively to content that **cannot be protected** and not to the structure of the database, as this, by choosing and disposing the material, could benefit from copyright insofar as it presents originality.

The main differences between copyright protection and the sui-generis protection of databases, and the way in which they affect the public domain:

I. **The condition** of the enforcement of copyright protection consists mainly in originality, as the work needs to be an intellectual creation. But the materials protected by the sui-generis right are not conditioned by originality, the natural conclusion being that the materials contained by the database can, therefore, lack originality, as also the structure itself, which does not need to stand out as bearing the name of a certain author. The databases that are protected by copyright have a content and/or structure that presents originality, whereas databases protected by the sui-generis right can lack originality and have content that is unprotected, meaning it is free to use, most of these types of materials being, as I mentioned, from the sphere of the public domain. We can remember, as a first differentiation between copyright and sui-generis, that while the former refers to databases that are the object of copyright, **the sui-generis protection regards databases that, through their content, are part of the public domain.**

II. **The object of copyright protection** relates both to the content of the database as well as to its structure, the sui-generis protection being exclusively related to content, materialized, as is clear from the above analysis, in works belonging to the public domain.

III. **The legitimacy of usage** of the sui-generis protected databases presents significant differences to the sphere of usage allowed in the case of public domain materials. If the materials located outside of the copyright's object are considered free for any use, of any nature, commercial or not, and without considering qualitative and quantitative aspects, the usage of materials that belong to sui-generis databases is limited as a sphere, the internal law allowing only certain acts, which, basically, should not affect the activity and interests of the database's producer.

The law considers, also important, to give priority of usage to acts of extraction and reuse that are not substantial, **this quantitative reference marking the first major difference**, which takes into account materials that are supposedly for public use. Referring to this aspect, although the regulations are assumed to take into account technological development and innovation interests, we must not forget the fact that the entire content of the databases that benefit from the sui-generis right pertains to the public domain.

If we were to disregard this abusively implemented right, we would have, at a legislative level, a copyright whose existence would not prevent unrestricted forms of access to materials that are free to use. Copyright, both in the form that covers the content as well as the one in which the structure of the database is taken into account, is not as such to affect the use of materials that belong to the public domain but, on the contrary, can only affirm corresponding rights such as the right of access, including through the dispositions that make evident the exclusion from protection of some materials like ideas, theories, simple data and information, a.s.o. The general public, beneficiary of the right of access to any material that pertains to the public domain, makes use of it in any way, being able to use the public domain in its entirety, if this was possible, **no quantitative prohibition being able to be imposed**. But the sui-generis right not only prohibits any forms of substantial extraction and reuse, but also unsubstantial extractions if they are *"repeated and systematic"* and if they "*imply acts contrary to normal use of this database or could cause undue damage to the legitimate interests of the database's maker."*(art. 122^2 paragraph (5)).

The database producer's interest is also supported and motivated at a European level, through the indications made in the Database Directive, article 6, paragraph (3):

*"In accordance with the **Berne Convention** regarding the Protection of Literary and Artistic Works, this article cannot be interpreted in such a way as to allow the use of its application in a way that would bring forth **unduly prejudice to the legitimate interests of the owner of the right or that contravenes normal exploitation** of the database"*

It remains unexplained why a referral to an act **that refers to copyright protection** of certain works is available, in the context in which the regulation regarded the sui-generis right whose existence was justified by completely different interests than those having to do with the necessity of copyright protection. It must not be omitted the fact that the interest of awarding copyright to the works' creators is founded on intellectual creation, copyright not being conceived outside the concept of originality. **Therefore, the existence of a creation that has an intellectual source, which has justified the protection through copyright in its current normative form, cannot be brought as a justification for protecting some rights whose justification is strictly pecuniary.**

Returning to the sphere of allowed uses, through a denaturation of what a **normal** exploitation of public domain works should be, it's considered that an act of prejudice is also that through which "acts that come in conflict with the normal usage of this database." The first conclusion that one comes to as a result of the interpretation of this syntagm, is the disposal to opposite extremes of two users of public domain works, a database user being considered as being in a position of opposite interests to the database's manufacturer, whom, we must not forget, is also a public domain works user. The second conclusion one comes to is the re-confirmation of the existence **of a distinct sphere of normal exploitation of the same type of public domain material**, a sphere created exclusively only as a result of the integration of these types of materials in certain databases. Therefore, the **normal** exploitation of the public domain is different than the **normal exploitation** of the public domain integrated in databases, as in the case of the latter, the usage has common ground with the individual interest and not with the public interest, which means that, in this case, the public interest is considered as not having the value of the economic interest of a single individual.

Reducing the sphere to what was supposed to be maintained as normal usage of public domain, regulating the sui-generis right has practically pushed outside legality multiple acts that were ensuring the public's access to materials that were free to use.

The disadvantage to innovation is much greater than the advantage that the initiators of the Database Directive invoked, and this is confirmed even in the first reports[1] of the European Institution, through which it was admitted that the economical impact that was desired is not at all what they were hoping for. Nor could it have been, in the context in which, the acts through which similar databases that could have been developed were able to be forbidden on the grounds of an identity or similarity in content.

Due to the same abusive regulation, the right of access over the public domain risks not being able to be exercised independently but only in correlation with what the database legislation calls **normal usage**. According to art. 122^3 from the internal law, acts of reproduction and public communication can be made without the consent of the databases' manufacturer, **only if they are necessary for normal usage and access to the database**. According to this disposition, the act of reproduction of a public domain material is conditioned by two circumstances that need to be met **cumulatively**, the reproduction having to be both an act of normal usage, as well as justified by the access to the database. The conclusion is even more interesting when we realize that **normal usage** represents a sphere of actions considered by paragraph (2) of the same article as being different from the one in which **the database manufacturer's interests are harmed or not**, one being able to sustain that an act, even without concretely causing harm to the manufacturer, could be considered outside what we call normal usage. The act of normal exploitation is different from the non-prejudicial one:

"(2) The legitimate user of a database, which is made available to the public in any way, may not perform an act that comes in conflict with the normal use of this database ***or*** *that unjustifiably undermines the legitimate interests of the database's manufacturer"*

IV. Considering the previous mentions regarding the particular legitimacy that acts of access over information conserved in databases has gained, we need to mention again that all of these only neglect the interests correlated with the public domain. The effect of such a regulation is the abusive creation of some databases in which the public domain ends up being encapsulated and made available to some private interests, the access to public domain being regulated indirectly.

The situation is even more disadvantageous if we take into account particular databases, which, although created on platforms owned by certain companies, end up being consolidated through the action of the general public, among these being User Generated Content (UGC) platforms. Another atypical situation, having been considered or not when the Directive was created, is that in which databases are created as an effect of activities specific to certain companies or entities, among which are museums, which have the possibility to exclusively gather and combine certain data and materials from the public domain. The ability to gather or collect certain information will largely depend in this case on the type of information in question, which is less accessible to the general public. An investment in collection of such information, even if it could be proven, is not exclusively allocated to creating the database, being specific to the manufacturer in question and only to him. Moreover, considering the aforementioned particularity of information, another manufacturer outside of the museum in question, would not have even been in a position to gather the information, which are not accessible to the general public. There is, therefore, a social and economical disadvantage because of which only certain entities will be in the position of database manufacturer, if we take into account certain materials. The case of museums, which, through their activity have come in possession of the multiple photographs of works from the public domain could be an example that highlights the situation of profound disadvantage of the public, who has not only the limited possibility of taking photographs inside the museum, but who is also prohibited from using (systematic or sustained) such

[1] DG INTERNAL MARKET AND SERVICES WORKING PAPER - First evaluation of Directive 96/9/EC on the legal protection of databases http://ec.europa.eu/internal_market/copyright/docs/databases/evaluation_report_en.pdf

images, if they are in online databases created by museums.

Cases[2] brought to the Supreme Court in Europe have shown, however, that the above-mentioned examples were not taken into account when drafting the Directive.

In all of these cases, the European Court of Justice (ECJ) held that "the investment in obtaining, verifying and presenting the contents of the database refers to resources that sought the collection of existing materials independently and not to resources used for the creation of such materials." In other words, it was decided that the sui-generis right will not be applied if the database is a product that is incorporated into the main activity of its maker, in this case, being considered that the investment was made with the purpose of supporting that activity and not for the collection of pre-existing materials.

V. But what the Directive doesn't manage to regulate can be less important to take into account comparatively with the real legislative "goals" that it ends up covering. Aspects not only unregulated, but which are controversial because of the way in which it affects the public interest, end up being indirectly "resolved" by the sui-generis right, due to which certain limitations of copyright are abolished (canceled).

We're especially referring to the time limitation specific to copyright, which is not perpetual and benefits form a specific protection period. The mentions regarding the protection period are considered to be imperative, no law may impede the reaching of the term or the rights that would arise after it. The sui-generis right, although, apparently, regulated to take into account a shorter period of protection compared with copyright, of 15 years, has the capacity to be renewed multiple times, including an infinite number of times, creating the possibility of some perpetual protections. The proof of this lies in the following paragraphs available in the internal legislation:

"Art. 122[4] (3) Any substantial change, evaluated qualitatively or quantitatively, to the contents of a database, including any substantial change resulting from the accumulation of successive additions, deletions or alterations, which would result in the database being considered to be a substantial new investment, evaluated qualitatively or quantitatively, ***shall qualify the database resulting from that investment for its own term of protection.****"*

The internal text represents the implementation of art. 10 paragraph (3) from the Directive, with which it is identified as a law text. The interpretations of these provisions allows the museums of public database creators to extend their banning periods beyond the 15 years by periodically updating the information they already have.

If a substantial modification that is based on a sizeable investment, can be contested as being made regularly, at least at a general level, the 15-year term itself is **a non-recommended plus**, a period abusively added to the duration already quite long of protection if we take into account the author's years of life plus the following 70, generally applicable in the copyright domain. The works that naturally would have ended up in the public domain, **being available freely by any person**, could be integrated in specific databases, ending up enduring the restrictive system for an additional period of 15 years, at least. That's exactly why we must rethink the position regarding the current "effort" made by so many curators and collectors, which, aside from the noble purpose of easing the access to public domain works, could, at any point, make use if their status as database manufacturers, the resources involved ending up actually supporting a right in disconsidering the public domain.

If the law itself, in its current form, creates the possibility of circumventing the provisions of time limitation of copyright and the prohibitions specific to it, the law also creates situations that are just as unbalanced in regards to other aspects, such as that of the controversy regarding digital reproduction of works of art. The problem of artwork photographs, although it's created and still creates multiple discussions, being able (at least theoretically) to affirm rights of both the author of the work, as well as the photographer's, was resolved at a European level and reaffirmed through public declarations of the United Kingdom Intellectual Property Office[3], an institution that said **that "the simple photographing of a work of art does not create distinct rights."** The decision of the British office regarded digital reproductions of works that are in the public domain, with the following argument:

"According to the European Court of Justice, copyright can be affirmed only in regards to original materials, in the sense in which these are the personal intellectual creation of the author. Considering this criteria, it is very unlikely that ***a simple digital image*** *of an older work to be considered original."*

The sui-generis right, without contradicting that which, obviously, can be concluded from the interpretation of the laws in force, can create interdictions in access to the photographs of the works of art that are in the public domain, if these photographs end up being part of a certain database. It's true that, based on the latest decisions of the European Court of Justice, a photographer that photographs works of art from the public domain, does not benefit from any distinct right over his photographs, not being able to affirm his interests/rights to any other person. This

[2] The Fixtures Marketing and William Hill cases: http://curia.europa.eu/juris/liste.jsf?num=C-444/02 ,http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d2dc30db69b7d830bae8429b94abdb00633a041d.e34KaxiLc3qMb40Rch0SaxuKa3f0?text=&docid=64575&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=26560 ,http://curia.europa.eu/juris/liste.jsf?num=C-203/02

[3] The United Kingdom Intellectual Property Office"Copyright Notice: digital images, photographs and the internet" - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/481194/c-notice-201401.pdf

photographer will not be able to prohibit the usage of his photograph because its subject is free to use, belonging to the public domain. If, however, that photograph ends up being part of a collection, there is a new set of limitations and interdictions created to its use as a direct effect of the sui-generis right, thus diminishing, as consequence, the possibility to affirm the right of access to that public domain photograph.

3. The genesis of the sui-generis right. Short historical presentation.

But what is the sui-generis right actually, and what justified its appearance? Beyond the clear interests that this right protects, its historical journey is interesting to study, especially through the fact that it brings back into discussion the basic principles of copyright.

The first mention of databases can be found in "Green Paper on Copyright...(1998)[4]," a document that looked at the "importance of databases that need to be perceived exactly as deposits of content from the information era." It was also mentioned that we "need to encourage and protect the investment in databases."

In the chapter dedicated to databases, it was mentioned that "the most frequent use of databases was, at that time, predicted as being in the scientific, industrial, and business domains, whose **potential was not given by originality** but by content rich in unprocessed information, which could be easily recovered and updated. This factor can have an impact over the selection of materials that will become part of the database if we take into account that, in some scientific fields, short extracts from scientific publications, such as formulas, can be enough to deliver essential information, this means that, in the case of the compilation of certain types of information, **the form of expression is of much lower importance compared to the substance of the information itself."**

As the text clearly shows, the database protection was thought to cover a sphere of information non-protectable from the scientific and industrial fields. The distancing from the originality required by copyright is motivated by the potential that some information is likely to have, but not because of the form under which they could present themselves.

The interest in the necessity of protecting databases was expressed, therefore, long before the adoption of the Directive regarding databases. The above-mentioned texts are proof of the fact that the main interest was given by the potential that they had to incorporate information that could not be protected through copyright.

The texts from the European communication also gave expression to an already-existing doctrine in the United Kingdom and the Netherlands ("sweat of the brow"), according to which, the author of a compilations, even if unoriginal, was protected for its effort and investment. In England, although the statutory legislation[5] expressly provisioned that the protection of a work through copyright necessitates originality, in practice, there was no ad literam interpretation of this law, because the British courts had held, for a hundred years, that "including labor and effort investment is sufficient to provide protection." The basis of these assertions was, in fact, one of the principles of copyright, namely that which confirms **the protection of the idea only in its forms of exteriorization.** Taking into account the exclusion from protection of the idea itself, it's considered that, in the case in which subject A creates a protectable work, subject B can add to it his own skills, resources, and interpretations, modifying A's work (idea) in a manner that would create an independent protectable work. This protection was based on the taking of the idea, but in a form that was not conditioned by creativity and inventiveness. Obviously, this doctrine could not survive in the digital era and, in truth, in 2012[6], the European Court of Justice, on the basis of the interpretation of the British legislation, excluded the protection based solely on work and skill, sustaining that *"in the case in which the creation procedures of the lists are not supplemented by elements that reflect originality in the selection and arrangement of those lists, these cannot be protected by copyright."*

In reality, the interest was not to support independent forms of taking over ideas because these also had the risk of being, in practice, real formulas through which copyright over the initial work ended up being breached. What has been preserved, however, at a European level, as an extension of the "sweat of the brow" doctrine, was the interest of a protection with a purely economic justification. Unlike copyright, whose protection is justified through intellectual resources allocated by each author in his creations, sui-generis is explained only by the material contribution of the database's maker. And if initially, as we noticed, the database protection outside originality was thought out to cover only information in the scientific and industrial field, **by consolidating the sui-generis right, the protection sphere has become a lot greater, ending up covering any unprotectable material, including materials that have become unprotectable as a result of the expiration of the term of protection, which basically means the entire public domain.**

We mention that the sui-generis right, this exclusively European creation, could not have been extended in the U.S. as well, a legislation that has

[4] Full title – "GREEN PAPER ON COPYRIGHT AND THE CHALLENGE OF TECHNOLOGY- COPYRIGHT ISSUES REQUIRING IMMEDIATE ACTION" Communication from the Commission Brussels, 7 June 1988. The full text of the paper can be read here: http://aei.pitt.edu/1209/1/COM_(88)_172_final.pdf

[5] UK Copyright, Design and Patents Act - 1988

[6] Decision in the case of Football DataCo

maintained as relevant the Feist[7] case, in which it was established that "**the information as such, without any minimal creativity, cannot be protected."**

4. Public consultation. The participants' arguments in regards to the necessity of the sui-generis right.

Coming back to the evaluation report of the Directive (2005), we make the mention that the already proven failure of this regulation has led to the need of public consultation concentrated around 4 options, which the participants needed to take into account to identify a solution. We find it relevant to present them as they were taken into account by the 2005 report, as well as by the acts that followed it, from March 2006.

1. Repeal the entire Directive;
2. Withdrawing the sui-generis right, while, however, maintaining unchanged the original database protection;
3. Modifying the provisions corresponding to the sui-generis right, in order to clarity its applicability;
4. Maintaining the current situation.

The options put forward by the commission have led to responses that were found to be favorable, especially **options 3 and 4**, but this is understandable considering that, among the entities called to participate, the majority[8] was made up of database production companies, press agencies, editors, betting companies, which considered the regulation favorable to their own interests.

In support of those interests, we show the following excerpts from the claims of certain participants who supported the sui-generis right, with some of them also exhibiting possible counter arguments:

- **Software & Information Industry Association ("SIIA[9]")** SIIA "Database editors do not just collect, combine, and organize information, but they also keep it updated and safe. These investments are worth benefiting from a legal protection." In order to counteract with the consumer's interest, the same association makes the following statement: "Consumers need quality databases that contribute to the comfort of their activity and their productivity. Finding a needle in a hay stack from the many, and poorly organized sources, could take weeks or even months. Thankfully, database editors provide a fast and secure access through databases."
- The France Press[10] **press agency** ("The Agency") has made many references to the issue of extending the exceptions corresponding to the sui-generis right, considered as being "risky proposals" to the interest of the database maker. In response to the opinions that the sui-generis right would lead to real information monopoly situations, the Agency argues that "it is generally recognized that the sui-generis right is applied to the database's content and not to the individual components within it (i.e.: the information itself)," so the accusation of monopoly cannot be considered.

We mention that the Agency's argument cannot be held in the context in which the law provisions restrictions in the use or the extraction of (even) **non-substantial** parts, when it is repeated and systematic. **The regulation of the use of non-substantial parts of the database is equal to regulating of the use of every piece of information within the database.**

In regards to the proposals of enlarging the exceptions sphere of the sui-generis right, the Agency sustains that "the Directive seeks to create a balance of interests between those belonging to database manufacturers and those of the databases' users. It's also considered that the purpose is achieved in a satisfactory manner by the Community regulations and that the widening the exceptions sphere would do nothing but jeopardize this balance."

In supporting its arguments, the Agency omits to consider and to properly address the users' interests and rights of access and free use of the public domain. **The rights of these users are not only a priority but also precede in constitution those of the database makers',** since the public domain, from the resources of which the databases are created, is necessary to exist prior to the indexation of certain materials. sui-generis itself should be provided in the legislation as an exemption granted to manufacturers on the basis of the investments made, and not as a stand-alone right, since its exercise impedes the exercise of the right of access and free use of the public domain.

The Agency also states that the "widening of the exceptions sphere to the sui-generis right presents the risks of leading to thefts and acts of piracy." The Agency's note refers to inadequate legal institutions because the sui-generis right, **even if it's treated as part of the copyright legislation, must not be confused with it, as the provisions regarding piracy cannot be applied to it, because they represent an act of copyright infringement.** Theft is also out of this discussion, because it can only refer to goods that are in a person's possession or detention. At most, the possibility of theft could be accepted in the exclusive case in which a database would be copied in its entirety, both in structure and form, as well as its content.

The takeover of information to which the Agency refers, in fact, has as its object content over which the database manufacturer does not own any rights, because that information belongs to the public domain. The database manufacturer is also just a user of public domain information. Even if, through his frequent and systematic usage, a database could be formed, he must

[7] Feist Publications, Inc., v. Rural Telephone Service Co., 499 U.S. 340 (1991)
[8] The list of participants to the public consultation: https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp
[9] https://circabc.europa.eu/sd/a/3de4cab2-2379-40a1-8862-57004a446467/siia_en.pdf
[10] https://circabc.europa.eu/sd/a/8741416a-ebcb-4c08-b0ae-65cf9322e55b/afp_en.pdf

not be viewed as anything more than a user of resources that should remain in public usage. **Therefore, the database manufacturer's status as a public domain information user, and not owner, MUST NOT be forgotten, any arguments or interpretations of the sui-generis right must be made with consideration to this status from which the database manufacturer cannot separate himself just because the information he gathered is greater than others', or just because he was the first to have access to certain data that, precisely due to this circumstance he had the possibility of collecting.**

It is unnatural, to say the least, that the systematic and repetitive acts of taking from the public domain end up being legalized to certain people to the disconsideration of acts of the same type exercised by other people just because the latter are made **after** those made by the database manufacturer. Principles applicable to other exclusivist protections (first come, first served in the field of trademarks) is also found in the field of copyright, but not to serve the interests of the creators, but, on the contrary, to block the entire access to the public domain assumed to be for the use of the general public.

At least questionable is the fact that this manner of fructifying the public domain has come to be considered as treating the interests of the database manufacturers and those of the users equally. The Agency's arguments, as well as those of other companies with interest in the disadvantageous fructifying of the public domain, omit to speak from the perspective of a user of some public information, on the contrary, their arguments highlight rights similar to those of property, whereas the property of the public domain must not exist, being a contradiction with the very notion of public domain. Moreover, there should be avoided any possibilities through which the interdiction of public domain material appropriation is eluded.

- **Data Publishers Association**[11] ("DPA") - makes mentions of the applicability of the sui-generis right in light of the European Court of Justice ruling[12] from 2004:

"The sui-generis right is difficult to understand. The ECJ's decision from November 2004 made a distinction between creating and obtaining information. The court's argument was helpful in the given cases, but has created the possibility of misinterpretation through the fact that it suggests that publishers should make a distinction between separating certain data and obtaining them. Many DPA members do not recognize the difference and have asked for guidance and clarification. The DPA considers that the Commission should strengthen the sui-generis right to ensure that investments in databases combined with the data created will benefit from the same protection as the obtained data."

In regards to the DPA's argument, we consider it appropriate to re-highlight the **ECJ's Decision from 2004 in its main points.**

The DPA's submission takes into account the opinion of the European Supreme Court, according to which, the Directive 1996/9/EC cannot protect databases that are created only as a direct result of the manufacturer's own activity. In order to benefit from the sui-generis right, the court states that the "**investments needs to have as its sole purpose, or its main purpose the collection, verification, search, and presentation of materials that already exist."**

For a better understanding of the ECJ's decision we can even take into account one of the cases that were considered by the ECJ, namely **British Houseracing Board** vs William Hill and Fixture Marketing Ldt. The European court considered that the "football matches lists necessitated no particular effort to be created by the professional league. These activities are invisibly linked to the creation of the data in question, in which the league directly participates, as its responsible for organizing the football matches."

The court's decision is of great importance for the support of public interest to access information corresponding to some restrictive fields that are derived as a result of the maker's activities, because in the absence of the sui-generis right, all this information can be freely accessed and used. The corresponding information to such restrictive fields are not independently and easily accessible by the public, the only option of access and use being the consultation, verification, use, or possibly extraction of the information from the database that contains them.

The ECJ's decision is of general applicability, the court's expression being of a manner of creating a misinterpretation that does not exclusively regard football matches lists. And, we consider it fair to have such an interpretation because, it's true, in such a case, the database manufacturer cannot prove any investment in finding and collecting some preexisting data, and this condition clearly derives from the concrete interpretation of the law's text.

In continuation, we will look at art. 122^1 (4) from the internal law:

"(4) For the purposes of the present law, the database manufacturer is the natural or legal

person that has made a qualitatively and quantitatively **substantial investment** for the

obtaining, verification or presentation of the contents of a database."

The corresponding article in the Directive is even clearer in highlighting the link between the sui-generis right and the investment in obtaining the data.

"(1) Member States shall require the manufacturer of a database to have the right to prohibit the extraction and reuse of the whole, or substantial part, evaluated qualitatively and quantitatively, of its

[11] https://circabc.europa.eu/sd/a/5abf4db2-4a5f-4893-a5ef-b6a790e4eca7/dpa_en.pdf

[12] European Court of Justice press release (08.06.2004) http://www.curia.eu.int/en/actu/communiques/cp04/aff/cp040046en.pdf Case numbers C-46/02, C-203/02, C-338/02, C-444/02 http://www.curia.eu.int/

contents, **when obtaining, verifying, and presenting this content demonstrates a substantial qualitative and quantitative investment**."

– **The European Direct Marketing Federation** (FEDMA[13]) is another supporter of option 4 among the options made available to the participants through the 2005 public consultation. And this entity expresses worry in regards to the above-mentioned ECJ decision, which, according to FEDMA, would have misinterpreted the sui-generis right, creating applicability issues.

FEDMA, like other supporters of the option to maintain the status quo, challenged the ECJ's decision, but not in its entirety, but only in regards to the limitation of the application of the sui-generis right. The perception of this false inequality that these types of entities intend to create can easily be overturned if we were to consider not only the aforementioned conclusion of the court, but the entire content of the decision in its main points, which will surprise with aspects that are in disadvantage not of the database manufacturer, but, on the contrary, to the user himself.

I. "the simple generation of data is not covered by the Directive but "where the creation of data coincides with its collection and verification and creates an inseparable body, then the Directive will be applied." As can be seen, even if the sui-generis right will not be applicable to created data, in the cases in which they will present an inseparable collection of both created data and obtained data, the sui-generis right can be exercised, thus becoming applicable also to the data created through the manufacturer's activity itself. **In light of this assertion the inapplicability of the sui-generis right will be found in the circumstance in which between the activity of creation and that of obtaining there is a clear and obvious demarcation, or in the context in which the database contains only created data.**
II. "the Directive prohibits the rearranging of the databases' contents."
III. "there is a general interdiction in regards to the extraction and reuse of a substantial part, considered as being, for example – **more than half of the database**."
IV. "Extraction and reuse of some unsubstantial parts is prohibited if it represents a repeated and systematic act, and it prevents the economic exploitation of the database by its manufacturer."
V. "Reuse is also forbidden when the data is taken from independent sources (for example, the internet)."
VI. "Substantial modifications give birth to a new database and a new protection term. For dynamic databases, the new database benefits from a new protection term when a certain modification is made."
VII. "The base term needs to be interpreted broadly." "it is left to the interpretation of the courts from the Member States to verify in each case if the investment was a substantial one."

As can be seen, points v. and vi. indicate an interpretation that serious prejudices the interests of the general public, extending the applicability of the Directive over some situations that the law maker did not take into account in the text of the Directive. And which, it must be mentioned, could not have been taken into account reasonably, as it makes a protection of information beyond the sphere of the database. At least that's what point vi. expresses, through which the reuse of the information is prohibited, even when the information is taken off the internet and not from inside the database. But, the only justification of the sui-generis protection is exactly the existence of information as part of the database, because outside of this data structure, it will still be public information, meaning unprotectable.

It must be noted that, aside from the particular situations brought into question by the concrete cases in respect of which the court was called to express itself, the database content that is supposedly subject to the sui-generis right, is made up of data and materials that are not subject to copyright, which belong largely to the public domain. This decision of the court not only widens the Directive's sphere of applicability, but makes the sui-generis right a much more restrictive right even than copyright itself, as it's known that copyright presupposes a protection that can be given to identical works created independently by its authors.

Aside from the possibility, or rather the real impossibility of such a circumstance, in which two different people could have identical forms of creative representation, this is however admitted, at least in theory, in certain creative fields, such as plastic art, in which two painters, having the same theme, could create identical original works and, therefore, **protectable.**

Independent protection represents a direct consequence of the relativity and subjectivity of copyright, whose originality needs to be appreciated outside of the sphere of "novelty", considered an objective notion specific to the domain of inventions and not of copyright.

Creativity itself represents a direct consequence of the unaltered preservation of these principles of law, as a protection conditioned on novelty or perceived absolutely would have the effect of blocking subsequent developments on the grounds of identical or similar content. Whereas, according to copyright, originality does not need to be absolute, it not being necessary for protection that the works to not have been inspired from previous creations. In addition, the very concept of inspiration is worth treated in association with the idea and not with the form of its expression.

[13] https://circabc.europa.eu/sd/a/cd9b9360-bb3d-4215-84dc-c3dc54c0b640/FEDMA_en.pdf

Per a **contrario, a copyright protection in which originality was understood in its objective and absolute form, would lead to situations in which protection would extend not only on the form of expression, but on the idea itself**.

The idea as a foundation for inspiration, must circulate freely and be capable of being exploited by any person, just as with the public domain. **The reasons used to justify non-protection of the idea are also valid for the case of the public domain's non-protection.** A restraint of this goal would lead to situations identical with the ECJ's decision itself, in **which information from the public domain cannot be used freely because it can be ALSO found in a certain database.** To accept such a position coincides with affirming that an idea cannot be used by two or more people only because, at some point in time, it ended up being, one way or another, part of a work belonging to a different author.

– **The European Consumer Organization** (BEUC[14]) is one of the few participants to the consultation that stated its position against both the Directive as well as the aforementioned ECJ decision:

"As mentioned, the rulings of the ECJ limits the ambit of the "sui-generis" right. However, the consequences of these rulings should not be underestimated. Even after these rulings, the Directive has a significant impact on competition in the database market. In a recent article published in European Intellectual Property Review, Davidson and Hugenholtz argues that the database industry will develop different strategies to circumvent these decisions. The authors mention two such strategies: database manufacturers could invest more in the presentation of the data, or they could prevent the data from being publicly available, and sell the exclusive right to them. Arguably, purchasing access to data might be deemed a substantial investment."

5. De lege ferenda – repealing the Directive and/or eliminating the sui-generis right. As the European Consumer Organization has also expressed, the Directive creates multiple inconveniences in its enforcement and the sui-generis right jeopardizes competition and innovation. In addition to the BEUC statements, as it's been shown earlier, the existence of the sui-generis right greatly affects the right of access to the information corresponding to the public domain and we consider it to be a particularly important aspect, especially in the context in which the position of the lawmaker, as far as the public domain is concerned, is rather deduced than expressly formulated, at a legislation level there being no texts that would express any guarantee in regards to exercising the access right.

Moreover, even in the absence of the sui-generis right, copyright over database structures may continue to be exercised by owners of such collections, its exercise not having the nature of bringing into question the database's content and information contained within said compilation.

It must be mentioned that, as it's said in the Directive and in its implementation laws, the sui-generis right represents, concretely, a real right of property expressed in a completely inadequate context, if we consider that the object of this protection is made up exactly of works that cannot be protected, meaning that cannot be proprietary, or over which one cannot assume ownership. An inadequate context is also that of copyright, whose protection presents serious differences from private property, only the latter being of the nature to be exercised exclusively. The specific non-exclusivity of copyright is sustained not only by the limited protection term, but also by the existence of a sphere of materials that cannot be appropriated. The exercise of the right itself is subject to certain limitations, beyond which there is no copyright, but other rights corresponding to the public's interest, such as the right of access. This is the specific balance of copyright, according to which the author or the owner has only **certain rights**, for a **certain period of time** and intended to be exercised only within **certain limits**. If the reinvention of other rights, such as the sui-generis rights, threatens to affect this balance, the position of this right in the legislation must be rethought.

References

- Green Paper on Copyright and the challenge of technology copyright issues requiring immediate action
- The Online European Court of Justice Database – www.curia.eu
- DG Internal Market and Services Working Paper - First evaluation of Directive 96/9/EC on the legal protection of databases
- European Court of Justice press release (08.06.2004)
- Decision in the case of Football DataCo.
- The United Kingdom Intellectual Property Office Copyright Notice: digital images, photographs and the internet"

[14] https://circabc.europa.eu/sd/a/731270d1-278c-462d-8038-e1256899586a/beuc_en.pdf

THE PRIVATE COPY REMUNERATIONS SYSTEM

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Abstract

The study aims to provide an actual overview of private copying compensation systems (also known as private copying levies or remunerations). These remuneration systems are an important element of copyright and related rights infrastructure.

Private copy remunerations systems vary substantially across the world because of a multitude of circumstances. Remuneration is funded either by importers and manufacturers of devices on which consumers make copies, or by State funds. Either way, the intention is that consumers should pay directly or indirectly for private copying. Levies on products are collected either as a percentage of the sales price or as a flat rate.

The study demonstrates that significant differences exist in key areas such as tariff levels, the selection of products for which levies can be collected, the liability of market players, methods of reporting, legal tools for monitoring and enforcement and methods of setting the tariff, to mention just a few.

In the early 1990s, the European Commission attempted to harmonize private copying compensation systems in the EU, but the Commission's efforts have not yet resulted in legislative proposals. On the contrary, legal and practical developments in the countries involved have proceeded unaffected by any cross-border considerations. The recent renewed interest of the European Commission and the European Parliament in investigating the viability of measures that would further the approximation and possibly the harmonization of (the important parts of) the private copying systems in the EU is of great significance for the future of levy systems, as is the multitude of rulings issued by the Court of Justice of the European Union.

Keywords: *private copy, remunerations, levies, INFO-SOC Directive, tariffs, products, EU legislative proposals and developments.*

1. Introduction

The **Berne Convention** allows Member States to provide for exceptions and limitations to the right of reproduction, provided that the conditions of the three-step-test are met. Many jurisdictions limit the application of the reproduction right for activities that can be qualified as "private copying" because it is practically impossible to grant permission to large numbers of individuals or to monitor how such permission is subsequently used. In general, the solution was found in an exception or limitation to the exclusive right on condition that fair compensation was paid to authors and other rightholders for loss of revenues or harm caused to the rightholder whose work had been copied. This is currently the only efficient mechanism for compensating creators for the widespread copying of their works for private or domestic use.

In EU copyright law, private copying has been given a specific meaning relating **only to the reproduction right**, not to other rights like: communication to the public, distribution to the public, public performance or adaptation. Also, at EU level the private copy is regulated by the **Directive on the harmonization of certain aspects of copyright and related rights in the information society** (called INFOSOC Directive)[1].

According with art. 5 (2) (b) of the Directive: *in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject matter concerned.*

By consequence, a private copy is usually defined as any copy for non-commercial purposes made by a natural person for his/her own personal use.

A levy on products used for copying was **first introduced in Germany in 1966**, replacing the exclusive reproduction right with a right to equitable remuneration. In other jurisdictions, levies were attached to longstanding private copying exceptions when modern technological developments made it difficult to deny that private copying was affecting the income potential of rightholders.

In general, **the exception only applies when the source is legal**. Downloads from a peer-to-peer network, newsgroups, torrent sites and the like, where music and films have been uploaded without consent from the rightholders, are usually not within the scope of the exception. There are exceptions to this rule: the Russian Federation, Switzerland and Canada do not have a specific provision regarding the source of the copy, and thus all copies made for private use fall within the scope of the exception.

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[1] Published in the Official Journal of the European Communities no. L 167/10 from 22.06.2001.

Also the private copy **doesn't apply to computer programs**, case in which, for example according with the Romanian Law on copyright and related rights[2] – Law no. 8/1996, the authorized user of a computer program may, without authorization from the author, make an archive or reserve copy where necessary for the use of the program.

2. Content[3]

The European Commission has been reviewing the copyright framework, including the private copy topic, for a long time.

In 2012, the issue of private copying levies was the subject of an industry **mediation process fostered by the Commission and led by former Commissioner António Vitorino[4]**. Mr. Vitorino delivered a report on this issue in February 2013, including several recommendations, although it has not led to any legislation. The aim of the recommendations is to make EU copyright law and practice fit for the digital age. The core elements of the recommendations are to clarify that copies that are made by end users for private purposes in the context of a service that has been licensed by rightholders do not cause any harm that would require additional remuneration in the form of private copying levies, also that levies should be collected in cross-border transactions in the Member State in which the final customer resides, and the fact the liability for paying levies should be shifted from the manufacturer's or importer's level to the retailer's level while simplifying the levy tariff system and obliging manufacturers and importers to inform collecting societies about their transactions concerning goods subject to a levy, or alternatively, clear and predictable ex ante exemption schemes should be established. In the field of reprography, the core elements of the recommendation, are set on the fact that more emphasis should be placed on operator levies than on hardware based levies. Regarding the final customers, the levies should be made visible for them, and as regards the negotiation procedures, there is a need to provide a procedural framework that would reduce complexity, guarantee objectiveness and ensure the observance of strict time-limits[5].

The debate on levy systems has continued through **stakeholder dialogue**.

In 2014, the European Parliament published the **Castex Report[6]** which describes the private copying levies as a virtuous system, which is nonetheless in need of modernization and harmonization. It focused especially on cross-border situations, the scope of the exception and the need for transparent and effective exemptions for professional uses. The Report also emphasizes that the major disparities between national systems for the collection of levies, especially as regards the types of product subject to the levy and the rates of levy, can distort competition and give rise to 'forum shopping' within the internal market.

As an important element the Report invites the Member States and the Commission to conduct a study on the essential elements of private copying, in particular a common definition of the concept of 'fair compensation' – which at present is not explicitly regulated by Directive 2001/29/EC – and of the concept of 'harm' to an author resulting from unauthorized reproduction of a rightholder's work for private use. From this point of view, the Castex Report calls on the Commission to look for common ground as regards which products should be subject to the levy and to establish common criteria for the negotiating arrangement for the rates applicable to private copying, with a view to enforcing a system that is transparent, equitable and uniform for consumers and creators.

Also as my opinion, the Report considers that the private copying levy should apply to all material and media used for private recording and storage capacity where private copying acts cause harm to creators and that private copying levies should be payable by manufacturers or importers, because if the levy were transferred to retailers, this would result in an excessive administrative burden for the small and medium-sized distribution companies and the collective management organizations.

In line with the judgment in Case C-462/09 (Opus), cited above Case C-462/09, Stichting de Thuiskopie v Opus Supplies Deutschland GmbH and others, the Report recommends, in the case of cross-border transactions, that private copying levies be collected in the Member State in which the end user that purchased the product resides.

July 2014 saw the **results of the Consultation on Copyright in the 2013-14 3rd consultation** (review of EU copyright rules), and on December 9, 2015, the communication **"Towards a modern, more European copyright framework"** was published[7]. The communication revealed the European Commission' vision to modernize the EU copyright rules: the first step was to adopt a legislative proposal on cross-border

[2] Art. 77 (1) of Law no. 8/1996.

[3] *International Survey on Private Copying*, Hester Wijminga, Wouter Klomp, Marije van der Jagt, Joost Poort Law & Practice 2016, published by de Thuiskopie and WIPO.

[4] http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf - accessed on 08.03.2018.

[5] Ana-Maria Marinescu, *Analiza Recomandărilor lui Antonio Vitorino rezultate din medierea privind copia privată şi remuneraţiile în reprografie*, article published in RRDPI no. 3 (36)/2013, p. 34-50.

[6] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0114+0+DOC+XML+V0//EN – accessed on 08.03.2018.

[7] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0626&from=EN - accessed on 08.03.2018.

portability, then to review the Satellite and Cable Directive and other Directives in the field[8].

At the present, the levy systems are not much discussed in the communication and are no longer a priority on the copyright agenda for the new EU Commission. For the most part, the possible impact on the Digital Single Market is a concern and even though the CJEU clarified some issues, some disparities remain and the national legislation in the field differ as it will be detailed in the following.

The relevant jurisprudence of the European Court of Justice regarding the private copy systems can be summarized as it follows: in the case C-467/08 *Padawan v SGAE* the issue was the indiscriminate application of the private copying levy; C-462/09 *Stichting de Thuiskopie v Opus GmbH* cross-border transactions; C-277/10 *Luksan v Van der Let* the main issue was that the author is entitled directly and originally to the right of fair compensation; the cases *VG Wort v Kyocera* tacled the issues of technological measures and the consequences of an authorization to reproduce; the case C-521/11 *Amazon v Austro-Mechana Gesellschaft* referred to the indiscriminate application combined with a reimbursement scheme, payment of the revenue in part to social or cultural institutions, double payment in cross border transactions; in the case C-435/12 *ACI Adam v Stichting de Thuiskopie* the issue was the lawful nature of the origin of the copy; in the case C-463/12 *Copydan Båndkopi v Nokia Danmark* the main topics referred to equal treatment, reimbursement scheme, consequences of an authorization to reproduce; the case C-572/13 *HP v Reprobel* relates to the allocation of fair compensation to publishers and copying of sheet music; the case C-470/14 *EGEDA* pointed the compensation financed from the General State Budget; C-110/15 *Nokia Italia v SIAE ex ante* exemption and reimbursement scheme for professional use; the case C-37/16 *Minister Finansów v SAWP* reffered to the value-added tax and the last case C-265/16 *VCAST Ltd v R.T.I. SpA* in the field is referring to the cloud computing services.

The scope and legal construction of private copying differs considerably between countries:

- In some countries, sources need to be lawful, in others not;
- In some countries, there are a set number of permitted copies specified, in others there are definitions of private circles;
- In some countries, the levy is constructed as a statutory license, in others as a debt;
- In some countries compensation is only due for private copying of music, in others for printed matter (reprographics) and audio-visual works.

22 of 27 EU countries have implemented the private copy, with the exceptions of UK, Ireland, Malta, Cyprus and Luxembourg. In the world, the private copy is implemented also in countries like: Burkina Faso, Canada, Japan, Norway, Paraguay, the Russian Federation, Switzerland, Ukraine, United States, Canada, Turkey, Ecuador, Peru, Nigeria, Côte d'Ivoire, Morocco etc.

The **levy schemes vary widely in the following respects:**

- Levies apply to different media or equipment that can be used to make copies (e.g. recordable carriers, hard disks, MP3 players, printers, PCs);
- Levies differ in tariffs for the same media or equipment, and apply different methods of calculation (e.g. memory capacity, percentage of price);
- Levies differ in whether they are imposed on the manufacturers, importers or distributors of media or equipment, or consumers;
- Levies differ in beneficiaries (music, audio-visual, reprographic rightholders; wider cultural or social purposes);
- Regulatory structures differ (processes for setting tariffs and distribution, contestability of tariffs, governance and supervision of agencies).

The tariffs setting models are presented in the *Annex 1*.

Countries commonly apply a **fixed tariff** directly related to the capacity of objects. An overview of the countries that apply a fixed tariff can be seen in the *Annex 2* and in *Annex 3* is presented the fixed tariff for 8 standardized media types and devices in 14 countries/Euros/2016.

As an alternative to fixed tariffs, countries can also apply a **tariff based on a percentage of the sales or import price** to determine the amount of the levy.

The Czech Republic, Latvia and Lithuania **combine fixed tariffs and a percentage** depending on the medium or device.

The levies and remuneration are intended as compensation for private copying acts by consumers in a certain country; rightholders whose works have been copied in that specific country have a right to be remunerated.

For this reason, if leviable products are exported, the exported items are exempted in most countries.

Different systems exist for refunding the levies that have already been paid on a product which is later exported.

Usually, the exporter can request a refund from the collecting society if he can show the proof of the actual export.

Another possibility is **a contractual relationship between an exporter** (often a wholesaler) **and an importer and/or the collecting society**, which can include an upfront exemption such that the exporter can buy within his country without levies and no refunds are payable upon export.

Some countries do not have a refund system in place; the exporter is only required to report goods sold in the home country. In these cases, levies on exports can often be recovered in the next report to the collecting society.

[8] https://ec.europa.eu/digital-single-market/en/news/towards-modern-more-european-copyright-framework-commission-takes-first-steps-and-sets-out-its - accessed on 08.03.2018.

Finally, some countries have **multiple possibilities**: exemption upfront via an agreement with the collecting society or a refund request.

Examples for exports and exemption from payment are presented in *Annex 4*.

Blank media and devices can be used for purposes wholly unrelated to the private copying exception, for instance, for the storage of professional data, or for professional reproductions where a license would be required. In such cases, products can be sold to a professional end user and no private copying is taking place.

In some countries, either products sold to professional end users are exempted from the payment of the levy or liable parties are entitled to a refund.

Within the EU, the CJEU ruling in *Padawan v SGAE* (October 21, 2010) had a considerable impact on the collection of levies. The court ruled that the indiscriminate application of the private copying levy to all types of digital reproduction equipment, devices and media, including cases in which such equipment is acquired by persons other than natural persons for purposes clearly unrelated to private copying, is incompatible with the 2001 Information Society (or "Copyright") Directive. Before this ruling, mutualisation systems, as they were known, were common. In these systems, **the professional use was incorporated into the tariff, resulting in a reduced flat-rate tariff to be paid on all sales**. Without this approach, the tariff would have been higher for products intended for private copying.

Padawan has led to follow-up cases in national jurisdictions and new cases before the CJEU to clarify the ruling further. **In Spain, the result was the abolition of the collecting system through media and devices**, leaving Spanish rightholders with an amount determined annually by the government based on the harm caused to rightholders by private copying. European rightholders have lodged a complaint with the European Commission and the questions have been referred to the CJEU (C-470/14). **For Spain, the recent ruling in this case has created the possibility of reintroducing a levy system**.

Court cases resulting from *Padawan* are still ongoing in many European countries.

In some countries, the systems exempting professional users were adapted in order to implement the latest case law.

Similar to the procedures used in the case of exports, if the professional use is exempted, **countries have implemented a refund system or an upfront exemption** (in the law or via contractual arrangements with the collecting society) for specific professional users (e.g., hospitals or government institutions).

Many of the levied products are bought online and sometimes the seller is located in another country, where a different private copying system is in place or there is no such system at all.

Of particular relevance for EU Member States, but also interesting for other jurisdictions, is the judgment of the CJEU in *Thuiskopie v Opus* (2011). The Court ruled that **the State that has a private copying exception in the law in conjunction with a levy system should ensure that the levy is paid**. The judgment states: *[…] it is for the Member State which has introduced a system of private copying levies chargeable to the manufacturer or importer of media for reproduction of protected works, and on the territory of which the harm caused to authors by the use for private purposes of their work by purchasers who reside there occurs, to ensure that those authors actually receive the fair compensation intended to compensate them for that harm*.

In this case, the court in the Netherlands – the country of residence of the consumer, where a private copying compensation system is in place – was requested to ensure recovery of the levy from the seller in Germany.

The collection process of the private copy remunerations is done by the collective management organization appointed by the government or by rightholders. The collective management organization must be representative of the whole variety of rightholders, and often the board of such a collective management organization consists of various rightholders' representatives (authors, performing artists, producers and the like).

In almost all countries, collection is done by one collecting society, to which importers, manufacturers and other liable parties are required to report.

In some cases, however, the collecting society only represents a specific group of rightholders and multiple societies collect remunerations on behalf of their rightholders. This is the case for the Czech Republic, Greece, the Slovak Republic and Romania.

Distribution follows a more complicated scheme.

Some collected funds are distributed directly to individual rightholders – this is the case if multiple collection societies operate on the market – but in most cases, distribution is done in stages.

The society responsible for the collection **allocates the funds to organizations of rightholders** (distributing organizations) representing the various categories of rightholders (authors, producers and performing artists) **for further distribution to individual rightholders**.

Distribution to different categories of rightholders, represented by the collecting societies responsible for distribution to individual rightholders, follows the schemes determined either by rightholders' organizations or by law, ministerial decree or other State intervention.

Where the distribution scheme is a matter for rightholders, the shares are established in negotiations between the different groups of rightholders. In some cases, the results must be validated or approved by the government.

Usually, the total amount collected is first split between categories like audio, video, written works and interactive works. The amounts allocated to these categories are divided among the groups of rightholders within them. Distribution to audio rightholders is split between authors, performers and producers; video rightholders are authors (directors, screenwriters, music authors, and literary authors), producers and performing artists (actors and dancers).

The introduction of levies on multifunctional devices makes it possible to remunerate copying of all digital works, and the advent of relatively new digital content like e-books and other written works that implies the creation of new schemes for distribution to these rightholders.

The first step is the allocation of the remunerations to a category of copied works that is usually based on a market research regarding the type of the works copied on the various media. As the levied products become increasingly multifunctional and all works can be digitized, the actual copying behavior becomes more important for distribution. Some countries (like Switzerland) have a distribution scheme for each levied product for which monies were received.

In the majority of the countries, a percentage is deducted for social and cultural purposes, on average about 30 per cent. These cultural funds are intended for the promotion of young artists or to feed pension funds for artists.

In most cases, **the law determines these percentages** (i.e., Austria, Bulgaria, Croatia, Denmark, France, Portugal, and Turkey) **or they are established in the Statute by law** (i.e., Latvia, Poland, and Switzerland). Cultural government bodies welcome funds that are allocated to promote the culture of society and improve the position of rightholders. The percentages vary from 10 per cent to 100 per cent (i.e., 50% - Austria, 30% - Bulgaria, 30% - Croatia, 33% - Denmark, 25% - France, 20% - Poland, 20% - Portugal, 10% - Latvia, 10% - Switzerland). Turkey is the only country where the levies are used entirely for cultural purposes by the Ministry of Culture. In the future copyright legislative reform in Turkey, the private copy remunerations will be still collected by the State, but is intended that a part of the remunerations to be distributed also to the copyright and related rights holders' through the collective management organizations.

In Romania, according with the Law on copyright and related rights[9], the list (see *Annex 5*) of physical media and devices for which compensatory remuneration for private copy is owed, as well as the quantum of such remuneration is negotiated every 2 years, at the request of one party, within a committee consisting of:

a) One representative of each main collective management organizations, which activate for a category of rights each, on the one hand;
b) one representative for each of the main associative structures mandated by manufacturers and importers of physical media and devices, appointed from them, and one representative each of the first 3 manufacturers and importers of physical media and devices, established on the basis of the turnover and market-share in the respective field, on the other hand.

The remunerations are in percentages and calculated at the value in custom for importers, respectively to the invoiced value without VAT, with the occasion of putting into circulation of products by the producers, and it shall be paid in the following month of import or date of invoicing.

The compensatory remuneration for private copy is a percentage quota from the aforementioned value, as follows:

a) A4 paper sheets for photocopier: 0.1%;
b) Other physical media: 3%;
c) Devices: 0.5%.

The compensatory remuneration for private copy is collected as follows[10]:

- By one CMO sole collector for the works reproduced after sound and audiovisual recording
- By one CMO sole collector for the works reproduced from paper.

The two sole collector collecting management organizations, are designated through the majority vote of the beneficiary collecting management organizations, at the first meeting, or the majority vote of those present, at the second meeting.

Compensatory remuneration for private copy collected by the CMOs, sole collector is distributed to the beneficiaries as follows[11]:

a) in the case of physical media and devices for sound recorded copies, by analogical proceeding: 40% from the remuneration shall be paid, in negotiable shares, to the authors and publishers of the recorded works, 30% shall be paid to performers and 30% shall be paid to the producers of sound recordings;
b) In the case of physical media and devices for audiovisual recorded copies, by analogical proceeding, the remuneration shall be divided in equal shares between the following categories: authors, performers and producers;
c) In the case of copies recorded by digital proceeding, on any type of support, the remuneration shall be divided in equal shares between the beneficiaries corresponding to both categories mentioned above;
d) In the case of paper recorded copies, by analogical proceeding, on paper, the remuneration shall be divided in equal shares between authors and publishers. The due sums for publishers are

[9] Art. 107 of Law no. 8/1996.
[10] Art. 107^1 of Law no. 8/1996.
[11] Art. 107^2 of Law no. 8/1996.

distributed only through publishers associations, based on a protocol established between them which includes the criteria for distribution as well the shares owed to each association.

The compensatory remuneration for private copy shall not be paid where unrecorded video, audio or digital physical media manufactured within the country or imported are traded wholesale to the producers of audiovisual and sound recordings or to television and radio broadcasting organizations for their own broadcasts[12].

In the case of paper recorded copies, by analogical proceeding, the remuneration shall be divided in equal shares between authors and publishers[13]. The distribution rule is set down by the Law on copyright and related rights.

The due sums for publishers are distributed only through publishers associations, based on a protocol established between them which include the criteria for distribution as well the shares owed to each association.

At the distribution protocol shall take part only publishers associations fulfilling the conditions established Romanian Copyright Office Director General's decision.

There are no deductions for social and cultural purposes and the administrative fee composed by the fee owed by the owners of rights, which are members of a collective management organization, for covering the operation expenses, cumulated with the fee owed to the collective management organization which is the sole collector, cannot exceed 15% from the annually collected amounts.

The distribution scheme for each category of copyright and related rights holders is established by each collective management organization in their Statute by law approved by the Romanian Copyright Office and by the courts.

In Poland, in the case of written works the distribution of the private copy remunerations is made also in 'waterfall' or three-level distribution scheme:

- Level 1: 50:50 author–publisher split set by law;
- Level 2: division between book publishers and press publishers;
- Level 3 (book publishers): number of titles / category / number of copies (based on statistical data supplied by the National Library and on results of private copying surveys).

The remunerations are divided between COPYRIGHT POLSKA which is representing the publishers' reprography rights and KOPIPOL which is representing authors' reprography rights.

The distribution principles are controlled by the Ministry of Culture and National Heritage and the data is reported to the Ministry and to the public (via website) by 30 June of the following year.

The distribution is done on the basis of surveys of copying practice that are conducted annually and that are underlying the division of all the collected levies between press publishers and book publishers (the macro-distribution scheme) and the share of the various types of books (academic, scientific, school, popular, fiction, maps, music sheets, etc.) in copying.

Also, the statistical data concerning the Polish book market provided by the Polish National Library are taken into account, as well as the legal deposit of all books published in Poland and the data concerning the number of copies printed of each book published by any Polish publisher.

On the basis of the macro-distribution scheme (books–press) the relevant amounts are transferred to the press publishers' collective management organization – the Association of Press Publishers REPROPOL, which distributes them directly to individual press publishers.

The remaining share of the collected levies (usually ca. 60–70%) is distributed by COPYRIGHT POLSKA directly to book publishers that are taking into account various types of books (academic, scientific, school, popular, fiction, maps, music sheets, etc.) in copying.

Some 80–85% of this share of the levies is distributed to academic, scientific and textbook publishers (these types of book are copied most frequently)

The amount assigned to specific book types is divided into two tranches: number of books published in the two years preceding the distribution year (two-thirds of the amount) and number of copies printed data (one-third of the amount).

3. Conclusions

The private copy remunerations are an important part of the copyright and related rights system in EU and the world. The system should be balanced in order to compensate the prejudice brought to the copyright and related rights holders by the private copy uses.

The article aims to provide an overview on the important developments in the private copying law and practice of countries that have such an exception in place.

[12] Art. 108 of Law no. 8/1996.
[13] Art. 107^2 (1^1) of Law no. 8/1996.

Annex 1 - The tariffs setting models

Models	Countries
State-funded system (no tariffs)	Norway, Finland. In Spain, the royal decree was recently annulled by the Spanish Supreme court.
Direct state intervention	Burkina Faso, Czech Rep., Denmark, Estonia, Greece, Italy, Lithuania, Paraguay, Poland, Portugal, Russian Federation, Slovak Republic, Slovenia, Turkey, Ukraine, USA
Negotiation with industries and societies	Austria, Croatia, Germany, Japan
Set by law/government after proposals by rightholders or negotiation among stakeholders in special government-appointed body	Belgium, Bulgaria, Canada, France, Hungary, Latvia, Netherlands, Romania, Sweden, Switzerland

Annex 2 - Overview of countries that apply a percentage as tariff

Country	Percentage of levy on blank media and devices
Bulgaria	1% to 1.5% on magnetic and optical media (including HDD and flash memory)
Burkina Faso	10% on blank media and devices
Czech Republic	Fixed amount on blank media, 0.75% to 3% on devices
Estonia	8% on blank media, 3% on devices
Greece	6% on all products/devices
Japan	3% on blank media, 2% on devices (audio only)
Latvia	4%/6% on flash/blank media, fixed amount on devices (all pc)
Lithuania	6% on blank media, fixed amount on devices and flash media
Paraguay	0,50% on all products/devices' import price
Poland	Ranging from 0.05% to 3%
Romania	3% on blank media, 0.5% on devices
Russian Federation	1% (of production price)
Slovak Republic	6% on blank media, 0.35% up to 3% on devices
Ukraine	0.02% to 1% blank media and devices
USA	3% on blank media, 2% on devices

Annex 3 – Fixed tariff for 8 standardized media types and devices in 14 countries/Euros/2016

Mdia types and devices	**Austria**	**Belgium**	**Canada**	**Croatia**	**Denmark**	**France**	**Germany**	**Hungary**	**Italy**	**Netherlands**	**Portugal**	**Sweden**	**Switzerland**	**Average**
CD (700 MB)	0,24	0,12	0,20	,01	0,32	0,35	0,06	0,14	0,10	0,02	0,05	0,06	0,09	0,14
DVD (4.7 GB)	0,36	0,40		,01	0,50	0,90	0,27	0,24	0,20	0,02	0,10	0,28	0,28	0,30
External HDD (1 TB)	4,50	6,75		,40		20,00	17,00	6,75	10,24	0,70	4,10	8,47		7,89
MP3 player (8 TB)	5,25	2,50		,86		12,00	5,00	13,35	6,44	1,40	1,60	0,85	4,20	4,95
PC (500 GB)	5,00			,80			13,19		5,20	3,50	2,00	8,47		5,45
Set-top box (500 GB)	20,00	10,75		,31		45,00	34,00	19,22	14,81	3,50	8,00	33,87	22,91	19,76
Smartphone (16 GB)	2,50	2,50		,33		8,00	6,25	10,25	4,00	3,50	1,92	5,93	1,17	4,30
Tablet (16 GB)	3,75	2,50		,33		8,40	8,75	10,25	4,00	3,50	1,92	1,69	2,20	4,39

Annex 4 - Exports and exemption from payment

Models	Countries
Exemption with refund (but exports by manufacturer/ importer are exempted upfront)	Austria, Belgium, Bulgaria, Denmark, Estonia, France, Hungary, Italy, Latvia, Lithuania, Netherlands, Portugal, Russian Federation, Switzerland
Upfront exemption	Canada, Croatia, Czech Republic, Germany, Greece, Japan, Romania, Slovak Republic, Sweden, Ukraine, Netherlands
No refund and/or exemption	Burkina Faso, Paraguay, Poland, Turkey, USA

Annex 5 - The list of supports and devices

Remuneration	Support/Device	Calculation method	
		For importers	**For producers**
3%	**SUPPORTS** 1. Memory sticks (other than for cellphones); 2. Disc Blu-ray; 3. HD DVD Disk; 4. Audio cassettes; 5. Minidisk ; 6. Video cassettes type VHS, Super VHS (except for cassettes for portable video cameras such as: Video 8, Digital 8, HI8, DVM, VHS-C, Super VHS-C), D-VHS, video cassettes HD; 7. Any type of DVD or blank CD, including CD-data.	amount declared in custom	amount without VTA when products are placed into commercial circuit
0,5%	**DEVICES** 1.TVs and digital magneto scopes with HDD or incorporated media storage, audio/video players with media storage, MP3 players, MP4 players, IPOD media player which supports the following formats: AVI, MPEG-1, MPEG-2, MPEG-4, XVID, DIVX (v3.11, v4.x, V.5x, V.6x), XVID/VCD, SVCD, DVD, ACC, WMA, WMV, ASF, MP3, MP4, WAV, IMOD and any other subsequent versions of these; 2. Blu-ray recorder; 3. HD DVD recorder; 4. Audio recorder; 5. Minidisk recorder; 6. Video recorder; 7.CD recorder, HI FI equipment which functions independently; 8.DVD recorder, HI FI equipment which functions independently; 9. MP3 recorder; 10. CD writer; 11. DVD writer; 12. incorporated in computer CD writer (the percentage applies to the amount that represents 7% from the value of the entire system with which it sells the CD writer); 13. incorporated in computer DVD writer (the percentage applies to the amount that represents 7% from the value of the entire system with which it sells the DVD writer); 14. External Hard disk, including the one with audio video input and/or output, regardless of its name; 15. incorporated in computer Hard disk (the percentage applies to the amount that represents 10% from the value of the entire system with which it sells the hard disk); 16. Memory sticks.		
0,1%	sheets of paper for copy machines, A4 format (regardless of the weight)		
0,5%	photocopy machines		
0,5%	printers, scanners, multifunctional devices		

References

- Directive on the harmonization of certain aspects of copyright and related rights in the information society
- Law no. 8/1996 on copyright and related rights, as amended and supplemented
- *International Survey on Private Copying*, Hester Wijminga, Wouter Klomp, Marije van der Jagt, Joost Poort Law & Practice 2016, published by de Thuiskopie and WIPO
- Ana-Maria Marinescu, Analiza Recomandărilor lui Antonio Vitorino rezultate din medierea privind copia privată şi remuneraţiile în reprografie, article published in RRDPI no. 3 (36)/2013.
- http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorinorecommendations_en.pdf
- http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0114+0+DOC+XML+V0//EN
- http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0626&from=EN
- https://ec.europa.eu/digital-single-market/en/news/towards-modern-more-european-copyright-framework-commission-takes-first-steps-and-sets-out-its

COPYRIGHT PROTECTED PLASTIC ARTWORK IN THE LIGHT OF THE EUROPEAN AND ROMANIAN LAWS AND THE ARTWORK VALUE RELEVANCE

Mihai OLARIU[*]

Abstract

The plastic artwork, as a species of the "work of art" genre, is subjected to copyright. However, the law does not define plastic artworks, which are generally included in non-exhaustive listings, in phrases of the types: "plastic or graphical artworks, such as...". This study analytically presents the categories of artworks that may be included in the plastic artwork group, in the light of the European and Romanian law. At the same time, the study analyses the legal relevance of an artwork value, under all its aspects.

Keywords: *artistic work, plastic artwork, sculpture; painting, engraving, lithography, scenography, tapestry, ceramics, glass and metal plastic, design, artwork value, artwork protection.*

1. Introduction

The term “art” broadly designates any human activity relying on knowledge, exercise, perception, imagination, and intuition. More restrictively, art is also characterized by the lack of (practical) functionality, by knowledge, and aesthetics.

In the Age of Enlightenment, arts included the various forms of the so-called fine arts: the classical genres of painting and graphics, sculpture, architecture, and may other secondary genres; dramatic art, having as main genres theatre, dance/choreography; music having as main branches vocal and instrumental music; literature with the epic, dramaturgic, and lyrical genres.

Starting the beginning of Modernism, the forms artistic expression, and the artistic techniques and means expanded significantly. For instance, photography and applied art were included in the category of plastic arts. Dramatic art, music, and literature, and plastic arts are currently supplemented by the so-called new media, such as radio and television, cinematography, etc.

2. Content

The phrase "plastic arts” designates all practices or activities leading to a representation through visual images, using dots, lines, colors, shapes, or volumes. In French, the phrase arts plastiques derived from the Latin ars and from the Greek plastikos and initially defined three-dimensional arts, such as sculpture or architecture, to then include painting, drawing, and engraving. Unlike decorating or applied arts - which were regarded as "minor”, especially during the Neoclassic and Academic Ages (the end of the 17th century and up to the 2nd half of the 20th century) - plastic arts were regarded as "major”, being the most appreciated. In the linguistic Anglo-Saxon area, the term plastic arts only defines the arts with three-dimensional manifestation, while the broad meaning of the plastic art notion is rendered through the phrase "visual arts”.

Even in Romanian, pursuant to the development of new techniques such as "video art" or "conceptual art" - which are hard to define as "plastic" – the term of "plastic art” – in its broader sense - is increasingly replaced, in the artistic language, with the phrase visual arts.

The equivalent of plastic arts in German is "Bildende Kunst”. German did not import an equivalent of the recent English phrase "visual arts".

The term "plastic arts" was traditionally associated to the term of "fine arts” or "belle arte”, the equivalent of the French "beaux-arts", and of the Italian "belle-arti"[1].

The plastic artwork, as a species of the "work of art" genre, is subjected to copyright. However, the law does not define plastic artworks, which are generally included in non-exhaustive listings, in phrases of the types: "plastic or graphical artworks, such as...”. Thus, the Law no. 8/1996 on copyright and related rights, as republished stipulates, in art. 7, that "original intellectual creation works in the literary, artistic fields, […] such as: [...] f) photographic works, as well as any other works rendered through a process analogue to photography; g) graphical or plastic artworks, such as: sculpture, painting, engraving, lithography, monumental art, Scenography, tapestry, ceramics, glass and metal plastic, drawing, design, as well as other artworks applied to products with practical use; h)

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[1] Between 1931 and 1942, The Arts University in Bucharest was entitled the "Belle Arte" Institute, and between 1950 and 1990, it was called the "Plastic Arts Institute". Between 1864 and 1931, art universities were called "beaux-arts universities".

architectural artworks, including drawings, mock-ups, and graphical works developed as part of architectural projects; i) plastic artworks, maps, and drawings in the field of printing, geography, and science in general" are subjected to copyright.

In the European Union law, Directive no. 2001/84/EC on the resale right granted to the author of an original artwork, of September 27, 2001, stipulates, in art. 2, entitled "Resale right for the benefit of the author of an original work of art" that "For the purposes of this Directive, "original work of art" means 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."

In the absence of a legal definition, but starting from the listing of "works of art", it may be summarized that the notion designates all artistic practices of activities generating a representation through visual means, using dots, lines, colors, shapes, or volumes. Hereinafter, we shall analyze the plastic art genres listed in the relevant laws in the field of copyright.

Sculpture is a branch of plastic arts dedicated to the development of three-dimensional artistic images, by carving or shaping a piece of material. As an art of three-dimensional shapes, sculpture in general, and stone sculpture in particular, represents one of the oldest means of visual expression of human thoughts and feelings - older than cave painting - the significations and themes whereof - initially exclusively zoomorphic and anthropomorphic - are common to both artistic genres.

Hence, practiced since immemorial times, stone carving has known, along the millennia, periods of maximum and complex boost in Ancient Egypt and Classical Greece, in the Hellenic countries, and in the Roman Empire, in ancient India and in pre-Columbian America, in Gothic, Renaissance, Neo-Classical, and Romantic Age Europe, or in the contemporary world everywhere, characterized through unprecedented diversification of working styles and techniques. Ever since ancient times, stone carving manifested in all currently known fundamental aspects: as an independent, autonomous art or as an auxiliary art, subordinated to and integrated in, architecture; as transfigured reflection of reality or, quite on the contrary, as non-figurative creation, with purely decorative function[2].

Painting is the branch of plastic arts representing reality in two-dimensional artistic images, using colors (oil, aquarelle, gouache, acryl, ink, etc.) applied on a surface (canvas, paper, wood, glass, etc.). In the theory of modern art, painting is regarded as a universal category including all artistic creations rendered on surfaces. However, the types of paintings vary depending on the materials and supports used and on the artist's working technique: frescos suppose the painting of a freshly plastered wall, while still wet (colors chemically combine with the support surface and they finally set after drying); stained glass is obtained through the combination of differently colored or painted pieces of glass; the pointillist technique is characterized by the combination of small dots, which the viewer can individually join, if he watches the support from the correct distance.

Engraving is a plastic art genre including as techniques the digging, incision, perforation, or shuttering of a generally flat surface using various physical or chemical procedures, for the subsequent printing and multiplication of the image, or in order to obtain an individual artistic object. Individual engraving is used for the inscription or decoration of the various items with shapes or decorating motifs. If engraved on precious, semi-precious metals or moulds for coins or medals, they belong to the glyptic art.

Lithography represents a technique consisting of the printing of the image from a flat typographic surface directly onto the paper passed through the press. The typographic surface is developed on a lithographic stone (dense chalk) or on a metallic board (zinc, aluminum). Developed by the German Alois Senefelder in 1796, the lithographic technique quickly expanded in Europe and America due to the less complex process and to the quality of materiality and expressiveness effects, similar to those of drawing.

Monumental art is the field of plastic arts that relates to large-sized works[3], generally carved. Mosaic, painting (fresco) and stained glass are monumental art genres, each having their specific features in terms of the plastic procedures used. The term "monumental sculpture" is frequently used in art history to determine, on the one hand, the category of a concrete oversized work, and on the other - simple in concept, virtuously performed, rigid and stable, with timeless qualities. In general, monumental sculpture is directly related to the surrounding environment (architecture or landscape), marking a space with a memorial, religious, funerary value or one that is consecrated to illustrious historical personalities who played an important role in certain geographical areas. Monumental sculpture has been known ever since ancient times (Colossi of Memnon, Egypt, 25th century BC; the colossal statues of Ramesses II, 15th century BC; the Pergamon Altar, 2nd century BC); and importantly developed along several centuries (the Statue of Liberty in New York, 1886; the Statue of Christ the Redeemer, 1931, Rio de Janeiro, etc.). Another monumental art genre is the mosaic, which creates images using colored glass or ceramic

[2] Similarly to wood or other material carving, regardless of the indicated situations, stone carving of all times fall - depending on their technique and purpose - into two large categories: free-standing (in the round) and attached (in relief). The former are referred to as such because they can be viewed from all sides, a *tutto ronda*, according to an Italian phrase or *ronde-bosse*, according to the French one, both consecrated as such in our specialised literature (available at www.putna.ro).

[3] From Lat. monumentalis-grandios.

cubes glued with mortar onto the wall. The mosaic art has been known ever since Antiquity (Ishtar Gate, the New Babylon, 6th century BC), and has importantly developed in the Roman and Byzantine art (San Vitale Church, Ravenna, 5-6th century, Saint Sophia's Cathedral in Constantinople, 9th-11th century, etc.). Finally, the term of stained glass designates decorative compositions made of colored glass, joined between lead elements, to obtain specific images. Generally, the metal structure frame for which the glass shapes are created is dictated by the geometrical, segmented shape of the details, which forms the visual integrity of the composition. Stained glass, as monumental art, attained its peak in the Gothic age, being almost omnipresent in European cathedrals. To conclude, we can state that the phrase "monumental art" includes works of art belonging to other plastic art genres, which, however, stand out through sizes and functions.

Scenography was traditionally defined as the "art of painting and setting the scene in theatre", or as the "art of creating the plastic ambiance (scenery, props, lighting) in theatre, cinematography, etc.". In other words, the scenography character of a work of art is given by its very destination. If a board is painted to create an atmosphere as part of a performance, the painting will be regarded as a scenography work of art. However, the scenography work of art is unitary, and it is not only a mere combination of pre-existing plastic works of art. Most of the time, the scenography work of art includes elements with no artistic value if taken individually - a certain type of scene lights; the management of the space on a scene; the costumes of the performing artists etc. –, but when combined by the scenographer, they render a certain image on the space and the theatre or cinematographic work to the public. Thus, scenography is an autonomous art, which aims at triggering a certain type of emotion, by creating artistic images and, more broadly, an "artistic atmosphere".

Tapestry is a form of textile art, which consists of weaving a piece of fabric on a vertical or horizontal loom. The fabric is made up of braids called woof and warp. The warp is parallel to the vertical of the fabric (if the weaving is performed on the vertical loom) and represents the bearing element of the fabric, while the woof is crosswise, being introduced between the warp braids during weaving. Tapestry is generally used in interior design, either hung onto the wall or on a vertical surface. Tapestry originates in Ancient Egypt, and it greatly developed in Medieval Europe, but it still is much spread.

Ceramics is the art of processing the plastic mixture made of common clays, kaolin, quartzite, talc, graphite, and coke in various percentages, through the homogenization, shaping, decoration, glazing, drying or burning thereof. Depending on the composition and on the artist's working procedure, ceramic may be gross (unbaked or baked pottery – terra cotta) and fine (porcelain, faience, etc.).

Glass and metal plastic is a type of plastic art involving the three-dimensional shaping of the two materials. Glass plastic works can be clear, opaque, or can include colors obtained from various pigments. Metal plastic works are achieved through the shaping of the various metal types (platinum, gold, silver, bronze, iron, alloys, etc.).

Drawing is the graphical representation of an object, a face, or a landscape on a two-dimensional, flat, or curve surface, generally, using lines, dots, spots, symbols, etc. Drawing may be monochromatic or colorful.

Collage is a form of plastic art characterized through the combination of different shapes (with or without artistic content) in order to obtain a new unitary artistic form. Previous shapes are glued together on a base. The term "collage" originates in the French "coller" ("to glue"). Though it has a quite lengthy history, collage mainly became a modern art genre starting the beginning of the 20th century, having as representatives Georges Braque[4] and Pablo Picasso.

The works of art applied to practical use products are dedicated both for the individualization - through plastic art-specific aesthetic elements and the industrially ("batch") manufactured utility goods. This category of works of art benefits from a double protection system, both in relation to copyright, and under the laws on "industrial drawings and designs". This added protection derives from the very fact that, due to their destination and reproduction manner, applied works of art fall under the scope of industrial copyright, and, in the light of the way they were developed, they fall under the scope of copyrighting.

Design was defined as a "multidisciplinary field interested in the overall factors (socio-economic, technical, ergonomic, aesthetic, etc.) that contribute to the aspect and quality of the large batch product." In other words, design is a creative activity, which takes into account the development of new forms for practical use items. However, unlike the industrial model or drawing - where the applied shape or drawing aim at individualizing the product through its aesthetic aspect – design aims at "facilitating and rationalizing the manufacture of the product"[5].

Architecture was defined as the "science and art of the organization and building of spaces required for human life and activity"[6] or as the "art of designing and constructing buildings and building complexes based on certain proportions and rules, depending on the nature and destination of the structures"[7]. Because it has both a functional, and an artistic value, the evolution of architecture depends upon the types of

[4] Georges Braque (1882 –1963), French painter, initiator of the artistic style referred to as "cubism", along with Pablo Picasso.

[5] A. Bertrand, La propriete intellectuelle, Livre II, Belfond, Paris 1995, p. 26, quoted by V. Roș, D. Bogdan, O. Spineanu-Matei, Dreptul de autor și drepturile conexe.Tratat, All Beck Printing House, Bucharest, 2005, p. 147.

[6] Dicționar Enciclopedic, Enciclopedică Printing House, Bucharest, 2009.

[7] Marele Dicționar de Neologisme, Saeculum Printing House, Bucharest, 2006.

materials used in a certain age (wood, stone, brick, concrete), the destination of the building (dwellings, religious buildings, industrial, military buildings, etc.), and on the spiritual environment it is developed in. The basic architecture elements volume, surface, and plan – organized based on a certain pace, characterize architectonic styles. Depending on the perception of the time (i.e., towards the functional or the spiritual), architecture accentuates either the structure of the buildings (classical Greek, Renaissance, or 20th century architecture), or the general shape and the decor, in order to trigger an emotion or accentuate national specificity (Egyptian, Baroque architecture, etc.). Depending on the destination of the building, architecture is divided into: civil, religious, military, industrial, etc. A new architectural genre is landscaping, defined as the art of intervening over the landscape in order to obtain an aesthetic space. The destination of the architectonic work is, however, irrelevant in terms of copyright protection, according to the provisions in art. 7 from the Law no. 8/1996 on copyright and related rights, as republished.

Being both an artist, and a technician, "the architect is, however, protected as the developer of original forms, and not as a technician using purely engineering processes"[8]. According to art. 7 lett. h from the Law no. 8/1996 on copyright and related rights, as republished, "even the plans, the mock-ups, and the graphical works that are part of the architecture projects" are protected. Art. 84 from the aforementioned law also concerns the "architecture and urbanism studies and projects exhibited in the vicinity of the architectural work site". Pursuant to the analysis of the two articles, it follows that architectural works of art play a double role: on the one hand, the plans, the mock-ups, the graphical works making up the architectural projects, and, on the other hand, the structure built. Or, even if the plans are not followed by the actual development of the project, the architectural work will be copyright-protected. This also is the conclusion that follows from the formulation of the Romanian legislator which, in paragraph 2 from art. 84, stipulates: "the building of a work of art, whether fully or partially developed based on another project, can only be performed with the approval of the holder of the copyright over the respective project."

Due to the relativity of art assessment criteria in general, the legal protection granted to works of art ignores their value. However, in our opinion, it is the just solution, because in social evolution, artistic and aesthetic standards have significantly developed, and the granting of legal protection only to the works of art regarded as valuable at a certain point, would deprive subsequent generations from the access to the works of art rejected by a certain socio-aesthetic circumstance.

The solution is also adopted expresis verbis by the Romanian legislator, which, in art. 7 paragraph 1 from the Law no. 8/1996 on copyright and related rights, as republished, stipulates that "original intellectual creation works in the literary, artistic, or scientific works, regardless of the creation method, the expression manner or form, and independently of their value and destination […]" are protected.

We believe that the legislator understood to include in the notional scope of the term "value" both the aesthetic value of the work, and other elements characterizing the work, such as: the content of the work; the sizes thereof, and its commercial value.

In so far as the aesthetic value of the plastic work of art is concerned, it should be stated that, despite the commonly attributed meaning, the term "aesthetics" does not only designate the category of "beauty", but it also supposes the capacity to trigger and communicate emotions that are specific to the receiver's senses. Or, in order to achieve this goal, the mere contemplation of "beauty" does not suffice. A series of contemporary artistic movements actually focus on the rejection of the conventional notion of "beauty".

Or, if the aesthetic value of the work were accepted as a criterion for the legal protection thereof through copyright, the law courts – called upon to rule on the fulfilment of the aesthetic criterion – would make an arbitrary decision affecting "the author's legal security. The law does not hold the capacity to decide whether a work of art is valuable or not, to distinguish between art and pseudo-art. The law has to treat all works equally, whether perfect or not, so as to avoid arbitrary decisions. The courts should only fulfil their mission of telling the truth, while leaving it to the academies to grant prizes and to the history to decide whether the work survived the author and the times when it was created, through its value, the only guarantor of immortality"[9].

In so far as the content of the work of art is concerned, it concerns the approached theme, which, in our opinion, may not be regarded as a criterion in deciding whether copyright protection is to be granted or not. "The protection of the work cannot be rejected because it does not comply with good manners, it is sacrilegious or anticlerical"[10]. Even if the work is, through its content, against the good manners of the time, it cannot be deprived of legal protection. The morality of society is a relative and changing notion, and a valuable work, regarded as obscene at a certain time, could be accepted, or even appreciated by subsequent generations. Such an example is the work of the painter Edouard Manet[11], "The Luncheon on the

[8] Colombet Cl., *Propriété littéraire et artistique et droits voisins*, Dalloz, Paris, 1999, p. 64.
[9] V. Roş, *Dreptul proprietăţii intelectuale. Curs universitar*, Global Lex Printing House, Bucharest, 2000, p. 76.
[10] Bertrand A., La propriete intellectuelle, Livre II, Belfond, Paris 1995, p. 152.
[11] Édouard Manet (1832(1832-01-23) – 1883(1883-04-30)), French painter, precursor of Impressionism. Starting from the great artists' tradition, Manet was able to join the old time suggestions with modern elements, which brought him the title of "Painter of Modern Times" (Charles Beaudelaire).

Grass". Featuring a group made up of two men wearing suits and two naked women, having a picnic, the scene scandalized the public and the critics of the time, because of the usual ambiance in which the female nude - only approved of at the time to evoke mythological themes - was presented. Regarded as shameless and challenging, the work was rejected from the "Official Salon" - an exhibition yearly held in Paris. In 1906, 23 years after the painter's death, the painting was exhibited at the Louvre, the largest and most prestigious art museum in France.

The dimensions of the work should not be a criterion in deciding whether to grant legal protection or not. A huge painted canvas, or a miniature the artistry whereof is hard to perceive at first sight; the Sistine Chapel, painted by Michelangelo over several years, or one of Da Vinci's unfinished drafts, are equally protected. Obviously, the works of art involving various author involvement levels will be differently appreciated by the public, critics, or the works of art market, but, as already shown, this appreciation is not relevant in terms of copyright protection.

Finally, legal protection is granted to a work of art regardless of its commercial value. The commercial value of works of art, set on the specialized market as the relation between demand and offer, may differ based on various criteria, but especially pursuant to the aesthetic value thereof as acknowledged by the public or the specialized critics. Generally, the commercial value of a work of art is only set after the work is "achieved" and disclosed, when it already is - if original - subject to copyright. However, especially in the case of works of art belonging to widely known authors, the commercial value of a future or still undisclosed work of art can be estimated based on the author's market share - set based on the commercial value of previous works belonging to the same author. In these cases, the commercial success of a work of art is the very granting thereof to a certain author. An eloquent example to this end is the case of the portrait entitled "Bearded Young Man" – attributed to Rembrandt - from the famous Thyssen collection, evaluated by Christie's auction house in 1986 to approximately ten million dollars. Immediately after the publication of the conclusions of "Rembrandt Research Projekt" - where Dutch experts stated that the work might have been painted by one of Rembrandt's students, but in a very similar style - the market value of the work dramatically decreased, to no more than $ 800,000. Similarly, in the case of a living painter, the value of an unfinished work may be evaluated according to his market share. Or, regardless of this aspect, as already shown, the future work will be copyright-protected, immediately after it was completed.

3. Conclusions

Romanian legal regulations concerning the plastic works are compliant with the ones provided in the European laws.

The article presents in a complex and historical manner the subjects of the plastic works, their definitions and characteristics.

The commercial value of the plastic works it is very important both for the authors, public and clients, expecially for the specialized market. Also, the commercial value of the plastic works has an important topic as regards the aesthetic value thereof as acknowledged by the public or the specialized critics.

References

- The Explanatory Dictionary of Romanian Language, 2nd rev., Universul Enciclopedic Printing House, 1998
- Encyclopaedia Britannica, Ultimate Edition, 2012
- New Explanatory Dictionary of Romanian Language, Litera Internațional Printing House, 2002
- Encyclopaedic Dictionary, Enciclopedică Printing House, 2009
- A. Bertrand, La propriete intellectuelle, Livre II, Belfond, Paris 1995
- Roș V., Bogdan D., Spineanu-Matei O., Dreptul de autor și drepturile conexe.Tratat, All Beck Printing House, Bucharest, 2005
- V. Roș, Dreptul proprietății intelectuale.Curs universitar, Global Lex Printing House, Bucharest, 2000
- Encyclopaedic Dictionary, Enciclopedică Printing House, 2009
- Marele Dicționar de Neologisme, Saeculum Printing House, 2006
- www.putna.ro
- Colombet Cl., Propriété littéraire et artistique et droits voisins, Dalloz, Paris, 1999

ISSUES ON ENFORCEABILITY OF FINAL DECISIONS OF EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE REGARDING EUROPEAN TRADEMARKS ON FIXING THE AMOUNT OF COST IN ROMANIA

Sorin Eduard PAVEL[*]

Abstract

The purpose of this paper is to analyse the enforceability in Romania of final decisions fixing the amount of costs related to European trademarks, issued by European Union Intellectual Property Office.

According to art 110 (1) and (2) of EU Regulation 2017/1001[1]*, such decisions are titles enforceable in any Member State and enforcement proceedings are governed by applicable national civil law of the Member State in territory of which the enforcement is carried out.*

Apparently, the enforcement of these decisions in Member States should be a formal procedure devoid of issues. Things may be complex having in view that each Member State is compelled by the art 110 (2) of the EU Regulation 2017/1001, to designate a national authority responsible with the verification of the authenticity of respective decisions.

Precisely, what happens when a Member State "forgot" to designate such national authority? Can enforcement proceedings regarding these decisions in respective Member State, be effective?

Romania does not designate the national authority prescribed under art. 110 (2) of EU Regulation 2017/1001, fact that generates, at least from theoretical perspective, issues on the enforcement of this kind of decisions. In a nutshell, if no such national authority has been designated, the procedure on verification of authenticity of these decisions cannot be fulfilled, meaning that enforcement proceedings may be deemed as failing to comply with the national law.

Keywords: *EUIPO; enforcement; EUTM; enforcement of EUIPO's decisions; decisions fixing the amount of costs.*

Introduction

European Union Intellectual Property Office (**EUIPO**) is EU office "responsible for managing the EU trademark and the registered Community design"[1]. EUIPO "was created as a decentralised agency of the European Union to offer IP rights protection to businesses and innovators across the European Union (EU) and beyond"[2].

As regards EU trademarks, EUIPO issues decisions *inter alia* grounded on the provisions set forth by the EU Regulation 2017/1001, out of which decisions fixing the amount of costs.

EUIPO has divisions that deal with legal aspects on the EU trademarks such as Opposition Divisions competent for making decisions on opposition proceedings related to EU trademarks [art. 161 (1) of EU Regulation 2017/1001], Cancellation Divisions competent for making decisions on revocation and invalidation proceedings related to EU trademarks [art. 163 (1) (a) (b) of EU Regulation 2017/1001], and Boards of Appeal responsible for deciding on appeals related to those decisions *inter alia* issued by examiners, Opposition Divisions and Cancellation Divisions [art.165 (1) of EU Regulation 1001/2017].

All Opposition Divisions, Cancellation Divisions and Board of Appeals could rule decisions on fixing the amount of costs and some of these decisions can become final (**Office Decision**).

This paper tries to point out those issues related to enforcement of Office Decisions in Romania.

Under art. 110 (1) (2) of EU Regulation 2017/1001, Office Decisions should be enforced in any Member State according to national civil code of the Member State in territory of which enforcement proceedings should be carried out, each Member State having the obligation to designate a sole national authority responsible with the verification of the authenticity of Office Decision as the sole formality (**National Authority**). After the verification of the authenticity of an Office Decision, the National Authority shall issue an order of enforcement, document which shall be attached to the Office Decision [art. 110 (2) of the EU Regulation 2017/1001].

So far, Romania has not designated a National Authority, fact that may generate legal issues when a creditor of costs fixed by an Office Decision initiates legal proceedings to enforce his title in Romania against the debtor.

This study on enforceability of Office Decisions in Romania is important because it reveals the legal issues that may occur in the absence of the designation of the National Authority for Romania. Such legal issues may lead, as we will see below, to the blocking

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[1] Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark;

[1] EUIPO official website accessed on March 8, 2018, https://euipo.europa.eu/ohimportal/ro/about-euipo;

[2] EUIPO official website accessed on March 8, 2018, https://euipo.europa.eu/ohimportal/ro/the-office;

of national enforcement proceedings initiated by the creditor before Romanian competent authorities.

In the absence of the designation of Romanian National Authority, the procedure whereby the authenticity of Office Decision should be verified according to art. 110 (2) of the Regulation 2017/1001, cannot be complied with, fact that may lead to the non-compliance with enforcement rules provided by the Romanian Civil Procedural Code (**RCPC**).

In this paper, we shall present the legal issues deriving from the application of enforcement rules provided by RCPC when a creditor tries to enforce an Office Decisions in Romania.

So far, we are not aware of a case whereby enforcement proceedings on Office Decisions have been blocked due to the non-compliance with the procedure related to the verification of authenticity of Office Decision, either because the enforcement was not necessary (debtor voluntary complied with the payment obligations set forth under Office Decision), or because such non-compliance has not been noticed by the Romanian authorities competent with enforcement proceedings

1. National Authorities designated by Member States, which are responsible with the verification of authenticity of Office Decisions

As per the information provided by EUIPO official website, the following National Authorities have been designated so far: courts of first instance in Belgium[3], the High Court in Ireland[4], the Federal Patent Court (Bundespatentgericht) in Germany[5], Industrial Property Office of the Slovak Republic in Slovakia[6], the district courts (Bezirksgerichte) in Austria[7], Danish Patent and Trademark Office in Denmark[8], the *Institut national de la propriété industrielle* in France[9], the district courts (Arrondissementsrechtbanken) in Netherlands[10], the Secretary of State in United Kingdom of Great Britain and Northern Ireland[11], Industrial Property Office in Czech Republic[12], Estonian Patent Office in Estonia[13] , the Court of Appeal in Lithuania[14].

The above outlook shows that Romania has not designated the National Authority, but also that our country is not the sole Member State which has failed to do so.

2. Legal aspects regarding enforcement procedure of Office Decisions in Romania

As we mentioned above, the National Authority has the sole purpose to verify the authenticity of Office Decision at the request of concerned party (creditor), in which case, the National Authority shall release an order of enforcement appended to the Office Decision [art. 110 (2) of EU Regulation 2017/1001].

After obtaining this order of enforcement, the creditor could continue the enforcement proceedings by notifying national competent authorities from the Member State in the territory of which the enforcement should be carried out [art. 110 (3) of EU Regulation 2017/1001].

Considering above matters and the compulsory nature of the provision of art. 110 of EU Regulation 2017/1001, the verification of the authenticity of the Office Decision subject of enforcement in Romania, cannot be performed in the absence of the Romanian National Authority.

Under Romanian law, an EU enforceable title for which EU law does not regulate a preliminary procedure for the recognition in the Member State in which the enforcement should be carried out shall *de iure* be enforceable without any preliminary formality (art. 636 RCPL). This means that an Office Decision could be deemed enforceable title in Romania, after obtaining the enforcement order (that should have been issued by the National Authority) when the verification of the authenticity of Office Decision – procedure provided at art. 110 (2) of the EU Regulation 2017/1001, is ended.

The enforcement proceedings in Romania are carried out by a competent bailiff (**the Bailiff**) and a competent enforcement court (**the Enforcement Court**) at the creditor's written enforcement request which is registered by the Bailiff under a writ [art. 665 (1) RCPC].

After the registration of creditor's written enforcement request, the Bailiff notifies the Enforcement Court to grant the authorization for enforcing the title. The Bailiff's notification addressed to the Enforcement Court is accompanied by the following certified copies: creditor's written enforcement request, the title subject of enforcement, the writ under which the creditor's enforcement written request has been registered by the Bailiff, and the proof of payment of the prescribed stamp duty [art. 666(1) RCPC].

[3] according to Communication No 3/07 of the President of EUIPO of March 13,2007;
[4] according to Communication No 1/07 of the President of EUIPO of February 2, 2007;
[5] according to Communication No 3/05 of the President of EUIPO of April 26, 2005;
[6] according to Communication No 8/04 of the President of EUIPO of September 22, 2004;
[7] according to Communication No 1/04 of the President of EUIPO of February 11, 2004;
[8] according to Communication No 7/02 of the President of EUIPO of May 17, 2002;
[9] according to Communication No 1/02 of the President of EUIPO of February 19, 2002;
[10] according to Communication No 6/99 of the President of EUIPO of July 30, 1999;
[11] according to Communication No 8/98 of the President of EUIPO of September 29, 1998;
[12] according to Communication NoCOM 2/14 of the President of EUIPO of September 19, 2014;
[13] according to Communication No 1/09 of the President of EUIPO of August 7, 2009;
[14] according to Communication No1/2017 of the President of EUIPO of November 17, 2017;

The Bailiff's notification could be accepted by the Enforcement Court, in which case the latter issues the authorisation to enforce the title, or could be refused.

The Enforcement Court could refuse to grant the authorization for enforcing the title under specific conditions expressly provided by RCPC, namely:

I. the creditor's enforcement request falls under the competence of another enforcement authority (e.g. other bailiff is competent with the enforcement) [art. 666 (5) (1) of RCPC];
II. the title subject of enforcement does not constitute by law an enforceable title [art 666 (5) (2) of RCPC];
III. the title subject of enforcement, other than court's decisions, does not comply with all formal conditions prescribed by the law or other requirements under specific cases provided by the law [art. 666 (5) (3) of RCPC];
IV. the debt is not certain, of a fixed amount and due [art. 666(5) (4) of RCPC];
V. the debtor enjoys immunity to enforcement due [art. 666(5) (5) of RCPC];
VI. the title subject of enforcement contains provisions that cannot be enforced [art. 666(5) (6) of RCPC];
VII. there are other restraints prescribed by the law [art. 666 (5) (7) of RCPC].

3. Consequences of the absence of enforcement order under proceedings of enforcement of Office Order in Romania

3.1. The case when the Enforcement Court notices the absence of the enforcement order

Since there is no National Authority designated for Romania, the procedure of verification of the authenticity of Office Decision provided under art. 110 (2) of the EU Regulation 2017/1001, cannot be performed and in consequence, the enforcement order cannot be obtained.

The absence of the enforcement order may be noticed by the Enforcement Court under proceedings whereby the Bailiff seeks to obtain the authorization for enforcement, in which case, the Enforcement Court shall find the provisions mentioned at point iii) of above section, applicable (Office Decision is not in compliance with formal requirements prescribed by the law) and shall refuse to grant the authorization for enforcement. Such refusal makes enforcement proceedings ineffective.

How can this legal impediment be overcome? There is no straight answer but only assumptions based on the interpretation of the law as follows:

a) The competence of Romanian National Authority is deemed to be taken over by the Enforcement Court

From the very beginning of proceedings when the Bailiff notifies the Enforcement Court to issue the authorization of enforcement, the Bailiff may additionally request the Enforcement Court to verify the authenticity of the Office Decision and to issue the enforcement order as provided under art. 110 (2) of EU Regulation 2017/1001. The Enforcement Court could be deemed as taking over the competence of the National Authority since the later has not been designated. However, this interpretation is arguable and may not be upheld due to the following reasons:

I. provisions of art. 110 of EU Regulation 2017/1001 are mandatory for any Member State (including for Romania). The obligation to designate a single National Authority responsible with the verification of Office Decisions is expressly provided under article 110 (2), without any possibility for the Member States to derogate from these specific provisions. Because of these arguments, since the Enforcement Court has not been expressly designated by the Romanian state, it cannot be deemed to play the role of National Authority within the meaning of art. 110 (2) of EU Regulation 2017/1001;
II. under RCPC, the Enforcement Court could be any of the Romanian courts of first instance in the jurisdiction of which the registered office/domicile of the debtor is located, except for those cases where the law provides otherwise. If the debtor does not have the domicile/registered office in Romania, the Enforcement Court is the Romanian court of first instance in the jurisdiction of which the registered office/domicile of the creditor is located, and if the latter is not in Romania, the Enforcement Court is the Romanian court of first instance in the jurisdiction of which the registered office of the Bailiff vested by the creditor is located [art. 651 (1) RCPC]. Thus, the Enforcement Court is actually "a series" of Romanian first instance courts and not a single court, therefore the interpretation whereby the Enforcement Court has the competence of the National Authority as the latter is defined under art. 110 (2) of EU Regulation 2017/1001, does not comply with the express provisions of the EU Regulation 2017/1001 whereby Member States are compelled to designate a single authority the contact details of which should, according to the same art. 110 (2), be communicated to EUIPO, the Court of Justice of European Union (**CJEU**) and to the European Commission.

b) The Enforcement Court is deemed to not have the competence of the National Authority

The Enforcement Court may deem the Office Decision unenforceable because it fails to comply with the formal requirements stipulated under art. 110 (2) of EU Regulation 2017/1001 (there is no enforcement order issued by the Romanian National Authority), in which case, the Enforcement Court shall not issue the authorization for enforcement requested by the Bailiff. Under this circumstance, the creditor cannot recover

the costs owed by the debtor, which is ascertained in the Office Decision.

How can the creditor enforce his rights if the debtor refuses to pay the costs having in view that the enforcement proceedings are blocked because Romania has not designated the National Authority? A solution might be an action in tort against the debtor on the legal grounds of civil liability stipulated by the Romanian Civil Code (**RCC**).

RCC provides the obligation of any person to refrain from bringing prejudice to the rights and legitimate interests of others [art. 1349 (1) of RCC].

Furthermore, the person who commits an illicit act is compelled to repair the caused prejudice also when this prejudice is a result of the infringement of the interest of the other person, if the interest is lawful, serious and, by way of its manifestation, the interest creates the appearance of a subjective right [art. 1359 of RCC].

The conduct whereby the debtor refuses to indemnify the creditor with those costs ascertained in the Office Decision, may be deemed having an illicit nature, in which case, civil liability provided by RCC may apply. Under these circumstances, the creditor may request the Romanian competent court to compel the debtor to pay the amount of costs ascertained in the Office Decision.

In order for the action in tort to be successful the creditor should demonstrate to the court the elements of the civil liability, namely: the prejudice, the illicit act, the relationship of causality between the prejudice and the illicit act and the guilt of the debtor. Failure to prove one of these elements leads to the rejection of the action.

In the case at hand, the debtor could defend himself by invoking that the amount of costs ascertained under Office Decisions represents in fact court expenses and not a prejudice in the meaning of civil liability legal provisions, thus these costs should be recovered under enforcement proceedings and not by way of an action in tort. The creditor could contest this claim by invoking that the debt ascertained under Office Decision has the nature of a prejudice within the meaning of art. 1349 (1) of RCC, since the recovery of this debt is not possible under enforcement proceedings due to the fact that Romanian state has not designated the National Authority.

3.2. The case when the Enforcement Court not notice the absence of the enforcement order

After the Enforcement Court grants the enforcement authorization for the Office Decision, without notice the legal aspect raised by the absence of enforcement order that should have been issued by the National Authority, the Bailiff proceeds to enforce the respective Office Decision against the debtor.

The Bailiff shall communicate the debtor (i) a copy of the Enforcement Court's decision whereby the enforcement of Office Decision has been authorised by the Enforcement Court, (ii) a copy of the Office Decision certified by the Bailiff and (iii) a notice to perform if the law does not provide otherwise [art. 667 (1) of RCPC].

Against the enforcement acts performed by the Bailiff, the debtor could file a contestation with the competent court which is actually the Enforcement Court within 15 days as of the date of receipt of the Bailiff's notice to perform, together with corresponding documents (certified copy of the Enforcement Court's Decision attesting the authorization of enforcement, certified copy of the Office Decision) [art. 715 of RCPC].

Having in view the mandatory legal provisions that should be complied with by an Office Decision to become enforceable, we consider that the debtor could successfully challenge the enforceability of the Office Decision claiming the absence of the enforcement order that should have been issued by the National Authority under the procedure set forth by art. 110 (2) of the EU Regulation 2017/1001. Thus, the debtor could request the Enforcement Court to cancel the enforcement title since the Office Decision does not comply with the formal requirements requested by the law [art. 666 (5) (3) of RCPC].

Conclusions

The failure by Romania to designate the National Authority risks to prejudice the rights of the creditors attested under Office Decisions because it creates a legislative vacuum that may impede the enforcement of these rights.

As a top priority, Romania should "fill out" this legislative vacuum with appropriate legal provisions, designating the National Authority responsible with the verification of the authenticity of Office Decision as it is provided under art. 110 (2) of EU Regulation 2017/1001.

Until this measure is taken, in order to secure creditors' rights ascertained by Office Decisions, the Romanian judicial authority should agree with the solution according to which, in the absence of a National Authority, the competence to verify the authenticity of an Office Decisions as provided under art 110 (2) of EU Regulation, vests with the Enforcement Court. Such interpretation is in accordance with the constitutional provisions whereby in case of conflict between a national rule and an EU compulsory rule, the latter shall prevail [art. 148 (2) of the Constitution of Romania]. Moreover, among other Romanian authorities, the Romanian judicial authority has to ensure (i) the compliance with the obligations resulted from the agreement on accession to European Union and (ii) the priority of EU law [art.148 (4) of the Constitution of Romania]. Having in view these matters, the Romanian judicial authority must admit that under EU Regulation 2017/1001, creditors' rights ascertained under Office Decision are to be enforced and the right to enforce cannot be devoid of effects due to the gap in the Romanian legislation generated by the

non-compliance with the obligation to designate the National Authority.

An appropriate National Authority that can be designated is the Romanian State Office for Inventions and Trademarks, since this authority is partner of EUIPO. Other solution could be the designation of Bucharest Tribunal (*Tribunalul Bucuresti*) considering that this court represents an European trademark court within the meaning of art.123 of EU Regulation 2017/1001.

Designating the Enforcement Court may be problematic, having in view that Enforcement Court could be any of the Romanian courts of the first instance from all national jurisdictions. Such designation may be deemed contrary to the provisions of art. 110 (2) of EU Regulation 2017/1001, since the National Authority should be a single one.

References

- 2017/1001 (REGULATION (EU) 2017/1001 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 June 2017 on the European Union trademark)
- https://euipo.europa.eu/ohimportal/ro/eu-trade-mark-legal-texts

FISCALIZATION OF COPYRIGHT. CONTRIBUTIONS TO CLARIFYING CERTAIN ISSUES REGARDING FISCALIZATION OF COPYRIGHT *(fiscus ubique praesens est)*

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Abstract

Intellectual creations and taxes have the gift (the first) and vice (the last) to be everywhere. Intellectual creations are sources of income for rights holders and the revenues incurred from their exploitation are, with some exceptions, taxed everywhere under a regime of favour. In some countries, the facilities granted are so attractive that the most important creators have established their headquarters in these „intellectual tax havens". Researching the share of tax revenues from the capitalization of intellectual property rights in the total budgetary revenues of Romania in the last years, as they are highlighted in the annual budget laws, the first words spoken were: It can not! It can not be true! We can not be so low!

According to Annex no. 1 of the state budget law, from the total amount of the planned revenues to be made in 2017, the amount of 96,825,000 lei is „income tax on the exploitation of intellectual property rights" and we find that it increased compared to 2016 with over 10,000,000 lei (from 86,384,000 lei), the forecasts for the following years being also of growth. Referring to the programmed amount to be made from the taxing of the results of the intellectual creation activity, we find that the share in the total state budget revenues is 0.082% (a sum that should not be worried by its small size only if we refer to the tax on profit of the commercial banks planned to be realized, that of 357,000,000 lei).

Keywords: *income from intellectual property rights; subjects of taxation; taxable matter; the regime of favour; collective management bodies.*

1. Questions instead of introduction

No matter how controversial Thomas Malthus[1] is for his ideas and theories, and especially for the one pursuant to which poverty, famine, disease, epidemics, climate change, calamities and wars are beneficial factors for mankind because they ensure the balance between the number of individuals and livelihood, we have to admit that he is right when he says, optimistically, that when a man is born *„God sends not only an extra mouth to be fed, but also a pair of arms that will work."* And I think we can forgive the cynicism of some of his theories in exchange for the realistic demand he made, that *„instead of poverty laws, take measures to educate the poor."* A suggestion that, when it was made, was in line with the spirit of Queen Anna's Statute of 1709, whose declared purpose was to encourage teaching and educators, not only for the benefit of the ignorant but also for the benefit of the country. What the British did in the 17th-18th centuries in the field of intellectual property and by the laws they had adopted over time in order to teach the subjects to work, and if necessary, force them to work and what Malthus said is a good and timely urge for our politicians and for that part of the population that refuses to school and work. And who should be educated to work, not to stand in the queue of social aid, taught to have an initiative, encouraged and helped to undertake when this desire exists, determined to produce goods and added value. How could they do it and we can not?

Many civil law teachers start their first course asking students the question: what did you see on the street coming to college? People and goods hurry most to respond, to the satisfaction of those for whom there is nothing else but pure civil law. The more perceptive they will say, of course, that they see around them creations of God and creations of men! Among these ones, some will continue to say: material goods and intellectual goods. And maybe some will say that all these are „goods" within the meaning of article 1 of The European Convention on Human Rights First Protocol to the Convention and, going further, they will say that upon all these we have some kind of ownership that, if we look closely we find that we are partakers of the state and not of our own. That ownership rights upon goods and/or exclusive rights on intellectual creations are not so exclusive and opposable to everyone as we would want, imagine, or affirm, since the state is entitled to a „portion" of our wealth and income.

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[1] Thomas Robert Malthus (1766-1834), a British cleric and economist, author of a theory that bears his name (Malthusianism), according to which the population grows in geometric progression while livelihood increases in arithmetic progression, this prospect is worrying in the absence of demographic controls. He was contested even during his lifetime, slandered, demonized by many, but many, lucid, admired him. However, he is topical, many are today who recognize the value of his theories and are seeking solutions to the present state of affairs (which confirms Malthus) pursuant to his ideas. His work "Essay on Population" was translated into Romanian language by Victor Vasiloiu and Elena Angelescu and published by the Publishing House *Științifică* in 1992.

Including those created as a result of performing an intellectual creation activity. We always divide our wealth and income with the state, and it seems natural for us to do it. It is true that if we did not do it, if we rebelled against this kingly right of the state, we would have soon find out how bitter the taste of this disobedience is and how „opposable" to the state is our right on what we have gained in property or over what we have created through intellectual activity. We would see how indisputable this kingly right of the state is, getting its share, and how serious this is, and not just in the eyes of the state, the fact of not giving it what is long and definitively admitted being owed to it. Why is that?

It seems to me that the Ecclesiastes has answered to all the questions. And we do not find fault with either one. We all agree that the State and the Tax are inseparable (or even one and only) that people can only live in organized communities, that living together involves spending to meet common needs, and that this requires everyone to participate supporting public spending, including creators who make revenue from exploiting their intellectual creations. We agree with the obligation principle, universality and equality in tax matters because we cannot live together otherwise and because it is moral and fair. We are unmistakably aware that the progress of mankind is due to the activity of those endowed with creative power and that our future depends on what and how much we will create. I mean the creators.

We are reserved as regards tax incentives that violate the obligation principle, universality of taxes and equality of individuals (taxpayers) against taxation. We are against social assistance for all who can work and do not because their help has perverse effects. Is this assistance the cause of laziness[2], denial of work and misery for those who can work and do not do so as a deterrent to those who work. Don't you think that Ecclesiastes (2.21) referred to this when he said: ***„for a man who has put into his work wisdom and science and has succeeded, shares it with the one who has not worked. And this is vanity and an exceeding great evil"?*** Or is the Book of Books overcome?

Albert Einstein, perhaps the greatest creator of all time, considered by the international science community „the man of the twentieth century," is a name associated with the genius. Nobel Laureate for Physics in 1921, the man who stunned the world with his theories, his findings, his scientific work, and related inventive applications[3], the man who always found light where for many only deep darkness was, said that ***„the hardest thing to understand in the world is the income tax"!*** And looking over a tax statement he stated that ***„it's too difficult for a mathematician (to fill out). I need a philosopher."*** And if for Einstein it was hard to understand, then who would understand what our taxes are all about?

Not all people can create, of course, and not all those who claim to do so are truly creators, life showing that plagiarism is not only a very shameful and old job, an act which is not forgotten, is not forgiven, and does not prescribe, but also a profit-maker (this could be one of the hypotheses where the legislator understood to allocate tax on illicit income, upon which I will return)! But with the exceptions justified by illness, disability or age, all those in power should work according to their skill, and those who lack knowledge, helped to acquire it, however in order to achieve this we need an efficient education system where the authors of works, creators in all fields and teachers are the most important contributors.

Comparative history and statistics with their insipid but convincing figures shows us what the states that have understood this simple truth have achieved. Shortly after England became the United Kingdom (1707), in 1709, the United Parliaments of England and Scotland adopted the first modern law on copyright whose title was: ***„An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the Times therein mentioned"***. Subsequently, the title of the law was adjusted and reduced to the ***„Law for the encouragement of learned people to compose and write useful books"*** or ***„The law for encouragement of teaching,"*** which is even better known in the specialized works as ***Queen Anna's Statute***. The purpose of the law derives from its very title: encouraging creative work as one that is useful to learning. In the copyright system, the **usefulness** of new and original creations is the real reason for the protection of works, and here is the fundamental distinction between this system of protection and that of the Berne Convention, at the heart of which is **the creator and its personality**. And even if we are emotionally attached to the European copyright protection system (the Berne Convention), we must admit that **the copyright system has proven its efficiency**, as it is in the states that practice it, the creative work is at higher levels than in Europe, categorically refuting the idea that the satiated creator (artist) can not create, an idea that has a long history in Europe.

The punishment was the first tax. The beneficiaries of the robbery-tax, says Mancur Olson[4]

[2] After adopting the "Law of Poverty" in England in 1601, „idleness and hatred of work were found encouraged", as in France, the establishment by the state, under the authority of the Constitution of 1848 and the ideas of Louis Blanc, of the National Workshops where work was paid by the state by day which was lasting for 10 hours, without the workers producing much, made the number of such paid persons increase, from 6,000 in March 1848 to 150,000 in June 1848, a bankrupt idea for the state. Apud Nicolae Idieru, Political Economy and Finance Studies, Carol Muller Publishing House, 1895, p. 135 et seq.

[3] A. Einstein was not an inventor in the classical sense of the word, but his theories and discoveries are inexhaustible sources of valuable inventions. Among them, the missiles, the atomic bomb.

[4] The American economist Mancur Lloyd Olson Jr. (1932-1998) in his latest paper, Power and Prosperity, and in other studies, analyzing the economic effects of various types of government (anarchy, tyranny, and democracy) distinguishes between roving bandit and stationary

were not at the beginning only a band of wandering robbers who, with time settled and started, with arms in their hands and then words that became themselves a force (the church had its role and interest), to arrogate their role as protectors of those they subjected with force, to gain legitimacy for their actions, then to organize themselves, to establish rules (one of the first being the repetitiveness of the performance, the other, the severe punishment of the one who refuses the imposed burden), institutionalize the coach and the coercive apparatus. And the little ones had finally the reasons to choose the latter as masters and to obey them, even if they made them gnashing their teeth, because their behaviour, besides offering them the safety of life, and has, and has the potential to, however, encourage economic development. The tax was born out of and through violence and is the consequence of a report of obedience, but not many are those who offer other justifications for the right to tax. It is, therefore, natural that relations between State / Tax Authorities and individuals should not be just as cordial

Individuals, unable to completely avoid paying taxes, want to give the state as little as possible (including creators, authors of the works of the spirit do that), and the state wants to take from everyone as much as possible! Individuals are seen by the state as fraudsters and not all of them are, because nowhere else, tax optimization is not evasion, but many of our **states lawyers**[5] and not a few judges (unfortunately) are determined to cut off the Romanian taxable material to make room for those who are to replace Romanian capitalists (incapable of organizing and becoming not only a voice to be heard, but also a force to be taken into account) and then expatriate their income to other lands , wondering of what will be paid for in the future prepared by them without discernment for the „good" they are doing to the country now. And the country can not strip robbers of the unjust, because the irremovability of judges is a trivial status in relation to the special status of state lawyers in Romania. The state, on the other hand, has always been seen by tax payers (a part of them) as the greatest robber! And so it is still today. The Bible tells us the same (we will return), but also Lysander Spooner[6], a genius creator, who defeated the United States in two famous trials, and whose work on the unconstitutionality of slavery offered solid arguments for its abolition.

Researching the share of tax revenues from the capitalization of intellectual property rights in the total budgetary revenues of Romania in the last years, as they are highlighted in the annual budget laws, the first words spoken were: It can not! It can not be true! We can not be so low! That's why I ask: Do you know dear politicians sent by us (wrongly?) where you are and decide on our behalf, what is the share of intellectual creation assets in performing societies and developed countries? If you know, why don't you encourage and support creative work and development research, as is the case in those countries? Do you know gentlemen politicians that we are the country with the lowest level of innovation in the European Union? If you know, why do not you do anything to fix things? Do you know that a country with such a rich culinary tradition has only four geographical indications protected at European level? Do you know it's harder to write a valuable scientific book than to produce software? If you know, why only IT programmers are exempt from income tax? But our list of questions is long. Now we end up with: Do you know that OSIM and ORDA are agonizing from your unpredictability? Do you know how incoherent, inadequate to the interests of the country and out of date (to be polite) is the Romanian legislation on intellectual property?

2. The Ubiquity of Tax Authorities and Intellectual Creations

Intellectual property and Tax Authorities or Intellectual Property and Tax Authorities have in common not only the seniority, permanence and continuous evolution, but also the gift of ubiquity, of their omnipresence at the same time. According to some authors, Intellectual Creation and the Tax Authorities have something sacred, divine[7]. And perhaps by the end of writing and / or reading and before concluding that yes, life might perhaps exist without a Tax and without intellectual creation, but it would certainly be much harder if not impossible, we

bandit, stating that a steady bandit is preferable, which, unlike the wandering one, correlates its interests with those of the population and robbers wisely in order not to remain without the wealth.

[5] This name is not good for those who should be "state attorneys", because attorneys work for the benefit, not against the interests of those who hire them. And many of these "state attorneys" do not understand their true meaning. For the statement that ***"tax avoidance is the only intellectual effort that still has a reward"***, Nobel laureate for economy, John Maynard Keynes, is likely to be declared, after the expression used by Romanian politicians to compromise competitors, and from which state lawyers they made themselves a currency, a "prisons".

[6] Lysander Spooner (January 19th, 1808 – May 14th,1887), philosopher, pamphlet, abolitionist activist, lawyer and entrepreneur, one of the most important figures in the history of American anarchism because of the consistency between written principles and values in action. He gained fame after having obtained the repeal of a regulation that forbids his lawyer access because he did not graduate from the college and after an uneven fight he conducted with the US Post Office holding the legal monopoly on postal services in the US, bankrupt the company he had created but also urged the US Congress to reduce postage rates several times. He also noted, through his belief in the primacy of the natural law of the laws created by men, that he was an opponent of slavery and defended for free the fugitive slaves, his work *"The Unconstitutionality of Slavery"* (published in 1845), sparked the admiration of slave opponents and defenders for their clarity and rigor, demonstrating that slavery is incompatible with the United States Constitution.

[7] See Ernst H. Kantorowicz, The King's Two Bodies, Polirom Publishing House. "It is, perhaps, the most important work on the history of medieval political thought, certainly the most spectacular of the past decades," wrote the American Political Science Review. The work was published in 1957 and translated into many languages. In Romanian it was published in 2014. E. H. Kantorowicz (1895-1963) was a specialist in medieval history and taught at the University of California, Berkeley.

will discover and other elements common to the two areas of social, economic and cultural life and law.

If Tax Authorities and its usual form of expression, the tax (we adopt the British model here and we understand by tax and taxes and contributions, when it will be necessary to refer explicitly to them, because they are not only conceptually different in our law, but are quite different and under the aspect of their legal regime) is „the blood of the state", intellectual creations are the „state mind" and the engine of its development. There can be no states without taxpayers' contributions to support general spending, as there can be no states that go beyond the creation of people, intellectual property.

The tax is contemporaneous with the state, and according to some authors the state is the cause of the tax, but others say that, on the contrary, the tax would be the cause of the state. Could the state and the tax appear outside the minds that have thought and put into operation these ideas (state and tax)? We do not believe it! The intellectual creation activity (not the legal institution of intellectual property, the intellectual property right) is older than the state rather than the tax, but only in organized communities (in states) and with great delay in relation to other protected social and economic values, the creation intellectual property has begun to be valued at its true value and legally protected. after the emergence of the state and on a certain level of development, theologians and scientists - creators, authors of scientific works - formulated ideas and theories, developed them broadly, not a few times with biblical arguments, and offered state reasons for justifying taxation and the right to tax. Among them, we only mention Thomas d'Aquino[8],who, inspired by Aristotle, sees in the state a necessary product because,"***man is a social creature***"[9] and asserted the right of sovereigns to collect taxes when the ordinary – areas income - was not sufficient, with the argument that the monarchs work for the general interests of the community, so that the community has a duty to contribute to their support, and so much more as a lack of means would put the sovereign in a position to contract loans, which would be likely to reduce the prestige that a state must enjoy in relation to another state.

The tax is ubiquitous and some authors (E. H. Kantorowicz among them) say that through this it resembles God. But the (intellectual, people's) creation is missing from something that satisfies people's needs today? Tax is a combination of divine and earthly evidence, proof that this is the very theory of solidarity, so often used in recent times in modern states to justify imposing, and which theory originates in the biblical commandment: help your neighbour (love your neighbour as yourself, Matthew 22:39). But is intellectual creation not the same? Has God not made us (Genesis 1: 26-27) with intellect, emotion, will, and of course, with creative power in his image and likeness? Are not we the way God wanted us to be? It is not the artistic creation a permanent mixture of divine and humanity, of grace of witch only some are gifted and of enormous human toil! He did not say in his famous aphorisms the most original plastic artist of all time, Constantin Brancuși, that he puts into his work divine fire, coincides with it and burns himself inside his work, or that to be true artist must „ *to create as a demiurge, to command a king, to work as a slave* „?

In the context it must be said that the artist of genius, whose gift made to the Romanian people in 1951 (230 sculptures according to some sources) was denied by those who then decided the destinies of the country and its culture and among which were great creators who they did not understand him[10] or they were simply afraid of his greatness, he would also deserve to be studied by jurists[11] and not just in terms of his vision of the originality of works, in which he succeeded in defeating the US customs authorities following a famous, a process that is quoted in all the important works in the field, but also many other events in our lifetime and from our life's realization, even today, for example, whether he died having or not Romanian citizenship , and whether his bones may or may not be

[8] Thomas d'Aquino Theologist (1225-1274, canonized in 1323) and medieval scholastic philosopher, author of "Summa Theologiae". He founded the philosophical system recommended in 1879 as the official philosophy of Catholicism, confirming his professor Albertus Magnus, who said that "*This silent ox will fill the world with his prick*" (The colleagues from Koln College - where he studied Aristotle - who admired d'Aquino for his qualities, called him "silent bull"). He is considered one of the greatest philosophers of the world, although his work is not explicit philosophical but theological. He built the philosophical method of harmonizing faith and reason, combining aristotelism with the dogmas of the church.

[9] Thomas d'Aquino took over from Aristotle who first said that man was a „***zoon politikon***" in his Political work and no one accused him of plagiarism. True, about the right of citation, limits and conditions quoting law speaks only in 1812 (**Charles-Emmanuel Nodier** was the first to say that "*any loans from previous works, except citations can not be excused*") and then A.C. Renouard who said in 1838 that "*to ban writers quoting predecessors, refused to advance science and public discussion using any passage from a work which is in the private sector is undoubtedly an exaggeration. It has even said that* ***an author that cites another, or he makes know the one that supports or disapproves, indicating that he did not want to take authorship of the work of another, is of course out of any conduct guilty.*** *But it can be abused by anything.* „Apud Frederic Pollaud-Dulian, Le droit d'auteur, Economic Ed., 2005, p. 508

[10] It was not the first time when Brâncuși was not understood, but the refusal of the authorities and the culture people to accept his gift, which hurt the artist who demanded French citizenship and lacked our country to have in her cultural patrimony the works offered by this.

[11] The Brâncuși process against the United States, having as object the artwork of sculpture "The bird in space", with the consequence of the duty exemption for its introduction in the US, is a lawsuit on a law problem posed by a much better known work of art , but no less important in civil law than the dispute between Joseph Kohler (1849-1919), professor in Berlin, with important contributions to the philosophy of law, intellectual property and comparative history of law, among others, authors of a work devoted to legal issues in W. Shakespeare's work ("Shakespeare vor den Forum der Jurisprudenz") and another professor at the University of Vienna Rudolf von Jhering (1818-1892), author of "Der Kampf ums Recht" , went on the edge of issue of executing a penalty clauses can not be taken out of the legal fabric of the play "The Merchant of Venice" (the punishment debtor could not meet the payment obligation of pounds of meat cut from the body of the debtor).

repatriated as some politicians and about 180 blood relatives in life say they want to do[12].

And in reverse of this state, i.e., in the dark side of the Tax Authorities and intellectual creations, there are similarities. In the consciousness of most people, the Tax Authorities has never been associated with holiness, on the contrary, and St. Augustine[13] he considered the Romanian State (and his instrument - the Tax Authorities), whose collapse he witnessed when he perfected his work as the fruit of the innate sin or instrument of Satan. In his work De Civitate Dei, St. Augustine identified the city of God with the Church, not with the State, although at that time the Christian Church, so oppressed by the State not long ago, vigorously supported the State. The Terrestrial Fortress of the People (the State), whose organization it saw, though useful, especially if it was impregnated by the Christian faith, was good only because it made possible the evolution of the people towards the City of God. We must not, of course, surprise the attribution of a divine origin to the monarchs by the monarchs, that is, by those who instituted them (the monarchy itself claiming divine origin for it, this descendancy being still affirmed in the Old Testament), for such an origin taxes, sustained, as we saw the Church, was useful for their acceptance by taxpayers and for their compliance by voluntary payment of gifts and, if necessary, by coercive measures.

And yet, those who gathered the ancient trials and were called customs officers[14], were like the robbers and sinners or the pagans, and they were hated by the people (Matthew even denied the shameful tax-collector service in the service of the Romans at the time of his calling to become a disciple of Jesus and evangelist, and in his Gospel the publican is a character negative, referring even to him as „*Matthew the Witness*", a sinner). But of those who created over time, were not some of the purifying fire given as heretics, as unbelievers, and sometimes the bows that were burned were not even made their books inconvenient to the Church? However, the fraternity of the Church and its odious Inquisition is not stranger, with the states in which the inquisitorial tribunals acted (I do not think it is a word expressing the inhuman way they did it) for punishing the subjects who were and not only of the Church? The Church was even more sympathetic to Tax Authorities and its agents than to many of the books and to many of the authors of books. The bibliocide is ancient millennia, but it is the Church that instituted a diabolical censure before the Nazis, communists or denizens, the mere possession of books forbidden by ***Index librorum prohibitorum***[15] being sufficient reason for the heretical condemnation of the banner.

Tax Authorities are omnipresent and omnipotent by that, it really resembles the Divinity. The lawyers assign ubiquity to Tax Authorities and are right about it. But ubiquity, which is an attribute of Divinity and of Tax Authorities, is also a feature of intellectual creations. These can be found anywhere, anytime and can be easily accessed by anyone and used at the same time by an indefinite number of people.

Tax is part of our lives, like days and nights, cold and heat, good and evil. And if the tax can not be included in our gene, as it would, of course, the State and Tax Authorities, it is long ago and perhaps more than the idea of ownership, part of our education, our culture acquired through reading, studying the works of others through experience. The person lacking goods or income is not and can not be sanctioned because he has no goods[16], because it does not create or because it does not have any revenue [17]. But the one who does not pay his taxes has no escape; he will be pursued by the Tax Authorities until the last possibility of realizing the fiscal claim of the state is exhausted. Is the book missing out of our lives? But our education is the product of what has been (intellectually) created throughout history and what is transmitted to us through books?

Tax is in everything we do (sometimes even without profit), and it is the instrument by which the Tax Authorities (State) takes its part, which wants continuously to increase it, from our income and wealth. We learn from early age (from books) that the one who has (or only claims) to care for us, our school, our health, our safety, our roads, that is, the state, to we are indebted and we have to return a price for the goods and utilities that he offers us so that he can take care of himself even more and better! First we learn the rule and then submit ourselves to life, the rule by which the

[12] We do not think it would be bad. It's just that we should know if Brâncuși really wanted to be buried near his mother and if not, let's not disturb his eternal sleep. I know, however, that there are two crosses in the Hobita cemetery with the name of Maria Brâncuși and it is not known where his mother is, and the house where he was born is no longer and that the one who show us that he is, is ready to collapse.

[13] Augustin de Hipona (354-430), bishop, theologian, philosopher, doctor of the Church, one of the four parents of the Western Church, alongside Ambrose, Jerome, and Gregory the Great. It was canonized (St. Augustine to the Catholics, Blessed Augustine to the Orthodox). Patron of the theologians and printers. The work of De Civitate Dei is essential for understanding the history of the Middle Ages.

[14] In the New Testament the word "tax collector" is used 22 times, never in a positive context.

[15] The list of books forbidden by the Catholic Church was promulgated in 1565 by Pope Pius V and was completed by 1948, published in 32 editions. The index was abolished only in 1966.

[16] The one who has goods "above average", according to a controversial legislative initiative that has not yet been finalized, should pay another tax, a "wealth tax" hidden under a name that wants to make it moral „solidarity tax ".

[17] By a law of June 16, 1948, a "leniency tax" was introduced in France due to males who had not reached the age of 50 who could not justify carrying out an activity likely to ensure existence. Various exemptions were provided in the law, including that of students who had not reached the age of 30 on December 31, 1947, and were enrolled at university regularly (on a regular basis). The amount due as "leniency tax" was 50,000 old francs, with overdue payment being followed by corporal constraints. In fact, the normative act adopted was aimed at taxing people who had undeclared income. Harshly criticized "leniency tax" was not applied. L. Lamarque, O. Négrin, L. Ayrault, *Droit fiscal général*, 2nd Edition, LexisNexis, Paris, 2011, p. 97. In Belarus, a draft law on the taxation of non-employed persons was announced in amount of 250 dollars per year, the declared purpose of the legislative initiative is to force everyone to work.

state is partaker of all our acts and deeds, and we must divide with it what we have gained through our physical or intellectual work, inheritance, the play of the hazard because we are under his protection or just (and certainly) in his power.

Tax is a creation of the human mind, and the Tax Authorities is as we know it today thanks to the work of intellectual creation of some of our fellow men, not just the old ones, and today they are looking for new methods of taxation. The value added tax, for example, efficient indirect taxation, was **„invented"** in France in 1954 by the Maurice Lauré[18], an engineer who came after the Second World War (that is, in times of the heaviest for public finances) general director of taxes in the French Ministry of Finance. Generalized in France in 1966, appropriated by CEE in 1967 and then generalized in the European Union (its application is condition of EU accession). VAT is therefore an intellectual creation, because it is the result of a creative work, of putting into practice an idea that has changed the existing reality. True, the „invention" of which its author was dissatisfied before his death was not and is not protected by any intellectual property right, which allowed „copying" in most states of the world without the author's permission and without remuneration for it.

We work for the state to pay taxes, just as much as for us. Some, the Nordic case, even more (statistics say up to 57%). We try to integrate (but we fail) and become the same with the average European working half a week to obtain the resources needed to meet individual needs and the other half to pay taxes, fees and other mandatory contributions, and we look yearning to the European average above which the mandatory levies on their income exceed this half. We accept the dry humour of a famous French cyclist Bernard Hinault[19], who in front of excessive taxes on his earnings said that „when I pedal four times, three times I do it for the state and once for me"[20]. It is true that from time to time we are witnessing fiscal tax anachoresis (adapted to the times in which we are, of course), known to us as ***băjenia*** (refuge), a form of disobedience to the Tax Authorities, in response to which, certain Lord of the Romanian Land[21] allocated a tax called: **năpasta (the blight),** a punishment-tax that was to be paid by the collectivity from where the ones that "fled" took part.

Nowadays, unhappy with the heavy burden of taxes, they are looking for more tax-friendly places, many choosing the way of the bloody tax havens. Among these, we recall a French genius actor, Gérard Dépardieu, who was full of the taxes he had to pay in his country (the country that gave the world VAT) and especially the solidarity tax (the wealth tax) has demanded and obtained Russian citizenship, stirring the fury of some of its fellow citizens, but also the appreciation of others who have followed suit, because more and more are those who establish their tax domiciles in friendly territories in terms of the level of income tax, thus leaving less and less money in their country[22]. In front of the offensive of fiscal anticorruption, which also takes the form of demonizing tax havens [23], new forms of organization for tax optimization have been devised lately - the case of multinationals that are virtually uncontrollable - not least by encouraging states by the facilities granted this phenomenon Ireland's case is IT-enhancing).

Most, however, under academic education or for reasons of moral, it seems natural today to work half the time to fill state coffers and we do not argue, although I have learned from history that our ancestors stood up against the state and the exploiters (boyars, noblemen, gentlemen, kings) and sometimes even for less hitting, which is true all over the world[24].

The tax not only fills the state treasury on the basis of a substantive law report of a regal nature (of divine origin and he), which is completely careless to the principle of equivalence of benefits (***do ut des***), and it also has a special symbolic value. Indeed, the tax symbolizes to a great extent the state's power over the subjects and the acceptance by the taxpayers of the ratio of obedience. Evidence: our contribution to supporting state expenditures is one of the four fundamental obligations of the constituent citizens (not just of Romania), along with the obligation of loyalty and

[18] Maurice Lauré (1917-2001), a valuable polytechnist (he is also the author of a patent for a turbine model) "invented" VAT at the same time as rock'n'roll in the United States (July 5/6, 1954 when Elvis Presley recorded his famous song That`s All Right). According to M. Cozian, *Précis de fiscalité*, p. 277. In an interview given in 2000, Maurice Lauré said he regrets that he "invented" this tax, whose virtues also bent in the period in which the Government and the French Parliament were trying to introduce. The First VAT Directive was adopted on 11 April 1967 (called the Directive on the harmonization of Member States' legislation on turnover tax). VAT is now considered to be the most evolved indirect taxation system. It was adopted in over 120 states, including China, India, Japan and Russia, but not the United States, which remained insensitive to the charms of this kind of indirect tax.

[19] Bernard Hinault has won 5 times the French Cycling Tour and is considered one of the greatest champions of this sport.

[20] M. Cozian, *Précis de fiscalité des entreprises*, Litec, Paris, 2007, p. 1.

[21] But it is known that Lord Constantin Brâncoveanu gave a letter to merchants from Câmpulung that the taxes should be paid individually, thus removing the collective burden called the blight.

[22] In France, where the solidarity tax exists, but without a "good wind from the aft" (M. Cozian, Précis de fiscalité des enterprises, chapter L 'impote de solidarité sur la fortune, p. 407 et seq.), Official statistics demonstrate in -a 10-year period, since 1998, no less than $ 125 billion have been removed from the country because of it. As far as social effects are concerned, the increase in the number of divorces is only one of them, the most important one being the tax evasion, with all the consequences of this fleeing in the medium and long term. Washington Post. Old Money, New Money Flee France and Its Welth Tax, (http://www.washingtonpost.com/ wp-dyn/content/article/2006/07/15/AR2006071501010.html).

[23] And yet, 92 countries have tax havens or they are tax havens themselves. Among them, the Netherlands (the one giving lessons to Romania), Great Britain, Malta, China (Hong Kong), Panama. The State of Delaware in the US is one of the largest tax havens.

[24] The war of independence of the United States of America stems from a fiscal dispute that ended with the emergence of a new state, at the beginning, a confederation of 13 states. But since the very beginning of its existence, the US has had a protectionist policy and encouraging intellectual creation activity, being the first (or the first) country in the world that included the authors' protection in the Constitution.

defence of the country, the latter, that of exercising in good faith rights rather than to ensure the fulfilment of the others. The state is privileged in the tax law report. The author, the creator, is also twice privileged: for the first time through the intellectual property laws, the second time, in fiscal terms, of some granted facilities, both aiming to encourage creative work.

Tax Authorities have been, are and will be everywhere and in all the times when there were and there will be states. It could not lack intellectual property and its most consistent and widely regulated part: in copyright.

We do not know exactly when intellectual property is being taxed. We know, however, that writing and book have become a good deal when the printing was invented. Fine for publishers, not for authors, because the idea that a satiety artist can not create is not even abandoned today, and from the „production" of books today the publisher wins more than the author, and publishers claim that the share of distributors is higher than their share. We also know that the privileges of the prints were used by the monarchs and the incomes they brought to their beneficiaries (but also because they allowed for effective censorship to prevent publication of inconvenient works). How do we know that the reasons for the US legal protection of software (first through the patent and later by the Copyright Act of 1976) have weighed very hard the fiscal aspects: the programs involved money and work, or expenses that companies had to deduct, the programs made and / or purchased are intangible assets that have to be accounted and depreciated, their capitalization brings revenues / profits that must also be taxed after the deduction of expenses, or all of which require the recognition of a right for the software created through intellectual creation activity. We also know that being indifferent their borders (art knows no strangers, said C. Brâncuşi), intellectual creations cause double taxation problems.

3. The state of research and the need to investigate the issue

In spite of the permanent offensive of the Tax Authorities against all kinds of taxpayers, including the offensive creators, which is based on the growing need for state resources and aims at the correct and complete identification of taxable material, the increase of taxable material through appropriate measures (but often these actions are devoid of legal and economic logic) and the collection of what is to be collected (part of taxpayers' income and wealth), the problem of copyright taxation (the creators being also the target of this offensive) reactions from journalists, and rarely creators, researchers have a rather reserved, expectant attitude. There are, however, a few exceptions, and we should remember them.

First of all, Professors Gabriel Edmond Olteanu and Sorin Domnișoru, with a very interesting and consistent study on ***„The ambiguity of the delimitation between the taxation of creativity and that of normal labour"***. A study demonstrating that it is imperative to research on the issue interdisciplinary, by intellectual property specialists and by tax specialists, as did the aforementioned authors. The two captivate by the way they dealt with issues and if they would continue, they would, I believe, do a great job to those who create both those who consume creations and those who want to tax all, that is, the Tax Authorities (the State). The authors of the remarkable study also recall and quote Alexandru Mihnea Găină from the Univeristy of Craiova when they also question the specific rules for determining the taxable income from intellectual property rights, referring to his work Tax Law and tax procedure[25], but the reference to a single page (88) of the work (which I have not been able to obtain) is likely to lead to the conclusion that the approach to the problem in the work of our colleague A. M. Gain is unfortunately reduced in size.

I also mention Cristian Râpceanu with an article on „Copyright regime in 2016"[26], a very technical and good study for all those who have to make payments to the budget, because I'm a creator and earning income "Taxation of income from copyrights" (GEO no.58/2010 by Andrei Straton[27], „Copyright less taxed" (Anonymous ?!), „Labour taxation of the blogger. Impressions from Web stock „by Emil Călinescu[28] and „Taxation of civil conventions and copyright contracts"[29] (under the name A & I consulting), Intellectual property income: social contributions payable by Mădălina Moceanu[30] are also part of the category of resources available on the Internet. Useful but small in size. He also wrote Luiza Daneliuc, but I did not (I know if) I managed to identify the correct posting [31] and there are many other technical ones.

By comparison, in the French doctrine there is a paper in 2005, having 500 pages, written by Jean-Luc Pierre and titled *„Fiscalité de la recherche de la propriété industrielle et des logiciels*"[32], dedicated, as it results from its title, only to taxation in the field of industrial property and software. Belgium seems to be champion in the field of intellectual property taxation.

[25] Published by Universul Juridic Publishing House, 2009
[26] https://republica.ro/regimul-drepturilor-de-autor-in-2016
[27] http://blogulspecialistului.manager.ro/a/important/contabilitate-si-fiscalitate/3146/fiscalizarea-veniturilor-din-drepturi-de-autor-oug-582010.html
[28] https://emilcalinescu.eu/fiscalizarea-muncii-bloggerului-webstock-2016/
[29] http://www.aiconsulting.ro/noutati/fiscalitatea-conventiilor-civile-si-a-contractelor-pentru-drepturile-de-autor
[30] https://legestar.ro/venituri-din-dreturi-de--proprietate-intelectuala-contribuții-sociale-datorate/ published on 15.09.2015
[31] http://www.luizadaneliuc.ro/anaf-raspunde-drepturi-autor-2015/
[32] Posted by Formation Enterprise, Edition 2005.

France has a wealth of jurisprudence, but also studies dedicated to this theme, many available on the Internet.

The domain is also worth exploring for us, the arguments for more extensive research are, we believe, numerous and in any case more than those we have identified. So:

According to the State Budget Law no. 6/2017[33], the state budget for 2017 was set at revenues, to the amount of 117.046.581.000 lei and to expenses, to the amount of 150.159.500.000 lei, with a deficit of 33.111.900.000 lei.

According to Annex no. 1 of the state budget law, from the total amount of the planned revenues to be made in 2017, the amount of 96,825,000 lei is **„income tax on the exploitation of intellectual property rights"** and we find that it increased compared to 2016 with over 10,000,000 lei (from 86,384,000 lei), the forecasts for the following years being also of growth. Referring to the programmed amount to be made from the taxing of the results of the intellectual creation activity, we find that the share in the total state budget revenues is 0.082% (a sum that should not be worried by its small size only if we refer to the tax on profit of the commercial banks planned to be realized, that of 357,000,000 lei).

Also according to Annex 1 of the law, in the chapter „tax revenues", in the year 2017 it is planned to make the amount of 94,000 lei as „profit tax obtained from illicit commercial activities or from non-observance of the Consumer Protection Law". It is hard to understand how the two sources could be united, because GO no. 21/1992 on the protection of consumers, in art. 55-55, establishes the contravention of the violation of the rules established by this normative act and the fines that apply. If, however, it had been taken into account that, according to Art. 61 of GO no. 21/1992 „falsified or counterfeit dangerous products are confiscated (...) and destroyed or used as appropriate, according to the legal regulations, then there are two problems:

- does the state legalize the consumption of products that can be dangerous, spurious or counterfeit, or does the state itself commit the act of putting spurious or counterfeit goods into circulation?
- if the recovery concerns only products that are not harmful (and probably this is the hypothesis envisaged by the legislator), then the income obtained is not taxable, can not be assimilated to it and is not the place next to a „tax on profit „.

As regards the first hypothesis, that of the „profit tax obtained from illicit commercial activities", here things are equally unclear, because, on the one hand, illicit commercial activities are not shown, not even exemplary, the law being in this respect and on the other hand, if we admit that, for example, the musical performances of a category of singers whose income is evaded from taxation, the programmed amount was to be paid (94.000 lei) as tax income from the tax on profit is ridiculous and demonstrates a lack of will rather than the state's impossibility to tax those incomes and those who make such incomes.

Regarding **the individual health insurance contributions due by the persons who obtain revenues from intellectual property rights**, the total intended income is to be credited by creators' contributions is 12.775.000 lei, in a total foreseen in this chapter (insurance contributions) of 23.551.730.000 lei, which represents 0.54% of the total contributions from this source.

Research revenues represent the penultimate category of size (4.000 lei), the last place, with 3.000 lei being the social stamp duty on the value of imported new cars.

If things are as they are from budget laws, then the situation is alarming for Romania. Because of these figures, the easy conclusion is that in our intellectual property, creative activity is either quantitatively reduced or worthless if viewed in its qualitative aspect. Or if we can accept that creative work with its research, development, innovation component is low and underfunded compared to other states, we still have significant activity in several areas. And we can mention here the programming activity, the creation of software, but it is immediately noticeable that this domain benefits from tax incentives that other domains are denied. This may be one of the reasons for the explosive development of IT activities in Romania, which is extremely attractive in terms of tax, but also evidence of inequality and incorrect legal behaviour.

It is, we believe, a duty of the state not only to identify the taxable matter (which is not to be confused with the taxable value, the latter being the value expressed in the unit of measure used for that, respectively the currency) in the intellectual property, correctly determine the value and subject it to taxation, how the duty of the state is to make the legal framework appropriate and where the creative work develops, and the taxable material and the tax revenues realized on the creative activity to grow.

The evolution of states' economies shows that if, over three centuries ago, wealth was based and appreciated exclusively by holding assets such as land, labor, and capital because mankind did not realize the true value of intangible assets, including intellectual creations , little by little, the economy built with primitive means has been replaced by an economy based on ideas and new creations, an economy in which wealth itself is generated by these ideas and creations, and humanity is increasingly aware of their economic value. Today, intellectual creation is, in terms of value, in terms of the effects, results and competitive advantages it derives, the most important component of the companies and even of the industrial branches as a whole. Creations and innovations related to the social

[33] At the date of presentation at the West University Conference in Timisoara in October 2016, we considered the State Budget Law for 2016, namely Law no. 339/2015. We've restored this part to update the digits at the time the article was handed over for publication.

and humanitarian domain also generate effects at least as valuable and important for the development of societies as technical inventions, some authors even claiming that „social innovation is more important than inventing the locomotive steam or the telegraph"[34]. Intellectual creations, which are not only literary and artistic creations, but also computer databases, advertising messages, trademarks, industrial designs, inventions and models, semiconductor topographies, generally all products of creative minds, constitute the heart of modern economies, are producing important incomes. In other words, they are valuable taxable items.

On the other hand, we must admit that even today, it is quite difficult to assess the contribution of intellectual property to the development of economies, among other things, and because there is no adequate way to highlight intellectual property intangible assets in the accounting balances of enterprises. However, studies on the evolution of the US Gross Domestic Product (GDP) between 1909 and 1949, by Robert Solow[35], have shown that an increase in labor and capital accounts for only a small portion of total US GDP growth, the other (estimated by no less than four-fifths), also called Solow's the result of technological progress. Subsequently, the results were confirmed by Edward Denison[36], which showed that „between 1929 - 1957, 40% of income per capita in the US growth was due to technological advances, and today these figures are probably even higher"[37].

Statistics show a steady increase in the share of intangible assets of the type of intellectual property to the detriment of tangible assets all over the world, but the highest growth is also recorded in developed countries and especially in countries allocating large R & D resources. Thus, if in the United States until 1982, about 62% of companies' assets were tangible assets; in 2000 the value of tangible assets decreased to 30%, correspondingly, the value of the intangible assets of the type of intellectual creations increased to 70%. The situation is similar in all developed countries where significant increases in gross domestic product are directly related to research and innovation, new technologies, and efficient exploitation. At present, the value of the intangible assets of the successful commercial companies' intellectual property **goes to 80% of the total assets**, their exploitation being extremely profitable, because the incomes that intellectual creations bring to those who exploit them efficiently and their authors are clearly superior income earned through physical work. In fact, the world's top wealth is lead by people who work or have intellectual property businesses, with Bill Gates (whose company, Microsoft, the second most widely spoken language in the Romanian language). At the same time, it is found that the authors of important intellectual creations are the best paid today, all over the world.

4. The legal framework of copyright taxation

Law no. 8/1996 on copyright and related rights has three texts in which it deals with tax issues.

First, is the article no 131[1], which regulates the methodologies for the use of works, and provides that, in the case of broadcasters, they must be negotiated under predictable and proportionate conditions with potential broadcast receivers, so that users can have the representation of payment obligations at the beginning of each fiscal year. It is, we believe, an application of the principle of predictability of taxation provided by art. 3 lit. e) and 4 of the Tax Code, which responds to the need for predictability, stability of taxes, taxes and contributions for a period of at least one year, for which the amendments to the Fiscal Code can not enter into force within a shorter term than 6 months from the date of its publication in the Official Gazette. Under this special provision, we believe that the negotiated methodologies can only enter into force in the year following that in which they were negotiated but not less than six months after the date of the negotiation. For example, methodologies negotiated between July and December of one year will not enter into force on January 1st of the following year. We believe, however, that this rule should apply in all cases where methodologies are negotiated in accordance with article 121 of Law no 8/1996, and not only if the payers are broadcasters, the current solution of the legislator being discriminatory.

The second is art. no 138 which establishes the attributions of the Romanian Office for Copyright (ROC) and provides that for their fulfilment the Office

[34] To be seen *I. Badâr*, The economic dimension of intellectual property, Ed. AGEPI, Chişinău, 2014.

[35] Robert Merton Solow, American economist, Nobel Prize winner for the economy (1987), decorated by President Bill Clinton with the National Science Medal (1999). The same conclusion came, independently and at the same time, Australian economist Trevor Winchester Swan, so the model is also called Solow-Swan.

[36] Edward Denison (1915-1992), American economist. He estimated the influences that various improvements in production factors had on economic growth and had the idea of taking into account the qualitative changes in the training of the labour force. Analyzing the correlations between economic growth, technological change and improving the quality of the workforce, Denison concluded that technological change and, implicitly, economic growth are not ensured simply by purchasing more efficient equipment, but only by increasing the quality of the workforce, so , the increase in education spending, which is reflected in gross domestic product growth, which means that investment in education does not mean money spent in an unproductive sector. Denison strengthened its findings by taking into account the Japanese experience in the field. The "Japanese Miracle" produced in the aftermath of the Second World War is explained by the initial increase in spending on education, which has led to the existence of people ready to quickly assimilate technological novelties. Investments in education are found in strong increases in gross domestic product, which makes education one of the most profitable economic sectors "[Apud C. Stoenescu, The New Immaterial Economy and Knowledge Management (*http://www.sferapoliticii.ro/sfera/145/art08-stoenescu.html)*].

[37] Kamil Idris, Intellectual property is a powerful tool for economic development. Translation after publication of OMPI no. 888 by Cristina Nicoleta Stamate and Ondina Chiru, OSIM Publishing House, 2006, p. 26. Kamil Idris was Director General of WIPO between 1997-2008.

has access to the necessary information operable and free of charge from the (...) National Agency for Tax Administration (...), as well as from the financial institutions -Banking, under the law. Access is justified by the ROCs control over the collecting societies, payment bodies and the budget for rights holders whose rights they collectively manage.

The third is art. 150 (2), which states that „the sums due to the authors, as a result of the use of their works, benefit the same protection as wages and can only be pursued under the same conditions. These amounts are taxable according to tax legislation in the matter „. It is a stipulation that should not be confusing, as the text assimilates the earnings of creators obtained from the valorisation of intellectual property rights with wages only when they are subjected to forced execution.

The Tax Code refers to its texts 27 times to intellectual works, also of 27 times in works of art and 7 times in copyright. The code also defines the royalty, but the term is used in at least two senses in the Tax Code, the intellectual property royalty being defined twice, in art. 7 point 36 and art. 257.

Income taxation from the exploitation of intellectual property rights is regulated in a regime that is special because it has some own rules and can be characterized as favour only because the personal deduction of 40% of the gross income for determining the taxable income is automatic, there is no need for proof from the author because we do not believe that it is really a facility in relation to other categories or that it really represents the measure of the authors' effort. Exceptions are those who earn salary or salary earnings as a result of software creation.

5. What is taxed in Intellectual Property? The object and / or material taxable

From a tax point of view, the qualification of intellectual property rights and in particular of copyright as a „property right" is of no interest. And this is because the object of taxation, the taxable matter, is not the object on which the intellectual property is exercised, that is, the good-creation, but the income deriving from the exploitation of the rights on it, which is the result of the intellectual work of the author. From this point of view, in the case of creators, the Romanian Tax seems rather attached to the idea of remuneration for work for which the author could be paid a salary, this being a sentence that has enough followers among those who demand the abolition of property rights and replacing them with a simple right to remuneration[38].

The Fiscal Code regulates the Income Tax in Title IV (Income Tax), the revenues from the capitalization of the intellectual property rights being „income from any source" within the meaning of Art. 59 fine the tax code, obtained from „independent activities", according to art. 61 lit. a) of the Fiscal Code, which are defined in article 67 of the same code. However, the tax code is not consistent, because when regulating VAT, intellectual creation activity is assimilated to service provision (otherwise, as will be shown below, VAT application to creators would be impossible).

Income from self-employment within the meaning of the Tax Code (Article 67) is, among others, income from intellectual property rights, made individually and / or in a form of association, including related activities, which means that income from the use of related rights also falls into this category.

Independent activity, within the meaning of the Tax Code (Article 7.3), means any activity performed by an individual for the purpose of obtaining income, which fulfils at least 4 of the 7 criteria listed by law: 1) has the freedom to choice of place, mode and work schedule; 2) has the freedom to conduct business for more than one client; 3) assume the risks inherent in the activity; 4) uses his / her heritage in his / her activity; 5) use for his / her activity intellectual capabilities and / or his own physical performance; 6) is part of a professional body / order with the role of representation / regulation and supervision of the profession; 7) has the freedom to carry out the activity directly with employed personnel or through collaboration with third parties under the conditions of the law. If a person does not meet at least 4 out of the 7 criteria, then it is considered to be tax-dependent, so that the taxation regime will be different, this being a controversial issue, especially for journalists, developers and presenters radio and television broadcasts, moderators, participants in such programs.

It should be noted that the Tax Code defines **the royalty** as income from the valorisation of intellectual property rights in art. 7.36, but later on it is about taxing income, without referring to it as royalties. The Tax Code also speaks of the classical royalties, that is, the sums due to the state for service or utilities provided by the state institutions or for agricultural concessions, mining, oil, etc. and which are budgetary revenues, some (the three mentioned above) assimilated from the point of view of administration and their tax revenue regime.

The Tax Code defines the royalty that is related to intellectual property rights twice, once in Art. 7.36 and the second time in Art. 257. The two definitions, although slightly different, make it possible to conclude that, from a fiscal point of view, royalties are the sums received for the use of rights, that is to say, licenses for use, those paid for the „full acquisition of any property or any property right" on creations not being royalties (Article 7.36 (2) of the Tax Code). In order to be a royalty, it is not mandatory for payment for usage or usage to be periodic. For example, licenses for software for which a single payment is made.

[38] See Gabriel Olteanu and Sorin Domnișoru, "Ambiguity of the Determination between the Taxation of Creativity and that of normal labour", Journal of Legal Sciences, Supplement, Craiova, 2015, p.83-93.

It is worth mentioning here a worrying fact (I have also noted in other papers [39]), namely, that according to the dispositions of Title VI, Chap. I, Section I, point 7 of the Methodological Norms for the application of the Tax Code [40]„,the amount to be paid for the use or right to use ideas or principles relating to software, such as logic schemes, algorithms or programming languages is a fee „, although according to art. 72 par (2) of the Law no 8/1996, „**the ideas**, processes, methods of operation, mathematical concepts and **principles** underlying any element of a software, including those underlying its interfaces, **are not protected**." And apart from the fact that the conflicting provisions show a worrying lack of correlation, it is once again remarked that Norms for the application of a law contradict the law and create a state of inexcusable confusion.

Is it then justified to define royalties? Yes, because according to art. 255 of the Tax Code, payments (...) of royalties from Romania **are exempt from any taxes** applied to those payments in Romania, either by withholding or by declaration, provided that the beneficial owner of the interest or royalties is a company in another member state (EU or EEA, n.n.) or a permanent establishment, situated in another member state, of a company in a member state, but this issue should be dealt with separately, in a study dedicated to it to identify and investigating all situations in which royalties are owed and taxed or exempt from taxation.

The object of taxation under the tax regime regulated by the Tax Code is, therefore, the income from the capitalization of the intellectual property rights, the tax being due by the holders of the rights of individuals. Legal entities, who may also be holders of intellectual property rights (in the case of works of art, software made by employees, collective works) as corporation tax payers, do not benefit from the regime of favour exclusively for the authors. The regime of favor does not apply to the successors of the authors of the works, regardless of whether they become rights holders for the cause of death or acts among the living.

6. The justification of favour regime of revenues taxation from capitalization of intellectual property rights

In the 70s, Ireland introduced a system of taxation known as the **IP Box-Regime** or **patent box**, a regime that established different, benevolent tax rules, of revenues from the capitalization of intellectual property rights and which made big IT companies (Google, Facebook, and Apple) to establish their headquarters in this country. Later, other countries have begun to apply income tax regimes to intellectual property rights, even if they have criticized the Irish solution (for example, the case of French Prime Minister Lionel Jospin between 1997 and 2002).

Generally, under this regime, income from intellectual property rights is taxed from a certain upward income or through reduced tax rates. In Ireland, the tax rate is 6.25% applied to the profit, 15% in France, 5% in the Netherlands, 9% in Spain, 8.5% in Belgium, in Belgium a deduction of 85 %, in Spain, 50% of the profit is exempt from tax. And it is possible that in the United Kingdom, which has announced that after Brexit will still be a good place for creation and protection of creations, tax benefits will be sized to make this country truly a tax haven.

In this state of affairs, we believe, is also the explanation of the exemption from the tax on the salary income of those who work in the field of software creation, but also in the flat personal deduction regulated by article 70 of the Tax Code.

The system, which has made it possible to develop tax optimization schemes, especially from multinationals, erodes the taxable base through the phenomenon of transfer of profits and a massive reduction of the state's tax revenues, and therefore worries and provoked critical reactions and proposals for measures and from the European Union and the Organization for Economic Cooperation and Development.

An OECD Plan of Measures is intended not to change the level of taxation (it is difficult to impose tax levels even in EU countries, direct taxes being, as it is known, non-harmonized and difficult to harmonize), but to establish a modal allocation of profits, the proposed plan being known as BEPS - Base erosion and profit shifting and it is expected that in the near future many double taxation avoidance treaties will be amended in this respect. Another direction of action is that of taxing corporate income at the place where the profit is made or where its actual decisions are made, although in the era of digitization and distance communication, the development of home-based work (home office) , this place will be harder to establish. Another measure that our legislators also seem to be interested in is that the preferential regime applies only to the substantial activities that generated income in the country providing the facilities.

7. Establishing income from the capitalization of intellectual property rights

Establishing annual net income from intellectual property rights, regardless of category creation is done by subtracting expenses from gross income determined by applying 40% to the gross income. In other words, it is considered deductible expenses 40% of the gross income received for making of the work, and it can not be increased even if it proves to higher expenses nor be proven.

In the case of the exploitation by **the heirs** of intellectual property rights as well as in the case of

[39] For example, in the course of Financial and Tax Law, Juridic Publishing, 2016, p. 55.
[40] Published in Official Monitor no. 22 of January 13, 2016.

remuneration for the right to sue and **the compensatory remuneration for the private copy**, the net income is determined by deducting from the gross income the amounts due to the collective management bodies or other payers such income, according to the law, without applying the flat rate of 40%, applicable only to the authors. This means that they will pay the 16% income tax on gross income earned.

For the determination of net income from intellectual property rights, taxpayers can only fill in the income part of the tax records or fulfil their reporting obligations directly on the basis of documents issued by the payer of income. Taxpayers who fulfil their declaratory obligations directly on the basis of the documents issued by the payer of income have the obligation to archive and keep the supporting documents at least within the time limit stipulated by the law and have no obligations regarding the keeping of the accounting records.

For income from intellectual property rights, payers of income, legal entities or other entities required to keep accounting records are also required to calculate, withhold and pay the tax corresponding to amounts paid by withholding, representing early payments of the income paid (Article 72 of the Tax Code). In this case, a 10% rate of income is applied and the tax to be paid in advance will be deducted at source, and for the difference of 6% the author will pay the difference after receiving the income.

This method requires a greater involvement from the holder / author, so that after deducting 10% of the contract value, it will have to submit the Declaration 200 until May 25th of the year following the receipt of the income. Only now will he be able to deduct the flat rate of 40%, and the remaining 6% will be regularized until the sum representing 16% of the declared revenues is met.

a) Taxpayers who obtain income from intellectual property rights at the time of withholding may choose to set the income tax as final tax. The option to impose the gross income is exercised in writing at the time of the conclusion of each legal report / contract and is applicable to the income generated as a result of the activity carried out on its basis.
b) Income tax is calculated by deduction at source when income payers, legal entities or other entities required keeping accounting records by applying a 16% share of the gross income from which the flat rate of deduction is deducted, as the case may be, and the mandatory social contributions withheld at source (Article 73 of the Tax Code).

8. Categories of taxpayers for income derived from the capitalization of copyrights

Tax laws (Tax Code and Tax Procedure Code) use to designate the person who, by virtue of the law, is the debtor of the state, the term „taxpayer". Thus, according to article 1 point 4 of the Tax Procedure Code and article 13 and 58 of the Tax Code, all individuals and legal entities and entities without legal personality who are liable to pay, according to the law, taxes, social taxes and social contributions are taxpayers. The term „taxpayer" covers a heterogeneous category of tax debtors: individuals, legal persons (public or private), employees, retirees, people not employed, low or large taxpayers, residents and non-residents earning income in Romania. These include, of course, creators and performers, related rights holders, and database makers who make revenue from capitalizing on their creations and their successors in rights.

Our Tax Code distinguishes between 2 categories of taxpayers, namely resident and non-resident taxpayers individuals.

A resident individual is any individual fulfilling at least one of the following conditions:

a) is domiciled in Romania;
b) **the center** of the person's vital interests is located in Romania;
c) it is **present** in Romania for a period or periods exceeding in the aggregate 183 days during any 12 consecutive months ending in the fiscal year concerned;
d) is a Romanian **citizen** who works abroad as an official or employee of Romania in a foreign state.

A non-resident individual is one who does not meet the above conditions, as well as any **individual with foreign citizenship** and diplomatic or consular status in Romania, or a **foreign citizen** who is an official or employee of an international and intergovernmental body registered in Romania or a foreign citizen who is official or employee of a foreign state in Romania and their family members.

As regards **the scope of income tax**, **resident** Romanians individuals domiciled in Romania owe income tax from any source, both in Romania and abroad.

In the case of **non-resident** individuals, they owe, as appropriate, income tax, as follows:

- **self-employed** through a permanent establishment in Romania for the net income attributable to the permanent establishment.
- in the case of **residents who are dependent** in Romania, they owe tax on the salary income from this activity. Dependent activity is any activity carried out by an individual in an income-generating employment relationship.
- in the case of non-residents who earn income from other categories of activity (CPF Article 129), they are subject to income tax determined according to the rules corresponding to the respective income category (from investments, goods recovery, etc.).

Non-residents who become residents in Romania owe income tax on income earned both in Romania and abroad, from the date they became residents, except for those who benefit from possible double taxation conventions on the basis of agreements Romania has with other states. Residents of countries with whom

Romania has concluded Double Taxation Conventions have to prove their tax residency by a certificate issued by the tax authority of the foreign state or another authority with powers in the field of residence certification.

Law no. 8/1996, in article 150 (2), as we have seen, only refers to „the amounts due to the authors as a result of the use of their works" and it is understood that they may be residents or non-residents. Taxpayers to income incurred from exploitation of intellectual property rights are not only the authors of works that are natural persons, in this category of taxpayers is falling besides the authors, their successors in rights, who are secondary subjects and who can be both natural persons or legal entities such as assignees, licensees, individuals authorized to use the works without the consent of the rights holders, employers of the authors, copyright holders of collective works. Obviously, in the case of legal entities, they will be liable to corporate income tax, but this tax is not subject to this article.

Micro-enterprises (creators may also organize themselves in an enterprise with this status) who are liable to income tax, for the case where they derive income from the exploitation of intellectual property rights, pay their tax pursuant to the taxable base determined according to article 53 of the Tax Code, without benefiting from regulated deductions for authors' earnings, the advantage of a 40% flat-rate personal income deduction from gross income cannot be cumulated with the benefits of establishing the taxable base for micro-enterprises by derogating rules and applicable only to this category of taxpayers. If the authors establish a micro-enterprise and exploit their rights through the established micro-enterprise, the authors, natural persons, cannot benefit from the personal lump-sum deductions, which are due to them in the nature of the dividends, not the revenues referred to in article 70 of the Tax Code.

9. The subjects of taxation in cases of copyright

According to tax laws, subjects of taxation are natural or legal persons or any other entity without legal personality to whom the law has imposed the obligation to pay a tax, a fee or other obligation to make a certain levy to the national public budget (into the account of the state budget, state social security budget, etc.). The law establishes payment obligations for all those who are tied to the state of income / profit.

At first sight, subjects of taxation, namely the taxpayers are all authors of works.

In reality, things must be nuanced; because authors do not always own the patrimonial rights of the author, not always that the authors of the works exploit or are able to exploit their work and the authors do not always make their income from the creative work done.

However, **the position as taxpayer is conditional on income**, not as author of works. A painting, for example, is the result of the creative work of the plastic artist, but the artist becomes a taxpayer only if, by selling his/her painting, displaying it in exhibitions, authorizing reproduction, etc., he/she earns income.

And in the context, it should be remembered that for the plastic artist the sums collected as a resale royalty are also considered revenues, although in this case the author – the plastic artist is the one who re-exploits the work.

Independent author

The author who exercises the moral right to bring the work to public knowledge and exclusive patrimonial right to decide whether, how and when his/her work will be used, including consenting to the use of the work by others, whether it earns income, regardless of the manner of use (those referred to in Article 13 of Law No. 8/1996 or others not listed by law) of his/her work. In the absence of the exercise of the rights to divulging and use the work, although the work exists, the author has only a virtual patrimonial right and this is not taxable. A tax obligation falls under the duty of the author of the work only when he/she, by exercising his/her right of divulging and the right to use the work with patrimonial consequences, derives income.

We note that under the common law, the owner of a good is a taxpayer regardless of the fact that the good (for example, an agricultural land, a construction, a motor vehicle, etc.) provides an income or not. It is the consequence of the exclusive nature of copyright and which also proves to be opposable to tax authorities, which cannot bind the author to divulging the work or to exploit it to obtain revenue, nor the price for which the use of the work may be authorized by the author.

If the author doing the work on his own (the independent author), the issue of taxation seems simple, for common and collective works, things are different.

The authors of common works

In the case of joint works, of works carried out in collaboration (art. 5 of Law no 8/1996), the use of the work shall entitle each co-author to remuneration in the agreed proportion, and in the absence of a convention, in proportion to the contribution parties or equally if the parties cannot be established. Obviously, each co-author is entitled to the deduction governed by the tax law in order to determine then the taxable income.

In the case of collective works (Article 6 of Law No. 8/1996), the law provides that „copyright" belongs to the individual or legal entity on the initiative, under the responsibility and under whose name it was created. The „copyright" to which the law refers should be understood here as the patrimonial rights (it is questionable in the copyright to which the moral rights

belong to collective works[41]), but the status of taxpayer can have two categories, namely:

Authors of collective work for payments made to them by the initiator of the work and whether such payments have been made. But these would be copyrights, and the law provides that copyrights in collective works belong to people other than authors. Thus, the originator of a collective work may be a co-author, but this is not mandatory, and sometimes it is also impossible, as is the case with the legal entity initiator;

The copyright holder, respectively, the individual or legal entity on the initiative, under the responsibility and under whose name the work was created. In this case, it is a question of whether or not the copyright owner of the collective work is entitled to a deduction of 40%, considered to be deductible expense from gross income, the tax owed to the net income thus established (Article 70 of the Fiscal Code) . The deductible amount is, however, considered as an expense for the realization of the work, and this expenditure may also be incurred by the originator, so it should also be deductible for him. This means, however, that regardless of the remuneration paid by the originator to the authors, only an amount equivalent to 40% of the gross income can be deducted from the gross income, the difference being taxable income.

The authors employed

In the case of authors employed who are employed on the basis of an individual labour contract with a creative assignment (we exclude those who do software programs who have a regime of favour, as we will see later) for which the contract stipulates that the patrimonial rights of the author (those who are interested in the fiscal aspect) belong to the employer, the authors of the works are not subject to taxation when the works are capitalized by the employer. They can become taxpayers only if they become holders of patrimonial rights on their creation as employees upon expiry of the terms provided by article 44 of the Law no 8/1996 and which is three years for the hypothesis of not having entered into the contract. The creation made by them is taxable matter in the employer's hand and to the extent that it is valued and produces income, this being the one to be taxed. The authors of the work on which the rights belong, according to the individual employment contract, to the employer; can not claim from the employer any payments other than those agreed upon. He can not benefit from the deduction of 40% of gross income for two reasons: the first is that the rights of the employer can not be redeemed by the employee who has given up his employer's rights. The second is that for the work done as an employee, he receives salary from his employer.

The author employee with a creative assignment may become the copyright holder at the end of the term for which, according to the contract, the rights are transferred (is the term used in Article 44 (2) of Law No 8/1996) or, if the term is not foreseen, on the expiry of a three-year period counted from the date of the surrender of the work.

The question is whether in this case the employee also benefits from the 40% flat-rate deduction. The argument against deduction is that the work was carried out in the performance of the service duties, respectively the creative assignment with which he was employed and for which he was paid by the employer. In fact, Article 44 (3) of the Law no. 8/1996 stipulates that upon expiration of the term for which the work is deemed to have been assigned to the employer, it is „*entitled to claim to the author a reasonable royalty of the proceeds from the use of his work to compensate for the costs incurred by the employer for the creation of the work by the employee, within the scope of the service duties* „.

The argument in favour of the right to benefit from this deduction is the silence of the law, the lack of the law of any exception to this effect in art. 70 of the Tax Code, which, in par. 2) governs three exceptions (only) from the right of deduction: in the case of heirs, the remuneration of the flat-rate and the compensatory remuneration for the private copy not benefiting from the deduction of the flat-rate in establishing the taxable income but of the amounts due to the collective management or other payers of such income. Another argument is added to it: in the previous regulation, in art. 57 of GD no. 44/2004, it was stipulated that the share of flat-rate expenses is not granted if the individuals use the material basis of the copyright beneficiary „„ while the Methodological Norms for the application of the current Tax Code, in Title IV, II, Section 4, paragraph 9, no longer contains such a provision. It is, moreover, evident that the previous Methodological Norms, by the quoted provision added to the law.

The authors of works devoid of originality

Apparently, the question of the originality of the works should be of no interest to the Tax Authorities. From the point of view of the Tax Authorities, since an author has done a work and claims copyright, and the author capitalizing on his work has earned income and paid the taxes due, the question of originality should be indifferent to the Tax Authorities. This is all the more so since, according to art. 14 of the Procedure Tax Code, income is subject to tax legislation, regardless of whether it is obtained from acts or deeds that meet or fail to meet the requirements of other legal provisions. In this case, this is the condition of originality!

The Tax Authorities is and must be interested in the issue of originality, because only the original works are protected and only in their case, the original works, on the occasion of exploitation, the deductions provided by art. 70 of the Tax Code and which, for the benefit of them, the author does not have to prove them. If the „work" does not fulfil the condition of originality, the income earned on it will be taxed, but when

[41] *A. Lucas, H.-J. Lucas, A. Lucas-Schloetter,* Traité de propriété littéraire et artistique, 4e éd., LexisNexis, Paris, 2012, p. 198.

determining the net income, the expenses incurred and proven by the subject of taxation will be deducted for deduction. In other words, these „works" will be subject to deductions from the common law regime. The issue is not only of theoretical importance since the Tax Code defines copyright in art. 7.13 with express reference to the original works of intellectual creation, and the regime of favor is determined by the belonging to the category of original works protected by copyright, to the works of intellectual creation.

However, the Tax Code has a contribution to the originality of some works, following, unbelievingly, the French model. Thus, article 312 of the Tax Code, regulating the regime of second-hand goods, works of art and antiquities (governed by Title VII - Value Added Tax, Chapter XII - Special Conditions) establishes a special regime for certain categories of works of art subject to of trade. The text reminds the original of some plastic works made personally by the artist (paintings, collages, plaques, paintings and drawings, engravings, stamps, individual pieces of ceramics, statuary art or sculpture, but in the case of the last two and copies made by another artist than the author). In the case of tapestries, special arrangements are allowed for pieces made according to original models, provided that there are no more than 8 copies. In the case of copper enamels, specially executed pieces are manually executed in a maximum of 8 numbered copies and in the case of photographs a number of 30 signed and numbered by the photographer. And as you can see, there is a lack of concern about the original qualifications of works of fine art, which is in contradiction with the regulation in Directive 84/27 / the right of suite, which states that it reaffirms the principle of originality for bad plastic art works*" limited in number even by or under the guidance of the artist ... numbered, duly signed or duly authorized by the author ".*

The minor and under restriction authors

In copyright, the question is whether minors, discerners and forbidden persons have the quality of authors when they perform works in the sense of copyright law, but also that of works of no originality.

John Locke made a distinction between artisans and geniuses, and considered that special copyright protection should only be recognized for those who produce something essentially new, immaterial wealth that does not exist to them, minor authors (in the sense of worthless) who merely repeat endlessly what they exist, they and their work being deprived of sparkle that gives glow, so that the works of the latter should be subject to the common law regime. As far as minors and discerners are concerned, their quality is protected by the special laws in as much as it can not be proved that the work is the result of an act of intellectual creation made with the will to create, to make a contribution new to what exists, to alter the reality existing by its realization.

Our law does not operate on such criteria; on the contrary, it protects the works without subordinating the protection of any valuable condition. The only condition for the protection of works by copyright is originality, but this criterion is also relative and subjective. However, the abandonment of the criterion of originality is not possible.

Recently, there is also a discussion of the work done by animals, but it is difficult for them to admit that they could be protected by copyright.

Unknown authors (non-transparent and anonymous pseudonym)

The use of the work under anonymous or pseudonymous conditions does not raise tax issues, the author having the obligation to declare his income and the Tax Authorities to preserve the confidentiality of the information in his possession. The less so it does not raise the problem with the transparent pseudonym. The obligation to declare income for tax purposes is a general obligation for all income generators and if the anonymity or pseudonym is the process of avoiding tax liabilities, then the act would constitute the tax evasion offense.

Authors who make the work available to the public free of charge

There are also the category of creators who make their work available to the public free of charge. If they do not earn income, they will not have the status of taxpayers, because in copyright the owner of the patrimonial right over the created object (the work) does not give you tax obligations. Copyright derives from the fact of creation, the quality of a taxpayer in the valorisation of intellectual creation. In other words, the quality of the taxpayer is conditioned not by the realization of the object upon which the patrimonial right, the creation is exercised, but the realization of the incomes from the exploitation of the intellectual creation.

The law does not prohibit or can not prohibit the release of the work to the public free of charge, it can not prohibit the transfer of the patrimonial rights of the author free of charge, it can not intervene in establishing the price of the assignment or the license. But we do not believe that it is possible to exclude the tax authority's discretion, the right to decide whether acts and deeds of the ceding author express the reality, are not manifestations of bad faith, evasion of tax obligations.

The principle of freedom of management, applicable equally to natural and legal persons and obviously to all holders of intellectual property rights, implies that:

Taxpayers have the right to refuse to make taxable items (intellectual creation works in our case) to obtain income or taxable profit, dispose of their goods in the exercise of their right to dispose of, or to free the goods free of charge, to destroy them , abandon them, do bad business[42]. However, exceptions to this

[42] However, ICCJ has held that it is not permissible to record losses continuously and repeatedly (Decision no. 2/2001 of the Administrative and Fiscal Complaints Division).

rule. It is the case of the falsifiers who can not alienate their goods free of charge (but which, in view of the moral right of disclosure, can not be forced to sell their works or to sell their works.) The moral right of the authors of works has, as is the case he does not make public his work, who does not reveal the created work, he is the author of the work, but he does not make any income and can not be taxed. And for no reason the author of the work can not be forced to make the work known to the public. He can not be forced to make income from the exploitation of his work. He can not be subjected to enforced execution by exploiting his patrimonial rights to his undisclosed work.

Taxpayers have the right to choose the path that generates the lowest tax burden. In the recent French doctrine it is stated that *„if paying taxes is an honourable obligation, the good father and the good manager also have the duty to pay the lowest possible tax to choose the least taxable way*[43]*,"* and that *„paying the highest taxes may be for some proof of holiness or heroism, but most will be convinced that it is rather a proof of foolishness and in no way a father's model of family worthy to follow*[44]*. „.* But that was also the case two centuries ago in England, Adam Smith, whose arguments will be resumed and developed by US Supreme Court judges in a famous tax law ruling in 1935 (Helvering v. Gregory).

Taxpayers have the right, unconcerned by state authorities, to make mistakes, to do business or bad investments, to dispose of their money without profit and to oppose their decisions to the tax administration.

Authors with disabilities

In accordance with article 60 of the Tax Code are exempted from paying the income tax the individuals with serious or severe disabilities for the income from independent activities, realized individually or in a form of association.

The creator successors

Whether they are through acts between the living or the cause of death, they are secondary subjects of copyright and will be subject to taxation under the conditions of common law. There are, however, two derogatory rules.

a) **First**, the limited duration of their rights, which is 70 years from the date of copyright authors' death, a rule that knows some exceptions. Thus, in the case of works made known under the pseudonym (non-transparent) or without an indication of the author (anonymous), the duration of the rights is 70 years from the date of publication of the work, so that only within this time the heirs will enjoy the rights conferred by their authors. Otherwise, the fact that works are published under pseudonym or namelessly affects the rights of heirs only to the extent that they can not exercise moral rights whose exercise is not transmitted, including the right to name.

In the case of equivalent rights (Article 25 (2) of Law No 8/1996, the duration of the rights is 25 years, to the heirs of the holders of equivalent rights, which are transferred within the limit of this period.

For holders of related rights, the duration of the patrimonial rights is 50 or 70 days from the date of the performance or execution, and the fixation of its execution and publication (Article 102 et seq. Of Law No 8/1996) that the holders of related rights do not enjoy patrimonial rights for their performances and interpretations throughout their lives.

b) **The second** is the deduction from the gross income due to the heirs of the amounts due to the collective management bodies or other payers of such income. Whether the heir carries on his own rights to creations by his author or through a management body or other entity, the heirs do not have the right to a flat personal deduction (40%).

The tax payer

Tax laws have also introduced the „payer" institution, a person who acts on behalf of the taxpayer, but is subject to the same regime as the taxpayer, although he is not the tax payer. The payer is defined in art. 1.35 of the Code of Tax Procedure as „the person who, in the name of the taxpayer, is required by law to pay or to withhold and pay or to collect and pay, as the case may be, taxes, social contributions and taxes. It is also a payer and the secondary establishment forced, according to the law, to register as a payer of wages and salary income. „Examples of the payer: the publisher who holds the income tax at source and pays it to the budget on behalf of the author, or the secondary headquarters of a foreign production house in Romania. As regards the assimilation of the payer with the taxpayer, it follows from a numerous texts of the Tax Procedure Code, in which the terms „taxpayer" and „payer" are associated, a procedure used to exclude any doubt as to the regime to which they are subject.

Collective management bodies as „successors" of the authors without heirs

According to article 25 of Law no 8/1996, if there are no heirs, the exercise of patrimonial rights rests with the collective management body mandated during the lifetime by the author or, in the absence of a mandate, the collective management body with the largest number of members in the respective field of creation.

For this hypothesis we identified the following issues:

a) Collective management bodies exercise patrimonial rights in the absence of heirs, so they are not the rights holders. Who are the rights holders in this case? Who are the beneficiaries of the proceeds from the exploitation of patrimonial rights by the authorizing bodies? We should say that the members of the management body, but the beneficiaries should be indicated by law.
b) Exercising patrimonial rights and earning income from the valorisation of intellectual creations, who

[43] Patrick Serlooten, *Droit fiscale des affaires*, p. 25.
[44] Maurice Cozian, Précis de fiscalité des entreprises, p. 534.

owes tax? The answer is that the people to whom the amounts thus obtained are distributed, not the collective management body (of course, we take into account the hypothesis of the lawful body that allocates these amounts to its members).

c) If the rights are exercised by a body other than that designated by the deceased author or by the body with the largest number of members in the respective field of creation, the amounts are distributed to the members of this body or to all creators or to all creators from the respective creative field? Equity tells us that the amounts should benefit all creators, but the problem needs to be resolved by law.

Related rights holders

Taxation of the income of the holders of related rights (performers, interpreters or executors, producers of sound recordings and producers of audiovisual recordings for their own recordings and broadcasters for their own programs and programs services) is above any right of appeal, only that individuals right holders are income tax payers, and corporate rights holders are corporation tax payers, so that it is impossible for them to apply their flat-rate deduction provisions of 40 % benefiting only income tax payers.

Individual related rights holders will benefit from a flat-rate deduction? Article 70 of the Tax Code refers to a deduction of 40% of gross income in order to establish the taxable income without distinguishing between the quality of the holder and art. 67 paragraph (3) of the Tax Code provides that *„the proceeds of the exploitation in any way of intellectual property rights are derived from copyrights and rights related to copyright, patents, designs, trademarks and geographical indications, topographies for products semiconductors and the like „.* Hence, the conclusion is that when the owner of the intellectual property right is an individual and he obtain income from the exercise of his rights, he will be taxed under the „benefit" scheme by receiving a flat-rate deduction of 40% of the gross income in establishing taxable income.

Database makers

In the case of original databases (referred to in Article 8 letter b) of Law no 8/1996), which are copyrighted, they will be subject to the tax regime for copyrighted creations. And because the law does not distinguish, they will also benefit from a flat-rate deduction of 40% of gross incomes when determining taxable income. The duration of their protection is that provided in article 25 (the author's life plus 70 years for heirs). As the law does not regulate collective management in the case of databases, the collective management bodies will not be able to exercise the rights of the holders - authors if they have no heirs. For these databases, it is possible to choose the protection system as the holder can choose for the cumulative protection (copyright and / or sui-generis right).

Regarding the databases for which the Law no. 8/1996 regulates a sui-generis right (Articles 1221-1224), respectively, for databases which do not fulfil the condition of originality but represent databases according to the second sentence of art. 1221 paragraph 2 (2), i.e. those not protected by copyright, the duration of the rights of the manufacturers of databases shall be 15 years from January 1st of the year following its completion, substantial changes, quantitative and qualitative evaluation of the contents of the database data for which a new investment can be considered as allowing it to be assigned a lifetime protection period to the database resulting from this investment. However, this time can be invoked, according to the above-mentioned text, and by the originators of the database producers, when the manufacturer has an interest in doing so.

In accordance with article 7.13 of the Tax Code, the sui-generis rights (which protect the databases) belong to the large category of copyright (the law is not happy, but it is understood that their object is represented by the databases). Article 70 of the Tax Code (which also has an unfortunate wording) however regulates the determination of the income from intellectual property rights, which, as we know, includes industrial property rights, and the text we do not believe it can be restrictively interpreted, as referring only to copyright, related rights and sui-generis rights, although there are arguments in favour of this interpretation, in particular Art. 7.13 of the Tax Code which refers only to the rights regulated by Law no. 8/1996, and not those regulated by industrial property laws.

Of course, to benefit for a 40% deduction, the database maker must be a payer of income tax – an individual (we have seen that in the case of micro-enterprises, although they pay income tax, the deduction provided for authors-natural persons does not apply for them)

Persons exempt from the payment of income tax

Of those exempt from income tax, according to article 60 of the Tax Code are interested in the following:

serious or severe disabled individuals for the income obtained from self-employment or in a form of association (co-author of a work);

Individuals, for the income from salary income and assimilated to the salaries stipulated in art. 76 par. (1) to (3) as a result of the software development;

Individuals, for salary income and assimilated to salaries under art. 76 par. (1) - (3) as a result of carrying out the research-development and innovation activity defined according to GO no. 57/2002 regarding the scientific research and technological development, if cumulatively a number of three conditions established by art. 60 (3) of the Tax Code (applies to all persons included in the project team, within the limits of the expenditure allocated to the project and by drawing up separate payment states for each project).

The case of people working for software deserves a wider discussion.

According to article 60 of the Tax Code, individuals who earn income from salaries and assimilated to salaries, as a result of carrying out the activity of creating software do not owe income tax. This exemption is granted to Romanian citizens and citizens of the European Union Member States, the European Economic Area and the Swiss Confederation, whose diplomas are equivalent, through the specialized structures of the Ministry of National Education and Scientific Research, with the diploma awarded after the completion of a long- duration or diploma awarded after the completion of the first cycle of undergraduate studies (Article 1 (4) of the Joint Order referred to below). The text is impossible to interpret, with the benefit only of persons who earn salary income or assimilated to them. Consequently, if the program right belongs to the individual's author (either because he did it independently or under the clause in the employment contract, according to Article 74 of Law No 8/1996), the author is considered to earning the income from independent activities and consequently he will pay the taxes as a copyright owner, but once again is raised the problem of the 40% flat-rate deduction (referred to above).

The framing in the software activity is done by joint order of the Ministers of Communications, Education, Labour and Public Finance of the Work, Family, Social Protection and the Elderly, the Minister of Communications and Information Society, the Minister of National Education and Scientific Research and of the Minister of Public Finance[45].

The Tax Code contradicts its self regarding the software programs and fees for them, because on the one hand, they are naturally considered works and protected by copyright and includes them in the definition of royalties in art. 257 and article 7.36 par. 1) lit. c) And, on the other hand, by art. 7.36 par. 2) lit. b) And c*) considers that the payments made for software purchases intended to operate the program (i.e. use, n.a.) and those made for the full purchase of a copyrighted software or a limited right to copy it solely for the purpose of its use to the user is not royalties.*

Without denying the need for tax incentives to encourage important activities and the need to align with the practice of other states, we appreciate that the tax exemption provided by art. 60 of the Tax Code for the category of employees creating software programs seriously violate the principles of universality and equality in taxation.

10. Collective management and taxation of collectively managed rights

Both living authors and their successors can collectively manage copyrights and related rights. **Collective management** is, as a rule, **optional**. However, in cases expressly stipulated by law, **collective management is mandatory** and, **when mandatory**, **is even a prerequisite for the exercise of rights** for which the law imposes such a management mode. In other words, the **patrimonial right of the author or the related right for which the law has instituted compulsory collective management can not be exercised individually**, although the right is still individual. Independent whether collective management is optional or mandatory and regardless of whether a mandate contract has been concluded between the authors and the collective management body, the management body is a trustee of the authors, not a commissioner, even if the law stipulates that the body is entitled to commission for the activity which he submits.

The problem with these collective management bodies is whether they owe income tax and indirect taxes - VAT

If a collective management body is a **legal entity and is a transparent tax entity**[46] within the meaning of Art. 7 point 14 of the Tax Code, then according to art. 13 par. 1) lit. a) And art. 2 lit. j) of the Tax Code, **the collective management body is not a corporate taxpayer**, each owner of patrimonial rights of the author being distinctly taxed on the income he realizes.

The transparent tax entity, as defined in article 7, item 14) of the Tax Code is „any association, joint venture, joint venture associations, economic interest group, civil society or other entity that is not a distinct taxable person, each associate / participant subject to taxation in the sense of profit or income tax, as the case may be „.

According to article 58 and 59 of the Fiscal Code, are taxpayers and owe income tax the Romanian individuals resident , with the residence in Romania for the income obtained from any source in Romania and abroad, as well as non-resident individuals who are self-employed through a head office, are taxpayers and are liable to income tax permanently in Romania for the income attributable to the permanent establishment.

In the case of income earned abroad, taxpayers (whether residents or non-residents for the latter, but only if the income is earned through a permanent establishment in Romania), are obliged to declare them by May 25th of the year following that to achieve the income, the tax body issuing the taxing decision.

In turn, art. 67 of the Tax Code (Article 64 letter a of the Tax Code) provides that „the income from **independent activities** includes income from

[45] The Order regarding the creation of software programs is issued by: Ministry of Communications and Information Society Nr. 409 of May 11th 2017, Ministry of National Education Nr. 4020 of June 6th , 2017, Ministry of Labour and Social Justice Nr. 737 of May 24th , 2017, Ministry of Public Finance Nr. 703 of May 16th , 2017 and was published in M. Of. no 468 of June 22nd 2017.

[46] The transparent tax entity may be an entity with or without legal personality. In the case of collective management bodies, Law no 8/1996, by art. 124, requires them to be associations with legal personality.

production, trade, services, income from liberal professions and **income from intellectual property rights**, realized **individually and / or in a form of association, including related activities** „ and that „ the proceeds of the exploitation in any form of intellectual property rights in any way arise from copyrights and rights related to copyright, patents, designs and designs, trademarks and geographical indications, topographies of semiconductor products and the like. „

It follows that in the case of transparent tax management bodies, they are not corporate tax payers, and income tax is due to the rights holders who actually make the income.

The solution imposing individual right holders administering their collective property rights is correct and if we consider the nature of civil legal relationship between the collective management body and the owner of the copyright or related rights, as regulated at this time in our right and for the legal form of the current organization of these management bodies in Romania[47]. This is because the collective management body is only a trustee of the copyright holder or related rights. Moreover, in the case of compulsory collective management, these bodies also represent holders of rights which have not given them a mandate (Article 123 paragraph 2) of Law no. 8/1996), in the latter case, we believe, in the presence of a legal mandate. However, as article 130 par. 1) lit. c) of Law no. 8/1996, **the trustee concludes the legal acts on behalf of the rights holders, therefore on behalf of the principal, not on his behalf, so that the rights and obligations arising from the contract concluded by the trustee with third parties belong to the principal and, the third parties, respectively.** The trustee must manage these rights and obligations that are assumed through the license to use the work (the right) under the concluded contract. Therefore, the amounts attributable to the principal in the distribution made by the collective management body that has the status of a trustee belong to the tenant, the collective management body (the trustee) having the right to its remuneration („commission", according to the Law No. 8/1996).

Unlike the mandate contract in which the trustee concludes contracts in the name and on behalf of the principal, the commission contract has as its object the conclusion of legal acts on its own behalf but on behalf of the principal. What distinguishes the mandate contract from the commission contract is that in the case of the mandate contract the representation is direct, while in the case of the commission the representation is indirect, even if it is sometimes stated that in the case of the commission contract we have to do with a mandate without representation. The commissioner's duty is to „do", not „give," the commissioner being a service provider.

10.1. Who is the „payer" of the income tax in the case of the amounts collected by the collecting management bodies in Romanian law?

Two issues that arise in relation to the person who holds and pays the anticipated tax: the first is the payment made by the user directly to the rights holder and the second the distribution of the amounts collected by the collective management body from the users and those obliged to pay the compensatory (fair) remuneration.

In the first case (the income is paid by the user directly to the right holder) there is no doubt: the user is the one paying the rightful remuneration to the right holder, he will withhold the amount due in anticipation (10% of the paid income) that will pay it to the budget. Subsequently, the right holder will make the annual tax statement, deduct (if he is entitled, the successors do not have the right to deduct) the flat tax rate of the total income, meaning 40% of the gross income, and pay the tax difference up to 16% net income. For example, a user has to pay to a right holder the amount of 100,000 lei. He will withhold 10% of the anticipated withholding tax and will pay the amount of 10,000 lei to the budget and to the holder the amount of 90,000 lei. The holder will draw up the final tax statement and will deduct 40% of the gross income, on the difference of 60,000 lei, will calculate the tax difference of 6%, meaning 3,600 lei representing the difference of tax payable. In this case, the holder of the right will pay in the amount of 13,600 lei.

The right holder may, however, agree with the user to pay the final tax of 16% on the payment of rights on the entire income, in which case the user will withhold and pay to the budget the sum of 16,000 lei.

In the second case, when the user pays the amounts due to the right holder of a collective management body, things are more complicated, the managing bodies being considered as **income payers** and having the withholding tax on income tax (for the anticipated payments, i.e. for 10% of the right holders' income) and to pay it to the budget, but the solution seems questionable to us.

Thus, according to art 72 of the Tax Code, for the income from intellectual property rights, **the payers of the income**, the legal entities or other entities that have the obligation to keep accounting records **are also obliged to calculate, to withhold and to pay the tax corresponding to the amounts paid by detention at source, representing early payments, of the paid income.**

The tax to be withheld is determined by applying the 10% tax rate to the gross income. The withholding tax shall be paid to the state budget until the 25th of the month following that in which the income was paid. Early payer presented are not required to calculate,

[47] Implementation of the Directive no. 2006/115 of December 12th , 2001 on rental and lending right and certain rights related to copyright in the field of intellectual property could bring about amendments to Law no 8/1996, which makes possible the functioning of other forms of collective management bodies, not only of the type of transparent fiscal ones.

withhold and pay the prepayment tax on earned income **if they make payments** to non-legal partnerships (joint ventures) as well as to **entities with legal personality who organize and conduct its' own accounting, according to the law, for which the payment of income tax is made by each associate, for his own income.**

The latter appears to be, according to the tax law, the situation of the collective management bodies. For example: a user, a legal entity (a television company), submits to the collecting management body the amounts owed for the use of works. In this case, the user (the television company) will not withhold the 10% income tax on the amounts paid and the anticipated tax retention and payment (the 10% of the gross income) to be made by the collective management body. However, collective management bodies are not „income-paying" for the purposes of either common law or copyright law, and the qualification of collecting management bodies operating in our country at this date (March 31st, 2016) as **„payers of income"** right holders are wrong. This is because the Law no. 8/1996 clearly **distinguishes** between **the payments** to be made by the users of works (to the right holders or their agents - collective management bodies or other mandates) and **the allocation of the amounts collected by the collecting management bodies to the right-holders (beneficiaries).** Thus, article 130 lit. a) and lit. e) of Law no. 8/1996, stipulate, among the obligations of the collective management bodies:

- the obligation to develop methodologies for their fields of activity, including appropriate patrimonial rights, **to be negotiated with users for the payment of these rights** (by users), in the case of those works whose exploitation makes it impossible for individual holders rights (Article 130 letter a), and here is the mandatory collective management when the bodies act even on behalf of those who have not expressly given them a mandate;
- the obligation to collect the amounts owed by users and to allocate them among the right holders, according to the statutes.

Or to **allocate funds coll**ected by right holders does **not constitute payment of income**, such payment being made by users when management body is only a trustee of the holders rights in the name and on behalf of rights holders and not the collective management body.Of course, it would be otherwise if the collective management body were not a transparent tax entity and would have the legal form of a company with that object of activity when the company would act on its behalf and on its own, contracts for the use of works entrusted by right holders.

Of course, it would be otherwise if the collective management body were not be a transparent tax entity and would have the legal form of a company with that object of activity when the company would act on its behalf and on its own, contracts for the use of works entrusted by right holders.

The solution to this problem is important in cases where right holders have to collect revenues for the use of works in other countries, but also if non-resident rights holders have to pay remuneration for the use of their works in Romania because it can generate either double-taxation or non-taxable income. For example, foreign users would remit to collecting societies the amounts due for the use of works withholding tax on income on the occasion of the „payment" made to the revenue collecting body. That (foreign) body must remit the amounts received to the correspondent body in Romania, which in turn should distribute the sums to the right holders, but also withholding the tax. The reverse of this situation: a foreigner has to collect money from a user from Romania, between himself and the user interposing the management body in his country and the corresponding body in Romania. The amount of money will be remitted to the Romanian body which will also remit it to the corresponding body in the foreign country and will remit it because according to art. 72 par. 4) of the Tax Code, by making the payment to another legal person, can not withhold the income tax due to the author.

It should be noted that for those situations where income concerns residents and their income in Romania, which has to pay the tax in Romania, the problem is of importance only in terms of the (apparent) comfort it creates to the holder of the right to pay the tax by the collective management body. But also in this situation, the right holder has to complete the income statement and the final payment of the tax, because the managing body can only pay the anticipated income tax and within the limit of 10% of the tax due, pay the difference of 6% applied to the net income (i.e. after deducting the 40% flat rate tax to which **the author**, not other holders) is entitled, is made by the author.

10.2. Relevance of the form of organization in terms of VAT payment

The value added tax is, I recall, an indirect tax „invented" by a French engineer and jurist, Maurice Lauré, whom the author also regretted that he invented. This tax is borne by the final consumer of the product or service, the price of which is in fact included and which the collector body (the seller of the product, the service provider) pays to the budget. It is collected in cascade by each economic agent who participates in the economic cycle of making a product or providing a service that falls within the scope of taxation. After exercising the right of deduction, the taxable economic agents who participated in the economic cycle pay the VAT balance to the state budget. Commonly, the ratio of tax law (which is more complicated in the case of indirect taxes) is established between participants' successive cycle of production and service providers and consumer tax, on the one hand, and between these companies and state of the other. As it results from its name, VAT applies to the value added by economic agents. And the first point to make is that management

bodies, as they do work now, are not economic agents and do not add value to a product that does not belong to them, the copyright law is clear in the sense that collective management bodies they are not rights transferees, and their proceeds are not their income but their copyright holders.

The issue is to know whether the collective management bodies, in the legal form in which they are currently regulated and operated under Romanian law according to the law of copyright, corroborated with the provisions of the Tax Code, are legally payable of VAT, respectively, if they are taxable persons (VAT) within the meaning of Article 269 of the Tax Code. Adjacent to this is the question of how intellectual creation work and valorisation of intellectual creativity are qualified.

The Tax Code, defining in art. 269, taxable persons (with VAT), dispose that any person who carries out in an independent manner and irrespective of place, **economic activities**, whatever the purpose or the result of such activity, **is taxable person**, including **services** and exploitation of tangible and **intangible** assets for the purpose of **obtaining income with a continuity character.**

As regards the transactions covered by the VAT, Article 270 of the Tax Code **considers delivery of goods** the transfer of the right to dispose of goods as owner, and art. 271 of the same code **consider service rendering any operation that does not constitute delivery of goods.**

11. Conclusions

How (ever) the transfer of rights to intellectual creation does not confer on the transferee the right to dispose of the work as a landlord (I have said: fallen in the public domain, the work remains the author and no one can approach it. Aristotle's work belongs to him, Picasso's paintings, even in a certain mood of other people belong to him, the musical works of G. Enescu belong to him and no one can get them and he can not have the works of others) it results from a fiscal point of view that all transactions in the transfer of rights of use for works must be regarded as supplies of services.

The solution is expressly stated in Art. 271 par. 3 lit. (b) of the Tax Code, which provides that **is considered supply of services** any transaction which does not constitute the supply of goods, including **the transfer of intangible assets**, whether or not the subject of a property right, such as: **the transfer and / or assignment of copyrights, patents, licenses, trademarks, and other similar rights.** It is noteworthy, however, that our Tax Code sometimes treats some works of art as assets that can be disposed of as an owner (see Article 312 of the Tax Code, special schemes for second-hand goods, works of art, collectibles and antiques).

Directive no. 2006/115 of December 12th, 2001 on rental and lending right and certain rights related to copyright in the field of intellectual property, by recital (6), **stating that creative, artistic and entrepreneurial activities are largely carried out by independent persons** and considering that the exercise of these activities must be facilitated by ensuring legally harmonized protection within the Community, **considers that these activities, are mainly, services.**

Or collecting management bodies, in the legal form in which they are governed and operates in Romania at this time, not forward and does not deliver goods **that the transferees can dispose of as the owners** and **shall not assign themselves rights in works and not exploit them in fact, the works of intellectual creation** (intangible assets), **nor can they do so,** and the amounts received by these bodies are not and can not be assimilated to their income.

This conclusion is also supported by Law no 8/1996, which states, among others, that:

- Collective management bodies are directly created by copyright holders or related rights, individuals or legal entities, and act within the limits of the mandate entrusted to them (Article 125 (2));
- **the collective management mandate** of property rights, copyright or related rights, is granted directly by written contract by the right holders (Article 129 paragraph 1);
- the exercise of collective management entrusted by the mandate contract can not in any way restrict the patrimonial rights of the holders (Article 134);
- the remuneration received by the collecting management bodies are not and can not be assimilated to their income (Article 134 (3));
- the collective management bodies may not have the purpose of using the protected repertoire for which they have received a collective management mandate (Article 129 (5));
- the management bodies have the obligation to authorize users of works, by non-exclusive license, in written form to use the protected repertoire (the works entrusted by the authors) in exchange for remuneration, to collect the amounts owed by users and to **distribute them among the rights holders** (Article 130);
- the amounts resulting from the placement of unclaimed and unpaid remunerations, in bank deposits or from other transactions carried out within the scope of the object of activity, as well as those obtained as damages or damages as a result of copyright infringement or related violations, **are attributed and distributed to rights holders and can not constitute income of the collective management body** (Article 134 (f));
- in the exercise of the mandate concluded with the holders of rights to the collective management bodies, no copyright or related rights or their use (Article 134 paragraph 4) shall be transmitted.

It cannot be considered that the collective management bodies (as they are organized and operate now in Romania) would be in the hypothesis regulated by article 271 par. (2) of the Tax Code (which provides that „*when a taxable individual is **acting in its own name,** but on behalf of another person it becomes part*

of provision of services, it is deemed to have received and provided the services itself" because the essence of the mandate contract is to conclude acts **in the name of the rights holder who mandated him and on behalf of the trustee**, so **not in its own** name, article 271 paragraph 2) confers the status of taxable person (with VAT) to the person acting in its own name and for the account of another person.

It follows that the collecting societies do not deliver goods that the transferee can dispose of as an owner, do not provide services within the meaning of the Tax Code and can not be considered to act in their own name and for other persons account because under the mandate contract he acts **in the name and on the name of the rights holder**, so that in the form in which the collective management bodies are regulated and operating in Romania, they can not be taxable persons with VAT. Quality of VAT payers may have only authors, as far as creative operates independently and on a continuing basis and exploit their creations for the purpose of obtaining income on a continuing basis[48].

Another legal form of these collective management bodies, compliant and possible with the forms stipulated by the Directive (EU) No 26/2014 on the collective management of copyrights and related rights and granting multi-territorial licenses could eliminate the current state of affairs.

References

- *I. Badâr*, The economic dimension of intellectual property, Ed. AGEPI, Chişinău, 2014
- *M. Cozian*, Précis de fiscalité des entreprises, Litec, Paris, 2007
- *Ernst H. Kantorowicz*, The King's Two Bodies, Polirom Publishing House, Bucharest, 2014
- *L. Lamarque, O. Négrin, L. Ayrault*, Droit fiscal général, 2nd Edition, LexisNexis, Paris, 2011
- *A. Lucas, H.-J. Lucas, A. Lucas-Schloetter*, Traité de propriété littéraire et artistique, 4e éd., LexisNexis, Paris, 2012
- *Gabriel Olteanu*, Sorin Domnișoru, "Ambiguity of the Determination between the Taxation of Creativity and that of normal labour", Journal of Legal Sciences, Supplement, Craiova, 2015
- *Frederic Pollaud-Dulian*, Le droit d'auteur, Economic Publishing House, Paris, 2005
- *V. Roș*, Financial and Tax Law, Juridic Publishing, Bucharest, 2016
- High Court of Cassation and Justice - The Law Enforcement Assembly, by Decision no. 48 of June 19th, 2017

[48]High Court of Cassation and Justice - The Law Enforcement Assembly, by Decision no. 48 of June 19th , 2017 (more than 6 months from the conference date and more than a year since I expressed this opinion in another paper - Intellectual Property Law, CH Beck Publishing, published in May 2016) that: "In interpreting the provisions of art. 126 para (1) letter a) and article 129 of Law no. 571/2003 regarding the Tax Code, as subsequently amended and supplemented, article 98 par (1) letter g1) and art 1065 of the Law no 8/1996 on copyright and related rights, as amended and supplemented, **the collection by the collecting society of performers remuneration due for the broadcasting or public communication of sound recordings containing the fixation of their art is not a taxable transaction from the point of view of value added tax**".

THE EFFECT OF LEVERAGE AND ECONOMIC VALUE ADDED ON MARKET VALUE ADDED

Kristína Jančovičová BOGNÁROVÁ*

Abstract

Economic value added (EVA) is a performance measure developed by Stern Stewart & Co.) that attempts to measure the true economic profit produced by a company. Such a metric is useful for investors who wish to determine how well a company has produced value for its investors, and it can be compared against the company's peers for a quick analysis of how well the company is operating in its industry. Market value added (MVA), on the other hand, is simply the difference between the current total market value of a company and the capital contributed by investors (including both shareholders and bondholders). It is typically used for companies that are larger and publicly-traded. MVA is not a performance metric like EVA, but instead is a wealth metric, measuring the level of value a company has accumulated over time. In order to maximise the value for shareholders, companies should strive towards maximising MVA and not necessarily their total market value. It is believed, that the best way to do so is to maximize EVA, which reflects a company's ability to earn returns above the cost of capital. The leverage available to companies that incur fixed costs and use borrowed capital with a fixed interest charge has been known and quantified by financial managers for some time. In this research the effect of leverage and EVA on MVA as the measure of shareholder wealth creation was analysed. Leverage and EVA have been used as the independent variables whereas MVA has been used as the measure of shareholder wealth creation. Correlation and regression methods have been employed to find out in what way financial managers can practice the effects of leverage and EVA to maximize MVA. The results showed that EVA and leverage have no profound impact on MVA of the selected Slovak companies.

Keywords: *economic value added, total degree of leverage, market value added, degree of operating leverage, degree of financial leverage.*

1. Introduction

Shareholder value creation can be attained through maximizing the market value of investors' wealth. Determining value and value drivers is crucial to evaluate an investment regarding whether it is sound or not. In this paper the leverage effect on market value added (MVA) and the effect of conomic value added (EVA) on MVA is investigated. Total leverage can be derived by multiplying financial leverage by operating leverage. It would be possible to forecast what impact the leverage will have on MVA as soon as the total leverage is determined. The outcomes of this paper could be valuable not only to financial managers but also to the managers those who are at all levels in a business organization. Furthermore, potential and existing shareholders can get to know the worth of their investments made in the organization.

The objectives of this paper are:

- To identify the association between leverage, EVA and MVA;
- To discover the effects of leverage and EVA on MVA.

2. The theoretical concept of EVA, MVA and leverage

2.1. EVA and MVA

The concept of EVA was popularised and originally trade-marked by Stern Stewart and Company in the 1980s. According to Stewart EVA is an estimate of the economic profit generated by a company. It considers the costs of all forms of capital (debt, as well as equity) and compensates all its capital providers accordingly. EVA is determined by calculating the difference between the cost of a company's capital and the return earned on capital invested, and multiplying it with the amount of capital invested in the company.

$$EVA_t = (r - WACC) * IC_{t-1}$$

where:

r = the return on the capital invested

WACC = the company's after-tax cost of capital

IC_{t-1} = the invested capital at the beginning of period *t*

This mesure quantifies the surplus return earned by the company. In those cases where a company 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.

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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 company 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 company'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 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 invested capital. The 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 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.

$$MVA = present\ value\ of\ all\ future\ EVA$$

If the company is not operating at optimal levels of financial gearing, changing the proportion of debt relative to equity can lower the WACC, so that the capital structure is closer to optimal. This will also unlock value for the company as a whole, including the shareholders.

2.2. Operating leverage, financial leverage and total leverage

Operating leverage (OL) is a measurement of the degree to which a company incurs a combination of fixed and variable costs. The higher the degree of OL, the greater the potential danger from forecasting risk, where a relatively small error in forecasting sales can be magnified into large errors in cash flow projections.

Most of a company's costs are fixed costs that occur regardless of sales volume. As long as a business earns a substantial profit on each sale and sustains adequate sales volume, fixed costs are covered and profits are earned. Other company costs are variable costs incurred when sales occur. The business earns less profit on each sale but needs a lower sales volume for covering fixed costs. However, the business does not generate greater profits unless it increases its sales volume[1].

The percentage change in the earnings before interest and taxes (EBIT) relative to a given percentage change in sales is defined as operating leverage.

Degree of operating leverage (DOL) = % change in EBIT/% change in sales.

The equation can also be written as follows:

$$DOL = Contribution\ /\ EBIT$$

The answer is a factor equal to one (in the case of zero fixed costs) or greater than one[2].

Financial leverage (FL) is the degree to which a company uses fixed-income securities such as debt and preferred equity. The more debt financing a company uses, the higher its financial leverage. A high degree of financial leverage means high interest payments, which negatively affect the company's bottom-line earnings per share.

The percentage change in earnings per share (EPS) due to a given percentage change in EBIT is known as financial leverage. Degree of financial everage (DFL) = % change in EPS / % change in EBIT. The following equation can also be used to calculate DFL:

$$DFL = EBIT\ /\ PBT$$

where

PBT = Profit before tax

The answer is a factor equal to one (no interest) or greater than one[3].

The total leverage is the outcome of the multiplication of operating leverage and financial leverage[4].

$$Degree\ of\ total\ leverage\ (DTL) = DOL\ x\ DFL$$

or

$$DTL = \%\ change\ in\ EPS\ /\ \%\ change\ in\ sales$$

If a company has a high amount of operating leverage and financial leverage, a small change in sales will lead to a large variability in EPS.

3. Literature review regarding the link between leverage, EVA and MVA

Some studies have shown that, compared to other accounting measures, MVA has by far the best correlation with EVA (Stern 1993; Grant 1997). Further support for EVA has come from studies by Hall (1998), Gates (2000), Kramer and Peters (2001) and Hatfield (2002), while there has been some criticism,

[1] For example, a software business has greater fixed costs in developers' salaries, and lower variable costs with software sales. Therefore, the business has high operating leverage. In contrast, a computer consulting firm charges its clients hourly, resulting in variable consultant wages. Therefore, the business has low operating leverage.

[2] A DOL factor of 1.5 means that for every 10% change in sales, the operating profit will change by 15% (all other things being equal).

[3] A DFL factor of 1.5 means that for every 10% change in profit before tax, the EBIT will change by 15% (all other things being equal).

[4] A DTL factor of 1.5 x 1.5 = 2.25 indicates that the profit before tax will change by 22.5% for every 10% change in sales.

amongst others from Keef and Roush (2002) and Copeland (2002).

Irala (2005) also initiated a study on whether EVA possess a better explanatory power relative to the conventional accounting measures like earnings per share, return on net worth, capital productivity and labor productivity. The results supported that as compared to the other accounting measures, EVA has better explanatory power in predicting the market value.

Several other studies have been done by researchers by relating leverage and EVA with of MVA.

The concept of shareholder value creation was examined by Kaur and Narang (2009) by using EVA and MVA. For that study, 104 Indian companies have been used as sample and the findings reveal that EVA influences the market value of shares.

The correlation between EVA and MVA of 582 American companies was examined by Fernandez (2003) over 15 years from 1983 to 1997. The NOPAT had higher correlation with changes in MVA than the EVA for 296 companies in the sample whereas for 210 sample companies the correlation between EVA and MVA was found to be negative. In line with this, a study conducted on EVA-MVA relationship of 89 industrial companies in South Africa by De Wet (2005) found that EVA did not show the strongest association with MVA.

Pachari and Navindra (2012) conducted a study on the influence of financial leverage on shareholders' return and market capitalization of Automotive cluster companies in Pitahmpur. They found that there is no significant influence of financial leverage on shareholders' return and market capitalization.

Majumdar and Chhibber (1999) analysed Indian firms and found a significant negative relationship between the value of the firm and leverage. On the other hand, Abor (2007) collected data of Ghana listed firms and found that there is significant positive relationship between the leverage and the company´s market value. To the same conclusion came Odit and Gobardhun (2011) in a study of Mauritius firms. Adenugba et al., (2016) examine the relationship between financial leverage and firms' value, by using a sample of firms listed on Nigerian Stock Exchange (NSE) from 2007-2012. Data were sourced from annual reports of selected firms. The Ordinary Least Square (OLS) statistical technique was used for data analysis and hypothesis testing. The results indicate that there is significant relationship between financial leverage and firms' value and that financial leverage has significant effect on firms' value.

It is clear from this brief review of literature that researchers have given much emphasize to EVA in respect to shareholder value creation. By recognizing this necessity this study makes an attempt to investigate the relationship between EVA, leverage and MVA.

4. Research methods

Correlation analysis has been carried out to identify the cause-effect relationship between the predictor variables and dependent variable. Additionally, simple regression method has been used to find out the impact of leverage and EVA on MVA.

MVA has been used as the dependent variable whereas EVA, operating leverage (OL), financial leverage (FL) and total leverage (TL) have been used as independent variables.

Variables used in the analysis and their measurement are presented in table 1:

Variables	***Measurement***
Dependent variable	
MVA	market capitalization – shareholders' funds
Independent variables	
EVA	NOPAT – cost of capital employed
OL	gross income / EBIT
FL	EBIT / PBT
TL	financial leverage x operating leverage

In order to avoid multi collinearity and auto correlation issues, explanatory variables have been tested in four models rather than being tested in a single model. Based on the variables used in the study, the following regression models can be developed.

1. $MVA = \beta_0 + \beta_1 x_1 + \varepsilon$
2. $MVA = \beta_0 + \beta_1 x_2 + \varepsilon$
3. $MVA = \beta_0 + \beta_1 x_3 + \varepsilon$
4. $MVA = \beta_0 + \beta_1 x_4 + \varepsilon$

where: x_1 = EVA; x_2 = OL; x_3 = FL; x_4 = TL; β_0 = constant; ε = error term.

The key sources of data were financial statements consisting of balance sheets and income statements of 20 selected Slovak companies in a 5-year period from 2012 to 2016.

5. Results

In this section the results of the analysis are presented.

Table 2: Pearson correlation

	EVA	***OL***	***FL***	***TL***	***MVA***
EVA	1				
OL	-0,501	1			
FL	-0,398	0,879	1		
TL	-0,401	0,914	0,973	1	
MVA	-0,223	0,009	-0,219	-0,183	1

Table 2 demonstrates the existence of statistically insignificant relationship among the predictor variables (EVA, OL, FL and TL) and MVA, that means that that there is no significant relationship between EVA and MVA and leverage and MVA[5].

[5] The findings of the correlation analysis are in line with the findings of the study conducted by Fernandez (2003).

Table 3: Regression analysis – R^2

Model	R^2
$MVA = \beta_0 + \beta_1 * EVA + \varepsilon$	0,102
$MVA = \beta_0 + \beta_1 * OL + \varepsilon$	0,029
$MVA = \beta_0 + \beta_1 * FL + \varepsilon$	0,119
$MVA = \beta_0 + \beta_1 * TL + \varepsilon$	0,045

As we can see from the table 3 that 10,2%, 2,9%, 11,9% and 4,5% of the perceived variability in the models 1, 2, 3 and 4 were demonstrated by the variations in the explanatory variables (EVA, OL, FL and TL) used in the study. Remaining 89,8%, 97,1%, 88,1% and 95,5% of the variations in the models were associated with factors which were not included in the models. These R^2 values suggest that there might be factors which may have greater explanatory power in predicting MVA. EVA and leverage have no profound impact on MVA. Furthermore it is clear that operating leverage has the least impact on MVA in case of the selected sample of companies.

6. Conclusion

This paper examined the association between EVA, leverage and MVA in the selected Slovak companies in the time period from 2012 to 2016. Pearson correlation and simple regression methods have been employed in the analysis. There is no clear evidence from the analysis to support the claim that the shareholders stand to gain by looking at EVA. Furthermore R^2 values reveal that the predictor variables used in the analysis have no explanatory power in predicting the changes in MVA. It is an indication that other factors are perhaps found to be better prognosticators of MVA.

One of the major limitations of this analysis is that the it is based on 5 years data. Only 20 companies were selected as the sample for the analysis. Therefore one can extend the study by examining a wider range of companies. Moreover, findings reveal that other factors are probably found to be better predictors of MVA rather than the explanatory variables used in this analysis. Hence, there is a big opportunity for more research in this field.

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References

- ABOR, J., BIEKPE, N. 2007. Corporate governance, ownership structure and performance of SMEs Ghana: implications for financing opportunities. In Corporate Governance: The international journal of business in society, Vol. 7, No. 3, p. 288-300
- ADENUGBA, A. A., IGE, A. A., KESINRO, O. R. 2016. Financial Leverage And Firms' value: A Study of selected firms in Nigeria. In European Journal of Research and Reflection in Management Sciences, Vol. 4, No. 1
- ANDRIES, A. M., COCRIS, V. 2010. A comparative Analysis of the Efficiency of Romanaian Banks. In Romanaian Journal of Economic Forecasting, Vol. 4, p. 54–75
- CASU, B., GIRARDONE, C. 2004. Financial conglomeration: Efficiency, productivity and strategic drive. In Applied Financial Economics, Vol. 14, p. 687–696
- COPELAND, T. 2002. Want to create value? In Strategic Finance, Vol. 83, No. 9, p. 48–54
- COPELAND, T., KOLLER, T., MURRIN, J. 1996. Measuring and Managing the Value of Companies, Wiley, New York, 2. Auflage
- CHEN, S., DODD, J. L. 1997. Economic Value Added: An Empirical Examination of a New Corporate Performance Measure. In Journal of Managerial Issues, Vol. 9, No. 3, p. 318-333
- DE WET, J. 2005. EVA versus traditional accounting measures of performance as drivers of shareholder value: a comparative analysis. In Meditari Accountancy Research, Vol. 13, No. 2, p. 1–16
- FERNANDEZ, P. 2003. EVA, economic profit and cash value added do not measure shareholder value creation. In Journal of Applied Finance, Vol. 9, No. 3, p. 74–94
- GATES, S. 2000. Strategic performance measurement systems: translating strategies into results. In Journal of Applied Corporate Finance, Vol. 13, No. 3, p. 44–59
- GITMAN, L. J. 2000. Principles of Managerial Finance (9th edition). Boston: Addison Wesley Longman
- GRANT, J.L. 1997. Foundations of Economic Value Added. Frank Fabozzi, New Hope
- HALL. J.H. 1998. Variables determining shareholder value of industrial companies listed on the Johannesburg Stock Exchange, Doctoral thesis, University of Pretoria, Pretoria
- HATFIELD, G.R. 2002. R&D in an EVA world. In Research Technology Management, Vol. 45, No. 1, p. 41–47
- IRALA, L. R. 2005. Economic Value Added: The right measure of managerial performance. In Indian Journal of Accounting and Finance, Vol. 119, No. 2, p. 1–10
- JANČOVIČOVÁ BOGNÁROVÁ, K. 2017. Analysis of the relationship between economic value added and market value added. In conference proceedings Challenges of the Knowledge Society CKS 2017, Bucharest, 12th - 13th May 2017, 11th edition
- JOHNSON, W. B., NATARAJAN, A., RAPPAPORT, A. 1985. Shareholder Returns and Corporate Excellence. In Journal of Business Strategy, p. 52–62

- KAUR, M., NARANG, S. 2009. Insights on shareholder value addition from India's wealth club: A study of selected companies. In The IUP Journal of Accounting Research & Audit Practices, Vol. 8, No. 3&4, p. 20–51
- KEEF, S., ROUSH, M. 2002. Does MVA measure up? In Financial Management, January 2002, p.20–21
- KRAMER, J.K., PETERS, J.R. 2001. An inter-industry analysis of Economic Value Added as a proxy for Market Value Added. In Journal of Applied Finance, p.41–49
- MAJUMDAR, S.K., CHHIBBER, P. 1999. Capital structure and performance: Evidence from a transition economy on an aspect of corporate governance. In Public Choice 98 (3-4). p. 287-305
- MISRA, A., KANWAL, A. 2007. Economic value added as the most significant measure of financial performance: A study of selected Indian firms. In Journal of Internal Business and Economics, Vol. 7, No. 1, p. 76–85
- O'BYRNE, S. 1996. EVA and Market Value. In Journal of Applied Corporate Finance, Vol. 9 No. 1, Spring1996, p.116-126
- ODIT, M.P., GOBARDHUN, Y.D. 2011. The Determinants of Financial Leverage of SME's In Mauritius. In International Business & Economics Research Journa, March 2011, Vol. 10, No. 3, p. 113-126
- PACHORI, S., NAVINDRA, K.T. 2012. Influence of Financial Leverage on Shareholders Return and Market Capitalization: A Study of Automotive Cluster Companies of Pithampur, (M.P.), India. 2nd International Conference on Humanities, Geography and Economics (ICHGE'2012) Singapore
- STERN, J. 1993. Value and People Management. In Corporate Finance, July 1993, p.35–37
- STEWART, G., BENNETT III. 1999. The Quest for Value, HarperCollins Publishers, New York

MEDIA MARKET OVERVIEW IN CEE COUNTRIES

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Valentin SAVA***

Abstract

Every year, in every market and in any country, advertisers spend increasing budgets on advertising to influence consumer behavior. Finding the ideal marketing channel mix is a continuous challenge for every brand on every local market. This paper is aiming to analyze overall media investment in CEE region trying to find patterns of media mix based on economic context and local market status that supports media investment (internet and Facebook statistics, TV audiences). In the paper are used multidimensional methods like: principal component analysis and hierarchical clustering techniques. Thirteen Central and Eastern European countries are clustered based on 2017 data from Media Factbook. Two main patterns are described in the paper based on these data. The first one is characterized by high Internet usage, high Print and Digital advertising share. In terms of inverstment level, these countries have negative evolution of Net Market Spend per Capita in 2016 versus 2008 but high media market sizes. The second one is characterized by high out of home advertising share. In terms of inverstment level, these countries are splited in two subpatterns: one with negative and one with positive evolution of Net Market Spend per Capita in 2016 versus 2008.

Keywords: *marketing mix, media market, clustering methods, principal component analysis, CEE countries.*

1. Introduction

Every year, in every market, in any country, advertisers spend increasing budgets on advertising to influence consumer behavior.

Finding the ideal marketing channel mix is a continuous challenge for every brand on the market in every country. Permanently, the brand, marketing or sales managers are struggling about where they should invest, how much and how often they should reassess where to invest in order to get the most of it for their brands. The question even bigger is about what metrics they should use to determine which media channels get more investment. Every brand has its own judgement in choosing the right media channels mix considering brand attributes, targeted customer profile and of course, local market particularities.

In this paper we analyze overall media investment in CEE region trying to find patterns of media mix based on economic context and local market status that supports media investment (internet and Facebook statistics, TV audiences). This *paper begins with a short* review of the literature regarding the evolution of marketing. The second section is a general analysis of media market at European level based on data from Media Factbook (2016, 2017). In the third section, by applying clustering techniques we try to identify some patterns among CEE countries on media market statistics. Finally, in the last section we conclude our analysis with some recommendations for Romania media market.

2. Literature review

The evolution of advertisement dates back into the ancient times. Societies used symbols, and pictorial signs to attract their product users. Over centuries, these elements were used for promotion of products. In the early ages, these were handmade and were produced at limited scale for promotions. Later on, this phenomenon used and gained strength more intensively for promotional purposes. Today's modern environment, advertisements have become one of the major sources of communicational tool between the manufacturer and the user of the products. (Abideen & Saleem, 2011)

Over the years, practical experience has shown that marketing costs and market response are stongly correlated. This dependency should be acknowledged and extensively evaluated as the marketing costs can not be completely ingnored or mentained at a level too low as they could not influence anymore the sales. At the same time, there are always limits at the higher level, for which the resources become insufficient (S. Prutianu et al.,1998).

Naik and Peters (2009) compared the impact of various paid-for media, which is helpful to marketers in determining their overall media spend and its allocation across media. They proposed a new hierarchical model of online and offline advertising, incorporating within-media (i.e., intra-offline: television, print, and radio) and cross-media (online-offline) synergies and allows

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higher-order interactions among various media. They reach the optimal spending on each medium and the optimal total budget which is real helpful to marketers.

This mater of marketing resource allocation in media have been continuously investigated through many studies along time revealing important insights on the effects of within-media synergies on the overall budget and its allocation (Naik and Raman, 2003; Prasad and Sethi, 2009).

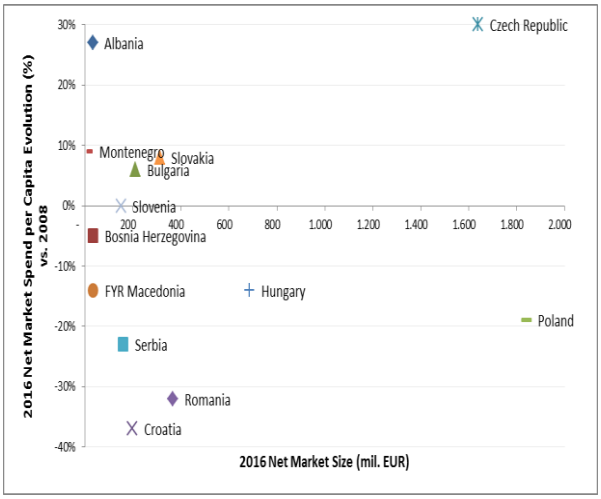
To derive more informative priors, Wang et al. (2017) pools data of similar brands within one category, and extends the model to a hierarchical Bayesian model that allows random effects of media and control variables for different brands. Sun et al. (2017) uses geo-level data instead of national-level data to estimate a similar hierarchical Bayesian model with the shape and the adstock transformations. In simulations, both approaches estimate the transformation parameters well with a much larger data set and derive informative priors to use when the model is applied to a single brand nation-level only data.

Recently, Dens, Pelsmacker and Gos (2018) have also investigated cross-media advertising synergy based on consumers' media usage in a a novel methodology, mixture-amount modeling. It allows to derive optimal media mixes that can be different for several types of media users. The authors provide a proof of concept by analyzing 46,852 responses to 92 beauty care advertising campaigns from 10,972 respondents from the Netherlands, Belgium, Finland, and Hungary. They analyze the impact of consumers' combined magazine, television, and Internet usage (i.e., how intensively they use media overall and the relative proportion of each individual medium) on their campaign-evoked brand interest, perceived brand equity, and purchase intention for advertised brands. The results suggest that different patterns of consumer media usage have different responses to advertising campaigns.

3. Media market analysis at Europe level

According to media fact book (2017), the CEE economy is expected to boost in 2017, after a healthy 2.9% expansion in 2016. A solid domestic economy and improving activity in the Euro area should fuel faster growth of 3.1%. Tightening labour markets, loose monetary policy and fiscal measures are contributing to a consumption spree in the region, which is being reflected in retail sales and confidence data. The impact on the CEE media markets' is still visible in most of the countries, different patterns being observed in terms of media spend / capita evolution vs. 2008 and also in terms of net media market size also.

Fig.1. Media Market Size Evolution



Source data: Own representation based on 2017 Media Fact Book, Romania

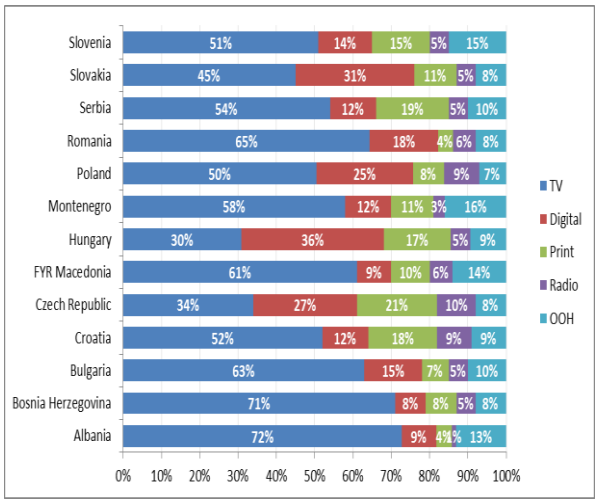
Czech Republic is the only country with media spend/capita strong positive dynamics based on positive economic trend and important media investment budget (1600 mil Eur).

On the opposite side, despite the positive economic evolution in Poland and massive media investment (above 1800 mil Eur), the trend is strongly negative being 19% below 2008. On similar decreasing trend are also Hungary, FYR Macedonia and Bosnia Herzegovina. But, below all, with relatively medium budget invested in media (200- 300 mil Eur), Serbia, Romania and Croatia are the most affected countries with significant drop (below -23%) showing that advertisers continue to be prudent with their media investments, given the current economic and political context.

With relatively small budget investment, Albania is the country with impressive gain vs 2008 while Bulgaria, Montenegro and Slovakia registered a marginal media investment increase, supported by a positive economic performance.

Considering media channels mix, TV continue to retain high shares of spending between 50% and 70% in most countries with significant outliers being Albania and Bosnia & Herzegovina where the TV share exceeds 70%, while at the opposite side is Czech Republic, Hungary and Slovakia (below 41%), where Digital is accountant for more than 30% of the total net media market.

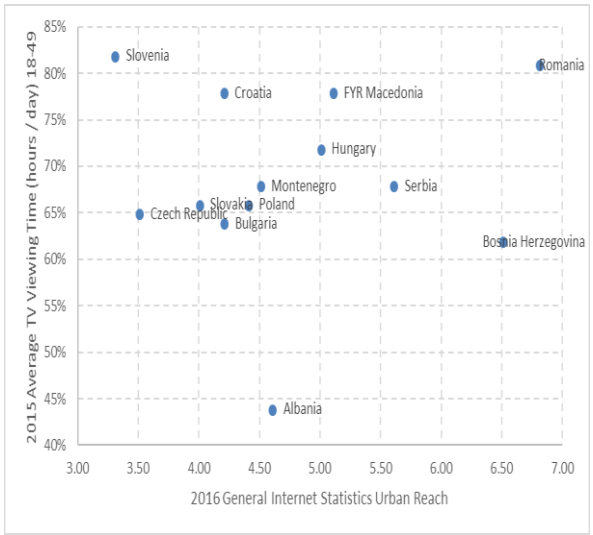
Fig. 2. Media channels mix – 2016 Shares



Source data: Own representation based on 2017 Media Fact Book, Romania

Print retains over 15% of media market share in the Czech Republic, Serbia and Croatia. Radio generally has a low share throughout the region, with the exception of the Czech Republic (10%), Poland and Croatia both with 9%.

Fig.3. 2016 Average TV Viewing Time (hours/day) for 18-49 years old in Urban area and General Internet Statistics



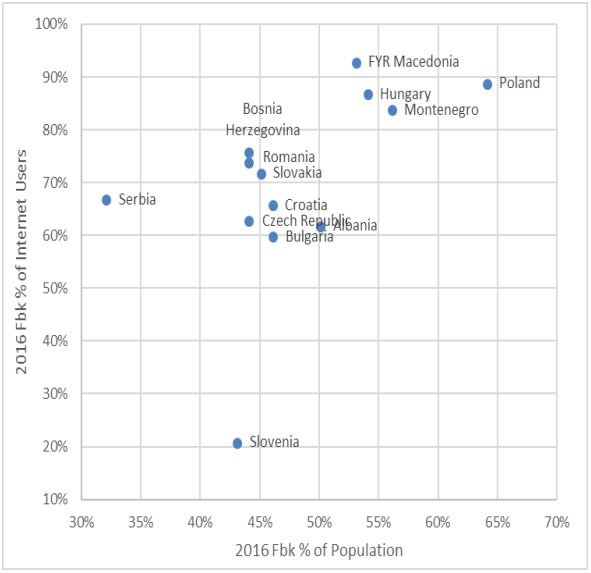
Source data: Own representation based on 2017 Media Fact Book, Romania

Based on 2016 Media Fact Book, the TV shares in the media mix tend to correlate with the ATS (average time spent viewing), with Albania. Romania, Bosnia & Herzegovina and Serbia having the highest level of ATS on commercial targets, while Slovenia and the Czech Republic are having the lowest.

All the countries in the region have an urban Internet penetration of over 60%, with half of them exceeding already 75%.

In terms of daily usage, the consumption map is quite heterogeneous with countries like Slovenia, and Romania having over 80% at urban level, and Bulgaria, Bosnia & Herzegovina and Albania with less than 60%.

Fig.4. General Facebook Statistics



Source data: Own representation based on 2017 Media Fact Book, Romania

The need for connection continues to grow in our region being supported by new and more affordable technologies, increasing the number of Facebook users. With the exception of Serbia (32%), the number of Facebook users amount to over 44% of the total population of each country. Also, Facebook users amount to more than 60% of the Internet users across all the countries in the region.

4. Patterns on media market

PCA is a technique used to reduce multidimensional data sets to lower dimensions, when all the variables used are quantitative. PCA is mathematically defined as an orthogonal linear transformation that projects the data to a new coordinate system (which is made by principal components) in order to obtain the greatest variance explained by this projection of the data.

Based on matrix of correlation (Annex 1), the following 7 uncorrelated variables were taken into consideration for analyzing patterns on CEE countries media market: 2016 Net market spend per Capita evolution vs 2008, %digital, %print, %OOH (out of home advertising), 2016 intenet urban reach, 2016 Facebook users of population, 2016 Facebook users of internet users. PCA is applied on these variables such that to analyse the correlation between them and to identify some patterns in CEE countries.

Table 1. Rotated Component Matrix (PCA)

	Component		
	1	2	3
2016 Fbk % of Population	.913	.229	.071
2016 Fbk % of Internet Users	.758	-.413	.015
OOH	-.069	.788	-.417
2016 General Internet Statistics Urban Reach	-.099	.644	.510
2016 Net Market Spend per Capita Evolution (%) vs. 2008	.030	.579	.000
Digital	.288	-.151	.858
Print	-.501	.019	.657

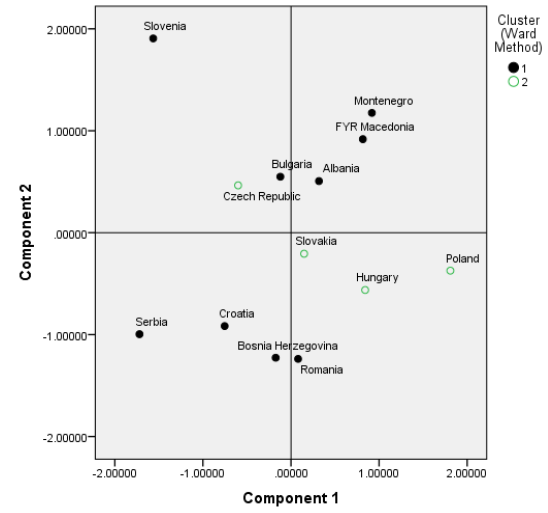
Source data: Own computations based on 2017 Media Fact Book, Romania

The projection of data on the first three principal components preserves 71.2% of the total inertia (25.1% for the first axis, 23.1% for the second axis and 22.9% for the third axis). On the first axis, the best represented variables on positive side are: 2016 Fbk % of Population, 2016 Fbk % of Internet Users and on the negative side is the spending on print channel. Therefore this component could be called Internet Challenge. On second axis, the best represented variables on positive side are: OOH, 2016 General Internet Statistics Urban Reach and 2016 Net Market Spend per Capita Evolution (%) vs. 2008 and on negative side is 2016 Fbk % of Internet Users. On third axis, the best represented variables on positive side are: spending on digital and print channels, 2016 General Internet Statistics Urban Reach and on negative side is OOH.

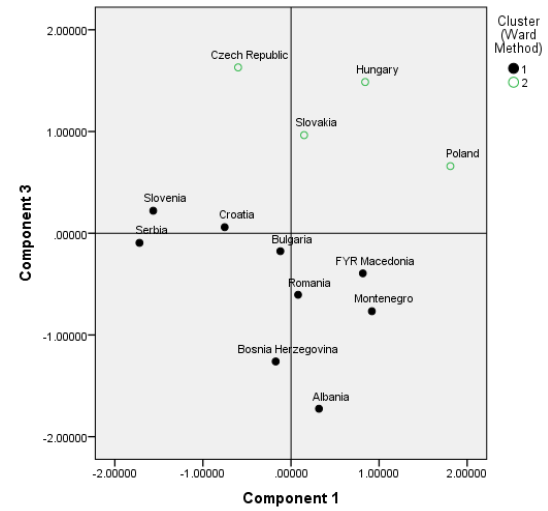
Ward method is a hierarchical clustering technique used to create homogenous groups with the minimum variance within the groups. By applying this technique on our data 2 clusters could be defined. Cluster 2 is represented by 4 countries: Hungary, Slovakia, Poland and Czech Republic and cluster 1 with all other countries.

Fig. 5. Projection of countries on the first three principal components

a.



b.



Source data: Own representation based on 2017 Media Fact Book, Romania

By representing the countries on the first three principal components we observe that countries from the first cluster have lower values for the third component (Fig. 5b.). Therefore we can conclude that in these countries Digital and Print have low share and OOH have high shares in media channel mix. Countries from cluster 2 have high shares for Digital and Print advertising and low values for OOH (Fig. 5b.) but also we can observe that they are countries with high percentages of Facebook users in total Population and in total number of Internet users (Fig. 5a.). Moreover this cluster could be splited into two subclusters. The first subcluster (Bulgaria, Slovenia, Montenegro, Macedonia, Albania) have with positive 2016 Net Market Spend per Capita Evolution (%) vs 2008. The second subcluster (Serbia, Croatia, Romania and Bosnia & Herzegovina) have negative 2016 Net Market Spend per Capita Evolution (%) vs 2008.

5. Conclusions

The question addressed in this paper was: which are patterns observed on CEE countries media market. We found that there are mainly two different patterns: one characterized by high internet usage and where Print and Digital advertising shares are very high. In these countries (Poland, Hungary, Czech Republic, Slovakia), the Net Market Spend per Capita had a negative evolution in 2016 versus 2008, even if they have the highest media market sizes. The second pattern is characterised by high share of out of home advertising (OOH) in media channel mix. These countries could be splited in two groups: one with Net Market Spend per Capita having a positive evolution in 2016 compared to 2008 (Bulgaria, Slovenia, Montenegro, Macedonia, Albania) and another group with a negative evolution in 2016 compared to 2008 of Net Market Spend per Capita (Serbia, Croatia, Romania and Bosnia & Herzegovina).

By analyzing all CEE countries, it is obvious that TV and Digital channels are having important impact. It is shown also that they continue to fight for dominance across all media markets in CEE, as TV is still holding strong on majority of countries (9) and Digital is the media channel with the most dynamic expansion, as mobile, social video and messaging apps will continue their developing trend. As smartphone use is continuing its strong growth, and the CEE developing economies hold a huge potential, mobile advertising revenues are expected to boost, supported by the fact that the share of web traffic coming from mobile devices is growing rapidly, accordingly to 2017 MediaFactbook.

The CEE media market size map is polarized in two segments: the first represented by the largest markets like Poland and the Czech Republic gathering yearly over 1.6 billion EUR in net value, medium markets like Hungary and Slovakia of over 310 million EUR, all 4 countries having digital share in media mix of above 25% and TV share lowest than 50% and the second segment consisting of the countries with less than 200 million EUR net investments.

Romania is a country with high potential as long as the media investements are high and internet penetration and internet daily reach in urban area offer good premises for attacking the media market through the digital channel.

References

- Abideen, Z.U. and Saleem, S., 2011**, "**Effective Advertising and Its Influence on Consumer Buying Behavior." European Journal of Business and Management, 3(3), 55–65
- Dens N., Pelsmacker P., Goos P., 2018, How consumers' media usage creates synergy in advertising campaigns, First Published January 12, 2018 Research Article
- Media Fact Book Romania, 2016, 2017, http://www.mediafactbook.ro/public/files/MFB2016.pdf, http://www.mediafactbook.ro/public/files/MFB2017.pdf, Initiative Media Agency Official Publication
- Naik P.A., Raman K., 2003, Understanding the Impact of Synergy in Multimedia Communications, Journal of Marketing Research: November 2003, Vol. 40, No. 4, pp. 375-388
- Naik, P. & Peters, K., 2009, A Hierarchical Marketing Communications Model of Online and Offline Media Synergies. Journal of Interactive Marketing, Pages 288-299
- Prasad A., Sethi S., 2009, Integrated Marketing Communications in Markets with Uncertainty and Competition, Automatica, Vol. 45, pp. 601-610, 2009
- Prutianu S., Munteanu C., Caluschi C., 1998, Inteligența. Marketing Plus, Ed. Polirom
- Sun, Y., Wang, Y., Jin, Y., Chan, D. & Koehler, J., 2017, Geo-level bayesian hierarchical media mix modeling. research.google.com
- Wang, Y., Jin, Y., Sun, Y., Chan, D. & Koehler, J., 2017, A hierarchical bayesian approach to improve media mix models using category data. research.google.com

Annex 1 Correlation matrix between media market characteristics

Note:* Correlation is significant at the 0.05 level (2-tailed), ** Correlation is significant at the 0.01 level (2-tailed)

	2016 Net Market Spend per Capita Evolution (%) vs. 2008	2017 Net Market Size (mil. EUR)	TV	Digital	Print	Radio	OOH	2015 Average TV Viewing Time (hours / day) 18 U	2015 Average TV Viewing Time (hours / day) 18-49 Urban	2016 General Internet Statistics Urban Reach	2016 General Internet Statistics UrbanDaily Reach	2016 Fbk % of Population	2016 Fbk % of Internet Users	Fbk users
2016 Net Market Spend per Capita Evolution (%) vs. 2008	1	,092	-,039	,079	-,057	-,328	,276	-,491	-,285	,044	-,653*	,045	-,258	-,301
2017 Net Market Size (mil. EUR)		1	-,586*	,631*	,243	,705**	-,551	-,291	-,339	,220	-,048	,387	,191	,785**
TV			1	-,833**	-,751**	-,499	,277	,489	,654*	-,399	-,279	-,090	-,028	-,196
Digital				1	,301	,339	-,517	-,269	-,397	,189	,082	,240	,193	,441
Print					1	,469	-,062	-,410	-,572*	,302	,318	-,342	-,198	-,217
Radio						1	-,572*	-,204	-,355	,369	,434	,065	,098	,495
OOH							1	-,262	-,145	,285	,060	,099	-,260	-,563*
2015 Average TV Viewing Time (hours / day) 18 U								1	,932**	-,611*	,052	-,171	,455	,088
2015 Average TV Viewing Time (hours / day) 18-49 U									1	-,766**	-,180	-,051	,401	,035
2016 General Internet Statistics Urban Reach										1	,553	,089	-,293	,042
2016 General Internet Statistics UrbanDaily Reach											1	-,101	-,092	,036
2016 Fbk % of Population												1	,534	,513
2016 Fbk % of Internet Users													1	,340
Fbk users														1

Source data: Own computations based on 2017 Media Fact Book, Romania

PERSPECTIVES ON FAMILY FIRMS IN THE ROMANIAN ECONOMIC FRAMEWORK

Viorel CORNESCU[*]
Andreea STROE[**]

Abstract

The paperwork focuses on emphasizing the increasingly significant role of family firms in the Romanian economic framework, by bringing into attention legislative matters, their advantages and disadvantages compared to other similar forms of organization (sole proprietorship (IF) and PFA (self-employed person)). The importance of FFs is indisputable, not only generally, from the economic point of view, but also in terms of the commitment shown to local communities, business responsibility, long-term stability and moral values. They are also a fertile soil for entrepreneurship as incubators for future entrepreneurs. Our goal is to capture their features, their evolution in time in the local framework, development tendencies, but also the peculiarities of their financial instrumentation. Their specific aspects in what concerns financial instrumentation of FFs may be the subject of future debates on proposals to improve the management of their work, to analyze their financial activity by highlighting the legislative aspects which are compared to similar forms of organization, by also assessing the evolution in time of family firms in terms of their importance within the economy. Therefore, the paperwork points out some of the key aspects and characteristics of such organizations which act as a balance in entrepreneurial development, along with the economic support of thousands of families, both from rural and urban environment.

Keywords: *family firms, sole proprietorship, financial instruments, evolution, microenterprises.*

1. Introduction

Family firms have gained great importance in economic practice, but also in specialized literature, especially in connection with firm's theories, with emphasis on their role and incorporation in management and entrepreneurship theories. (Beckard and Dyer, 1983). Family firms are often considered, in the light of their features, different from non-family firms, and their economic implications generated a significant academic debate. Family firms are established all over the world, having different shapes and sizes, from the smallest manufacturers to large multinational companies. Their features are different according to many variables (dimensions, organization of assets, legal forms, etc.), this thing explaining the contradictory points of view from specialized literature. Furthermore, we notice that the great majority of them are smaller than private non-family firms in what concerns the number of employees and the volume of sales and have a greater inflexibility in terms of the impact of new techniques and technologies. Typical family firm is less based on formal knowledge, is less involved in exports and has a low productivity compared to private non-family firms. Family firms can, by definition, take the liability only on the legal forms of the limited liability company, partnership or sole companies, according to the legislation of each country.

The researchers use different criteria to define family business, such as the status of assets, strategic control, the involvement of multiple generations in the business and the intention to keep the business in the family.

Some researchers such as (Lea, 1998) suggest that family firms should be defined by the fact that they are established by and for the need of a specific family, or under the explicit anticipation that future generations take over the business. Other studies such as Donckels and Frohlich (1991) and Lyman (1991) suggest more conservative approaches, stating that a person or a group of individuals whom are directly related to each other by ties of kinship should control 60% or in full a company in order to be classified as a family firm.

EC definition (2009) adopted by the European Union and by some multinational family business networks, such as the European Group of Family Enterprises (GEEF), Family Business Network International and Family Firms Institute (FFI), points out that a company can be considered a family firm if it fulfills the following conditions:[1]

I. The majority of the decision making rights are held by the natural person or persons (family) who established the firm, or who hold the share capital of the natural person or the capital of the spouses, parents, heirs;

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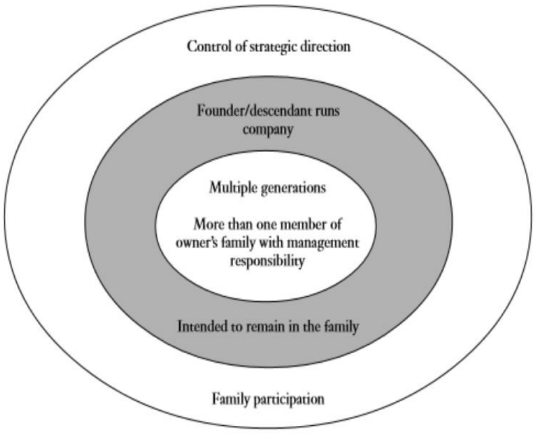
[1] The Characteristics and Performance of Family Firms: Exploiting information on ownership, governance and kinship using total population data, Fredrik W. Andersson, Dan Johansson, Johan Karlsson, Magnus Lodefalk and Andreas Poldahl, 2017

II. The majority of the decision making rights are indirect or direct;
III. At least a family representative is officially involved in the management of the company;
IV. The publicly traded corporations fulfill the definition of family firm, namely the person who established or purchased the firm (share capital) or family or descendants if they have mandated 25% of the share capital.

A very suggestive descriptive definition of family firms is suggested by the picture below describing the universe of such organizations.

Picture 1. The universe of family firms



Source: Family Businesses' Contribution to the U.S. Economy: A Closer Look Joseph H. Astrachan, Melissa Carey Shanker, 2003

The characteristic of family firm is that the transfer of ownership, when the case may be, is made to another member of the family, so that family plays an important role in the business management, and the impact of the generations on the business development is a significant one. Therefore, in addition to quantitative aspects of the business, we must also take into account the importance of intangible aspects.

Gartner (2001) questions the interconnection of entrepreneurships with the researches on the development of family firms. A recent research indicates that 80% of small partnerships have similar characteristics with those of family firms (Chua et al. 1999), such as the engagement of own financial resources or human capital. Entrepreneurship is a special case of strategic management, in the creation and renewal of organizations, a merge between opportunity and resources. Taking into account that an important part of new organizations is created by means of family involvement, families induce to entrepreneurial activities their values and aspirations. On the other hand, entrepreneurship requires an understanding of how family resources can be exploited and how family involvement can influence the type of attracted capital, organizational form of the enterprise and financial performances. Therefore, there can be noticed the possibility of a symbiotic connection between entrepreneurship and family firm.

Habberson et al. (2003) captures family firm as an interactive system consisting of individuals, a family and a firm, pointing out the synergy created by its familiarity and contribution to creating competitive advantages and wealth. The financial resources (capital raising), human resources (different organizational culture), technological resources (innovation) are meant to distinguish between family and non-family firms by meeting standard criteria of unity, inseparability and synergy. Christman et al. (2003) proves that the classification of Habberson can be applied more broadly by replacing the maximization of wealth by the maximization of the value as predominant goal of family firm. By introducing the concept of value determination policy (Christman et al.) shows how the Habberson's theory concepts can help explaining long-term survival and development of family firms.

On the other hand, Schulze (2003) points out the contribution of altruism and self-control, as entrepreneurial features that can help or raise difficulties within the company, the differences between trading companies and family firms being highlighted in terms of organizational conduct and performance. The altruism matter occurs when managers try to help third parties (i.e. children), thus encouraging avoidance, postponement of decisions or liberty, which cannot be controlled by means of economic initiatives. Therefore, these difficulties can be harder to solve than in a trading company.

The existent entrepreneurial research did not ignore family firms. Notwithstanding, they used very selective criteria which ignore the size and issues of family firms. Chrisman et al. (1998) paperwork explains that entrepreneurship is a special case of strategic management, where the risk, organizational renewal and innovation (Sharma and Chrisman, 1999) are strategy actions involving synchronization between opportunity and resources. Only few strategic decisions are made for pure economic reasons; the values and aspirations of top owners and managers also play an important role (Andrews, 1971).[2] In addition to them, while human calculation for new company establishment certainly takes into account profit and its determinants**, the FFs also include goals which cannot be viewed only from the financial point of view.** Therefore, family firms seek to meet family's economic needs, and the wishes of those establishing them to create, to build something and to add value, stability and security in the present and the future, to them, family and descendants.

Selznick (1957), believes that family business entrepreneurs are unique by trying to build enterprises which are also family institutions. The way the founders of family firms deal with the establishment and development of organizations to create family

[2] An introduction to theories of family business, Jess Charisma, Jess Chua, Mississippi State University, 2003

inheritances and sustainable economic value should be of interest for the entrepreneurship field. The perpetuation of such inheritances requires the firm to manage family succession, which, besides the need to replace the founding entrepreneur, often involves changes in strategy and / or structure.

Such changes could revive a novelty responsibility (Stinchombe, 1965), with deep implications for organizational survival and growth.

Tan and Fock (2001) show that the appointment of an entrepreneurial leader can be the key to success in family business succession. Researches suggest that a substantial proportion of new enterprises is created under family involvement. Families influence entrepreneurial activities by their values and aspirations. They must support intergenerational entrepreneurship in order to achieve their goal to create sustainable family inheritances. On the other side, entrepreneurial spirit requires an understanding of how family resources can be exploited and how family involvement can affect the type of targeted investment and the performance of shareholders at the beginning. Therefore, there can be a symbiotic relation between entrepreneurship and the research in family business field.

2. Specific features of IF compared to other forms of economic organizations

Let's see what is a family firm and what is the legal regime applied in Romania. Small entrepreneurs which want to carry out an economic activity together with the family, can choose the establishment of a family firm (former family association), currently regulated by Government Emergency Ordinance no. 44/2008.

In the process of setting up a family firm, the first requirement is the assessment of the conditions provided by the law on two aspects, both important, namely: 1. the persons who can become members; 2. the economic activity that can be carried out by this form of association. In what concerns the persons who can become members, the law uses expression "family members". The law also provides who the respective persons are: husband, wife, their children who have already turned 16 on the date of family firm authorization, relatives and up to fourth degree of kinship included; [Art. 2 para. (1) letter d) of Government Emergency Ordinance no. 44/2008].

The number of persons required for family firm establishment is of at least two. Once fulfilled these criteria, the first step for the establishment of family firm is the conclusion of an establishment agreement between the members and the appointment of a representative of the family firm authorized by means of a special power of attorney to manage the interests of the family firm.

The National Trade Register Office employs the following definition **The firm of a professional, family firm consists of the name of the family or its representative plus phrase "Family firm".*

Family firm, in Romanian legislation, has the following restrictions in what concerns the scope of business: liberal professions or economic activities regulated by special laws, economic activities for which the law established a special legal regime, certain performance restrictions or other prohibitions, services provided under the freedom to provide cross-border services.

Under the regime of legal acts concluded for the performance of economic activities within a family firm, according to art. 29 and art. 32 of Government Emergency Ordinance no. 44/2008, they are concluded by the representative of the family firm and produce effects on all the members of it[3].

Under the legal regime of natural person's assets, the performance of economic activities within a family firm enables the establishment of dedicated assets. The members of a family firm can choose, by pursuing a specially regulated procedure in this respect, the dedication of a part of personal assets for the individual performance of economic activities. This part shall be subject to a special legal regime and shall be designated by term dedicated assets.

In terms of acquiring the capacity of trader, the option for the individual performance of economic activities, as a member of a family firm, leads to the acquiring of this capacity as of the registration with the Trade Register.

In terms of acquiring the capacity of taxpayer, the independent performance of economic activities within a family firm entails the existence of such capacity. Normative acts establish on the members of the family firm, on the self-employed person and on the entrepreneur, holder of a sole proprietorship, the obligation to pay certain taxes and fees, which can be classified in two main categories: general tax obligations (incumbent on all the members of a family firm) and special tax obligations (incumbent only on certain members of a family firm, as a result of their will, of acquiring the capacity of employer, of performing certain category of activities or of the activity scale, reflected in the turnover).

Other similar forms on which we can draw conclusions on the similarities and differences are sole proprietorships and PFAs.

Sole proprietorship (II) is a form of economic activity organized by a natural person entrepreneur, and the low cost of establishment is one of the advantages of establishing such an entity.

Self-employed person (PFA) is any natural person authorized to perform any type of economic activity permitted by the law, by using mainly its labor force (art. 2 letter i) of Government Emergency Ordinance no. 44/2008). PFA is insured under the national pension system and other social insurance rights and is entitled to be insured under the social

[3] www.onrc.ro

health insurance system and unemployment insurance system, under the terms provided by the law. PFA is held liable for the obligations on the dedicated assets, if set up, and, in addition, on all assets, and in case of insolvency, it shall be subject to simplified proceedings provided by Law no. 85/2006 on insolvency proceedings, as further amended and supplemented.

Under Government Emergency Ordinance 44/2008 updated in 2014, family firms are treated alongside sole proprietorship and PFAs, not gaining legal status by means of the registration with the Trade Register Office. In order to note the advantages and disadvantages of all forms of organization, we hereby present a short compariso

Criteria	Family firm[1]	Sole proprietorship	PFA (Self-employed)	S.R.L (Limited liability company)
Form of organization	-it consists of 2 or more members of a family -does not hold own assets and does not gain legal status by the registration with the trade register - the members of the family firm are considered natural person traders.	- does not gain legal status by the registration with the trade register -can employ no more than 8 employees, third parties, under individual labor agreement	-is entitled to perform any form of economic activity permitted by the law, by mainly using its labor force -can employ, as an employer, third parties under an individual labor agreement, concluded under the terms of the law and can cumulate the capacity of certified natural person with the capacity of an employee of a third party	-is a legal form of company, a certain form of legal entity, with limited liability before the law and its owners. It is a hybrid form of business with the features of both a partnership and a corporation -has legal status (law no. 31/1990)
Legal matters	- income and expenditures are distributed among members, according to the share of contribution, members pay income tax amounting to 16% on distributed net income (every member declares his share of income to the fiscal body) -the members of a family firm may simultaneously be PFAs or holders of sole proprietorship and can also hold the capacity of employee of a third party. -family firm cannot employ third parties under labor agreement.	-the natural person entrepreneur is considered natural person trader, can employ third parties under individual labor agreement, according to the law, but can also hold the capacity of employee of a third party - the costs of establishment and administrative costs are lower - owes health insurance contribution -it gains an annual cumulative income equal to at least 12 basic gross wages	-it is certified but, cannot cumulate the capacity of natural person entrepreneur holder of a sole proprietorship. -the costs of establishment and administrative costs are lower - PFAs can benefit from the achieved net income at any time, without distributing dividends, compared to SRL - the process of establishment of a PFA is much more simple and requires lower costs	-higher investments, the costs of establishment and management are higher than in case of the other form of organization - shareholders are bound to pay another 5% tax for dividends. It is the only legal way to take money out of the company (unlike PFA).

[1] The establishment of self-employed persons, family firms and sole proprietorships is regulated in our country by *Emergency Ordinance no. 44/2008* on the performance of economic activities by self-employed persons, sole proprietorships and family firms.

	-Family firm is set up under an establishment agreement, concluded by the family members in writing			
Advantages	-the accounting is kept in single-entry bookkeeping, the accounting records are kept by filling in a Receipts and disbursements journal, where cash and bank transfer collections and payments are recorded in chronological order.	-the accounting is kept in single-entry bookkeeping -the accounting can be kept by the business owner (a receipts and disbursements journal or file index is the only thing required),	- the accounting is kept in single-entry bookkeeping (as of January 1st, 2015, they can choose double-entry bookkeeping), they are insured under the social insurance system	-the accounting can be kept under double-entry bookkeeping - in case of debts, the liability of every shareholder is limited to the share capital he has deposited at the time of the company establishment
	-obligations to the state budget: - 10% tax on net income -10% of the national minimum income for health insurance system compared to 5,5% of the gross income declared in 2017 - 25% of the declared monthly income (namely the income for which you want to be insured) contributions to pension system CAS.	-they can choose the income tax bracket for self-employment income, a fixed tax which is established according to a scale set up by ANAF (National Agency for Fiscal Administration) or for real regime tax system (income tax amounting to 10% applicable on the difference between income and expenditures in 2018)		-they can take part in private or public auctions
	-In order to carry out the activity as P.F.A., I.I. and I.F. it is required that the natural person, the owner of the sole proprietorship or the members of the family firm have qualification in the respective field, qualification to be proved by a study document or a qualification diploma. - flexibility and adaptation to changes in the economic environment	- throughout the performance of the business there is the possibility to extend it by opening new business units or the scope of business can be modified, higher flexibility	- it is required to prove the fulfillment of certain conditions or professional training and/or certification of professional training -PFA carries out only regulated or registered activities -the documentation submission process is easier and consists in the submission of tax statement before ANAF	-the submission of documents certifying professional training and experience of the founders of the company in the scope of business is not mandatory
	-the members are insured in the public pension and social security system	-simpler formalities of establishment or deregistration,	-there are only three obligations to the state budget: 10% tax on net income, 10% of	-the companies which gain income under EUR 100,000,

	and are entitled to be insured in health insurance system and unemployment insurance system, under the terms of the law. - the termination of the activity can be performed by the simple deregistration with the Trade Register, short-term procedure with low costs,	registration costs generally reach about RON 500-600 -the deregistration is performed by the submission of an application to the Trade Register, as well as of the documents of the company (registration certificates and company confirmation details in original.	the national minimum income for health insurance system, 25% of the minimum income contributions to public pension system CAS ; -If the taxpayer chooses to pay CAS and CASS for the gross national minimum wage, as of January 1st, 2018, they will amount to RON 665,	regardless of the number of employees, pay income tax of 3% (with no employees), 2% (1 employee – full time) or 1% (≥2 employees – full time) (advantage for the companies with lower expenditures and disadvantage for traders); -program for the encouraging of SRL-D establishment
	- the economic activities of IF, they can be carried out in all areas, occupations or professions that the law does not expressly prohibit. (agriculture, industry, tourism, constructions, IT or trade, etc.)	- Sole proprietorship can have as a scope of business no more than 10 classes of activities referred to in NACE code.	-Only NACE codes that concern the activity in which the PFA is to be certified can be chosen; this mean that you cannot function as a PFA in any area	-there can be chosen more than one NACE code in order to conduct more economic activities from different areas; there are no scope of business limits
Disadvantages	-as of 2016, under the new amendments brought by the Tax Code, the operation as sole proprietorship, self-employed person or family firm entails, from a strictly fiscal point of view, more disadvantages compared to SRL - no new shareholders can be coopted, according to the regulations in force, IF cannot employ third parties under labor agreement, -the natural person, owner of the firm or members of the family firm are held liable before third parties with the	-10% corporate tax, plus certain contributions (CAS, CASS). - if in case of a SRL corporate tax generally amounts to 3% plus 5% tax on dividends in 2016 (practically a corporate tax added to the income tax) or 10.5% as of 2017 - you will be held liable with own assets, in case of a II, the assets are confused with personal assets -you cannot become an employer within your own sole proprietorship.	-as of 2018 10% income tax, namely one third of the collections are transferred to the state -the contributions to health insurance system and CAS shall be paid even if the PFA does not earn income throughout the year, in this case the national minimum income being established as a calculation base - in case of debts, the liability of the natural person is maximum, in case of insolvency, the person shall be subject to the simplified proceedings provided by Law no. 85/2006 on insolvency proceeding[2] - lower business development opportunities in some	- if a shareholder does not have salary income sources, the state shall apply and shall retain social insurance contribution of dividends - the dissolution of a SRL entails a complicated procedure, takes a long time (about 2 months) and requires great costs. -greater opportunities for business development -5% dividend tax, as of January 1st, 2017 - 5.5% contribution to health insurance system for

[2] The creditors shall execute the receivables according to common law, if the PFA does not hold the capacity of trader. Any interested person can prove the capacity of trader within the insolvency proceedings or separately, by declaratory action, if a legitimate interest is justified

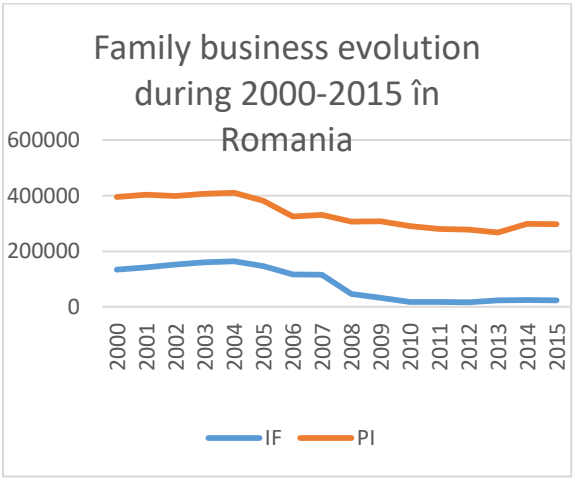
	dedicated assets and own assets - the option to contribute to public pension system and health insurance system was introduced even if the actual or estimated income is lower than the minimum calculation basis from which contributions become mandatory.		situations, less entrepreneurial development - cannot employ third parties under a labor agreement for the performance of the activity	dividends withdrawal.

Own source

3. I.F. in Romania

In Romania, throughout the latest years, the number of family firms or sole proprietorships fluctuated depending on the market conditions. The incidence of entrepreneurial exploration or exploitation in what concerns the identification of opportunities, the adjustment of the strategies to market conditions, the reorganization of the resources was affected by the instable economic environment after 2007, by decreasing the number of IFs. It seems that a greater flexibility and adaptation has been achieved by IIs, the number of which remained stable in recent years, given the legislative conditions. The studies show that the involvement of the family in the management of the firm affects the ability of future generations to reach high levels of ambidextrousness, along with the fact that the opportunity can trigger a conflict within the IF and its settlement would influence the timeliness of its exercise. (Shepherd and Haynie 2009). This is a special approach that can be taken into account only for the supplementation of economic explanations, as follows:

Picture 2 The evolution of IF (family firm) and II (sole proprietorship)



Own source

It is noted that throughout 2000-2015 family firms had significant fluctuations. We associated this evolution with the increase of the number of self-employed persons, in order to create a clearer picture of the changes in the field. The number of IFs raised from 133,610 in 2000 to 142,537 in 2011, by reaching the peak in 2004 with a number of 165,236 due to legislative support (law no. 346 of July 14th, 2004 on the stimulation of establishment and development and on the priority for public procurement of SMEs). Since 2005 we have noted a downward trend which will lead to a drastic decrease of family firms to almost a third in 2008-2009 in the background of the economic crisis, which led to the bankruptcy of small companies with less flexibility to drastic market changes. The decrease continued, with a slight increase starting with 2013 where their number will be around 24.500. The number of self-employed persons was much more stable given the autonomy and unilateral control of the business and of the legislation that favored the economic problem, therefore their number fluctuated around 261,258 in 2000, up to 214,710 in 2007 and reaching 274,065 in 2015, this can also be due to the restriction of the activity of certain microenterprises or enterprises which chose the individual performance of an economic activity by being affected by the economic crisis. In 2013 in Romania operated almost 268000 of sole proprietorships, of which almost 244000 were self-employed persons and 24000 family associations. Compared to the aforementioned forms of organizations, the number of sole proprietorships had decreased significantly and constantly starting with the economic recovery period (in 2013 their number increased by 140000 compared to 2004). This is due almost exclusively to the fact that four of five family associations ceased their activity. The mass disappearance of family associations is partly due to legislative changes (since 2007 they have been registered as family firms), but probably also to the fact that once with the accession of the country to the European Union and the re-launch of credit market, financial resources that only trading companies with legal status could access became available. It is plausible to argue that many of the owners of dissolved

family associations established limited liability companies, and the other passed to sole proprietorships. Current legislation entails the employment of third parties (outside the family) in addition to the owner, which in certain cases provides more favorable taxation conditions than in case of trading companies.

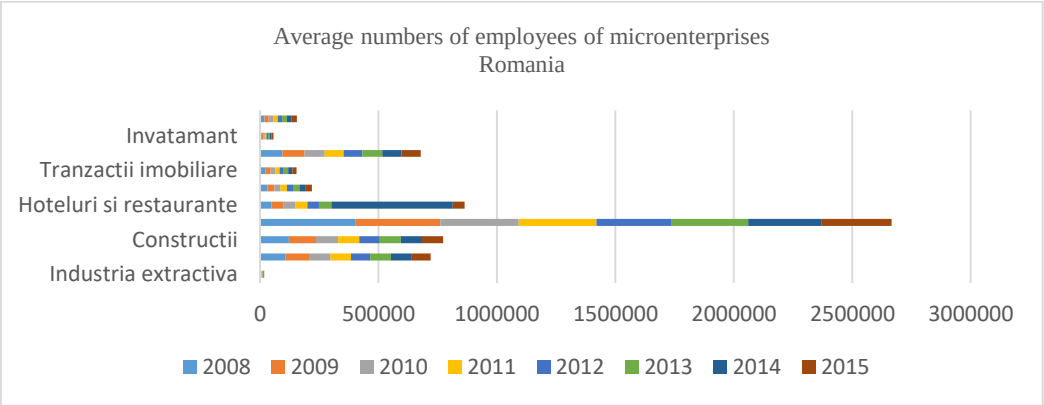
In 2016, the law which changes fundamentally the operation and registration of natural persons who carry out economic activities was published (more specifically self-employed persons PFA, sole proprietorships II and family firms IF). The law provides a maximum number of employees that such a person can have and a maximum number of scopes of business – NACE codes - that the person can carry out. In other words, essentially, natural persons can carry out economic activities as follows: individually and independently, as certified natural persons, as entrepreneurs and holders of an individual entity, as members of a family firm.

If we take a look at the legal background of SMEs supporting and at the role of EU directives in the supporting of entrepreneurship and microenterprises, we note a significant support. In this respect, the European Commission adopted the following principles: all new proposals which have impact on companies must be subject to rigorous researches on their potential impact on SMEs, the legislation can be different for microenterprises, small and medium-sized enterprises and large companies, in order to make sure that the created burden is divided proportionally between different types of company. In order to protect SMEs, certain support measures can be applied, decreased taxes and fees or even tax exemptions, in order to ensure a fair competition environment for all legal entities.

In Romania of the 2000s, the number of small enterprises increased, and survival statistics have improved as a sign that post-privatization "evolution" selection ended (Grabher & Stark, 1997). The adaptation ability of smaller business has improved considerably. General macroeconomic more favorable conditions also contributed to it (legislative stability, foreign capital flow, more accessible credits). These positive changes suddenly stopped during the economic and financial crisis. Global negative economic factors and the government's austerity measures – of which the introduction of flat tax and the fiscal tightening of flexible forms of employment – were the greatest danger and did not go easy with the SME sector, but as of 2012 the number of newly created enterprises exceeds the number of those which cease the activity, a fact that can be construed as a potential sign of recovery. These considerations can be broadly applied on sole proprietorships (independent and family firms), which are often treated separately in the statistics of enterprises. They do not have legal status, meaning that the assets of the enterprise and those of the individual/household are not separated, and the entrepreneur bears unlimited liability for his activities with all his assets.

Statistical evidence deals separately with entrepreneurial forms without legal status (independent enterprises and family firms) and publishes less information on them, although there are cases when the separation of microenterprises from individual entrepreneurial forms is not justified. From our data concerning the end of the 2000s, we can note for example that **entrepreneurs flexibly choose between legal forms if concrete advantages motivates this fact.** This happened in case of family associations, when their number decreased to one fifth in a period of only five years. Besides the changing of the related legislation of 2007 we assume that, following the accession to the European Union, many persons established small trading companies due to better opportunities to obtain financing, and other obtained individual entrepreneur certification, which, as of 2008, has offered a greater flexibility in the employment area. Family firms can be compared in terms of structure with microenterprises with a number of employees between 0-9, therefore we can hereby corroborate the evolution of family firms with that of the micro sector, so that to have an overall picture on the Romanian economy on this sector of small enterprises, some of them without legal status. Two important indicators which can guide us in our analysis are the following: the average number of employees and the turnover. Their reporting can provide us information on the average productivity of the respective sector. By taking into account the main economic activities, we conclude that the highest average number of employees was recorded in the wholesale trade sector in 2008 (403130), by reaching an upward trend until 2015 where values of 295674 are reached. The other sectors with similar growth are constructions, manufacturing industry and scientific and technical professional activities. The turnover has a discontinue evolution between 2009-2013 but does not record significant deviations, the fluctuations being related to legislative changes or the adherence to new forms of organization, the increase of the number of employees or liquidation of the company if we take into account post-crisis period 2008-2009. The sectors with a major turnover are manufacturing industry, wholesale and construction, last places being held by health and social care, respectively education. (15786154366 – manufacturing industry compared to 581440797, education 2015). The average of work which relates the turnover to the number of employees recorded significant values in 2008, respectively 2015 in what concerns constructions sector (RON 151,832 and RON 208,692), within this range the rate fluctuates by approximately 20-30%, being followed on the first place by the trade sector with a productivity of RON 218,577, respectively RON 329,487 in 2015. If we make a comparison with previous picture Evolution of family firms, we will notice the same slightly downward trend in 2008-2012, followed by a slight increase between 2013-2016, which explains the symbiotic nature of family firms.

Picture 3 Average number of employees of microenterprises



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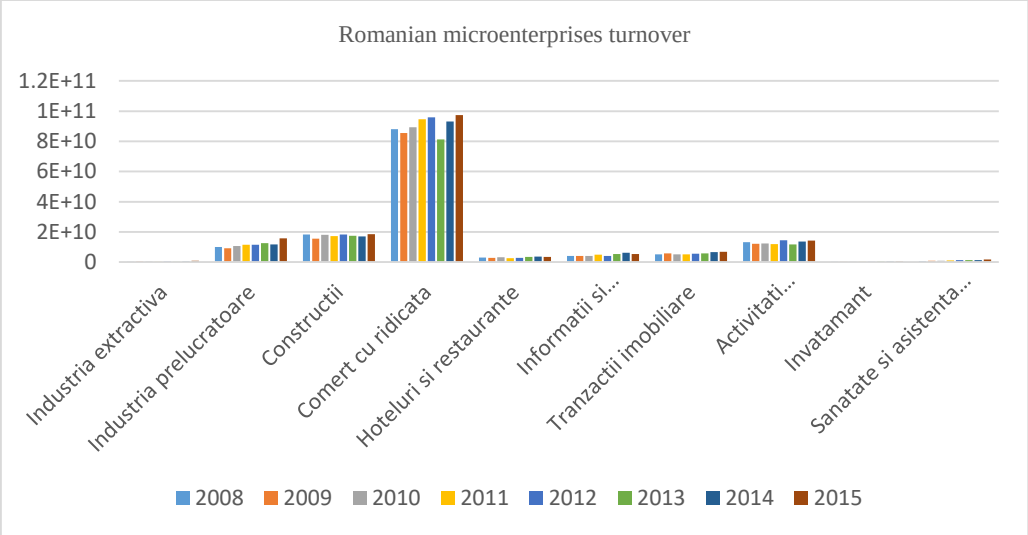
Picture 4 Microenterprises turnover



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4. Specific aspects regarding financial instrumentation

In order to support I.F. managers we will note certain specific aspects regarding their financial instrumentation, by making comparisons, from case to case, with the specific aspects of trading companies, from a general point of view. First of all, family firms use single-entry bookkeeping, with the possibility of using double-entry bookkeeping as of January 2015, trading companies use double-entry bookkeeping.

Single-entry bookkeeping is a real regime bookkeeping based on earnings and expenditures (with some exceptions, such as depreciation). The required accounting records are: Accounting journal and Inventory journal, which, as of March 1st, 2015, their registration with the tax bodies is no longer mandatory. The collections of the Receipts and disbursements journal shall include the following: the amounts collected from the performance of the activity, contributions in cash and by bank transfer performed on the start of the business or throughout the performance of the scope of business, the amounts received as bank credits or other loans, the amounts received as indemnities, the amounts received as sponsorship, patronage or donations, the amounts received as special support from non-reimbursable external funds (allowances), other collected amounts (such as refunds of taxes, fees and penalties).

The individuals who manage single-entry bookkeeping can use the following financial accounting forms provided by Order no. 170/2015 of the Minister of Public Finance, or only a part of them, according to the specific elements of the activity carried out: asset book, invoice – according to the provisions of the Tax Code, waybill, stock card, receipt, receipt for foreign currency operations, payment order, payment-collection order for the cashier's office, salary statement.

The registration of the income is based on the following supporting documents, such as: receipt, invoice, daily fiscal closing report, if electronic fiscal

cash registers are used, the extract of the payment slip. The VAT payers shall also draw up the Sales journal where they will record the income earned. In case of VAT payers, the income, VAT excluded, are taken over from the corresponding columns of the Sales journal. The following elements are registered by the I.F. in the Receipts and disbursements journal, without representing gross income from a tax perspective: contributions in cash or RON equivalent of the contributions in kind performed on the start of the business or throughout the performance of the scope of business, the amounts received as bank credits or other loans from natural persons or legal entities, the amounts received as indemnities, the amounts received as sponsorship, patronage or donations.

Furthermore, not only operations in cash are recorded in the Receipts and disbursements journal, but also those performed through the current bank account. In the Receipts and disbursements journal, the transactions shall be recorded at the amount provided in the supporting documents, including the value added tax.

If the I.F. passes from the single-entry bookkeeping system to the double-entry bookkeeping system, this shall be achieved by taking over, based on the inventory and information on the receivables and debts, as initial balances, at the beginning of the financial year for which they chose to pass to the double-entry bookkeeping system. Unlike the double-entry bookkeeping system (usually practiced by the trading companies), single-entry bookkeeping consists of the following:

- simultaneous registration of an economic operation in two accounts;
- the creation of a logical link between the two accounts used in double-entry, operation called account correspondence;
- the practical-current representation of the double entry using value equality, called accounting formula.

We should note that beside the Accounting Journal which records chronologically all the financial operations and of the Inventory Journal which classifies into categories the assets and liabilities according to their nature, the following are also available:

The General Ledger where the movement and existence of all assets and liabilities are recorded on a monthly and systematic basis, by regrouping the accounts, which the draw up of the trial balance is based on, cash book, *tax register. The balance sheet and the income statement* are financial documents based on which the company's profitability is calculated, containing important information on profit, expenditures, assets and liabilities.

As shown, the accounting of family firms is a simpler one but grants us a lower degree of instrumentation of profitability elements, the main indicator taken into account being the income in reference to expenditures. Therefore, the main profitability rates that would give us an overview of the profitability of family firms are related to the accounting value (the value of receipts – the value of disbursements), existent inventories and costs rate. The main profitability indicator is the profitability threshold, namely the required sales volume where the profit generated by these sales covers the fixed costs of the business. The income remains the main indicator the tax of 16% (respectively 10 %) is related to, as a balance between collections and payments.

It is obvious that the option of the double-entry bookkeeping system provides more financial information and contributes to a greater flexibility of the organization. The double-entry bookkeeping system enables, for example, the purchase of a laptop by the registration of certain debts that are to be subsequently paid. The advantage of such a system is that the manager can have clear records of assets held, receivables and debts, respectively of the income and expenditures and can see on the basis of the accounting records, for example, what receivable he/she has to collect in relation to his/her customers. The disadvantage is that it involves a greater bureaucratic effort than the single-entry bookkeeping system.

What is to be taken into account is the fact that in both systems, the obligation of the economic entities refers to mandatory registers: Receipts and disbursements journal (chronological registration of all the amounts collected and paid, both in cash, and by bank accounts) and the Inventory Journal in case of single-entry bookkeeping the Accounting Journal and Inventory Journal, documents regulated as of January 1st, 2016 by Order 2634/2015 on accounting-financial documents, under the fulfillment of the accounting regulations in force. In both cases (double/single-entry bookkeeping), there is the obligation to perform the annual inventory of the assets and liabilities. From tax perspective, regardless the preferred option of accounting system, the annual net income shall be calculated according the provisions of the Tax Code, by filling in the Tax register, as the difference between gross income and deductible expenditures incurred for the purpose of gaining income.

Conclusions

Our goal was to present an overview of family firms, some of their features compared to other forms of similar organization (sole proprietorships, self-employed persons) so as to be given an exhaustive explanation on the place and role of family firms within the economy. We note that family firms are economic entities without legal status established by a natural person entrepreneur together with the family. The economic activities carried out by a family firm can be in the field of agriculture, industry, tourism, constructions, IT and trade. The legislative regulations they are subject to are different from those of trading companies, by being similar in terms of legislation to sole proprietorships and PFAs. In this respect, since 2008, a serial interruption has been registered in Romania, family associations being turned into family

firms. The differences between them and other similar economic entities do not consist only in legislative changes on the organization form, fiscal obligations, taxes or modalities of accessing financing, but also in what concerns their financial instrumentation. The peculiarities of these documents are related to the supporting documents (Inventory Journal, Receipts and disbursements journal), to the regulations on single-entry bookkeeping system, the lack of mandatory reporting of NiRs (goods received notes) or mandatory registers. From this point of view, the calculation of the profitability in case of family firms is more difficult, the information being diminished compared to the case of trading companies which make available a balance sheet, an income statement or trial balance. The income remains the main performance indicator based on which the profitability threshold is anticipated, the coverage of expenditures and corporate tax (10 % as of January 1st, 2018). The possibility to pass to double-entry bookkeeping as of the establishment date (in case of PFAs) should be taken into account because of the access to more extensive information.

Furthermore, we should not forget that the IF represents an opportunity for thousands of families to ensure for themselves a decent economic existence, by being also an important factor for economic growth and development of some areas and localities of the country.

It is true that family firms are versatile, they start as small business cores and can be turned into real business conglomerates, therefore their importance should not be overlooked precisely from this trampoline perspective, a launch phase in support of small entrepreneurs who, in the beginning, need assistance and legislative conditions to support their development. As we have noted, the trend of microenterprises corroborated with that of the evolution of family and individual firms has been a stable one in recent years, although it faced some downs throughout 2008-2010. Even in a post-crisis time, a similar form of organization provided greater flexibility, fewer risks and higher degree of adaptability to the economic environment changes, and these things must be taken into account when we analyze the Romanian economic environment, with the fluctuations imposed by legislative coercions of recent years.

In other words, family firms can be the start-up engines of future business, by shaping the profile of an individual successful entrepreneur and even if their contribution to economic growth can be challenged, the perspective can be a positive one taking into account that the role of family firms is recognized at European level in niche economies and as developers of great businesses from the point of view of entrepreneurial ethics, sustained moral values and success through perseverance.

References

- The Characteristics and Performance of Family Firms: Exploiting information on ownership, governance and kinship using total population data, Fredrik W. Andersson, Dan Johansson, Johan Karlsson, Magnus Lodefalk and Andreas Poldahl, 2017
- Family Businesses' Contribution to the U.S. Economy: A Closer Look Joseph H. Astrachan, Melissa Carey Shanker, 2003
- An introduction to theories of family business, Jess Charisma, Jess Chua, Mississippi State University, 2003
- Defining the Family Business by Behavior, Jess H. Chua, James J. Chrisman, and Pramodita Sharma, Entrepreneurship: Theory and Practice,1999
- Structural Changes in the Evolution of Enterprises in Romania (1990-2013), Csata Zsombor, Romanian Academy, World Economics Institute, 2015
- The White Paper on SMEs, Romania, 2016, Bucharest; CNIPPMR.
- Accounting and Tax Approaches to Taxes and Fees, Vasile Raileanu, Adriana-Sofia Dumitrescu (Raileanu), Economic Publishing House, 2009
- Order 170/2015 for the approval of Accounting regulations on simple bookkeeping
- Law no. 182/2016 regarding the approval of Government Emergency Ordinance no. 44/2008 on the carrying out of economic activities by authorized natural persons, individual enterprises and family enterprises
- www.insse.ro
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AGENT-BASED INTELLIGENT COLLABORATIVE MECHANISM

Adina-Georgeta CRETAN*

Abstract

This paper proposes a collaborative intelligent mechanism to support concurrent negotiations among organizations acting in the same industrial market. Each organization has limited resources and in order to better accomplish a higher external demand, the managers are forced to outsource parts of their contracts even to concurrent organizations. In this concurrent environment each organization wants to preserve its decision autonomy and to disclose as little as possible from its business information. The complexity of our negotiation model is done by the dynamic environment in which multi-attribute and multi-participant negotiations are racing over the same set of resources. We are using the metaphor Interaction Abstract Machines (IAMs) to model the parallelism and the non-deterministic aspects of our negotiation process.

Keywords: *Negotiation model, web services, collaborative mechanism, dynamic environment, multi-agent systems.*

1. Introduction

The advent of the Internet and more recently the cloud-computing trend have led to the development of various forms of virtual collaboration in which the organizations are trying to exploit the facilities of the network to achieve higher utilization of their resources. We try to provide support to these collaboration activities and we propose negotiation as a fundamental mechanism for such collaborations.

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 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"[1].

In this paper we present how organizations participate and control the status of the negotiations and how the negotiation processes are managed.

The starting point in the development of this work was the goal to support small and medium enterprises that are not able or are not willing to perform alone a large contract since in this situation the association in a virtual alliance provides the opportunity to subcontract the tasks of the contract to other partners within the alliance. To achieve this goal, research was dedicated to the development of a model to coordinate the negotiations that take place within an inter-organizational alliance. Our research was focused on the topics of virtual alliances, automation of the negotiations and of coordination aimed to provide the mechanisms for coordinating the negotiations that take place among autonomous enterprises that are grouped in a virtual alliance.

Assuming that the nature of the roles that may be played in a negotiation are similar in multiple approaches, the number of participants involved at the same time in the same negotiation is considerably different.

Depending on the number of participants involved in a negotiation, we may distinguish various negotiation types: *bilateral negotiation (one-to-one)*; *one-to-many negotiation; many-to-many negotiation*.

Taking into account the complexity of the negotiations modeled by multi-agent system, we can state that to conduct in an efficient fashion one or many negotiations that involve a large number of participants and to properly account for all negotiation dimensions, it is necessary to develop a coordination process that is defined outside of the specific constraints of a given decision mechanism or communication protocol.

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 type of alliance that we use to define their association emphasizes that each participant to this alliance is completely autonomous i.e., it is responsible of its own amount of work and the management of its resources. 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.

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[1] Camarinha-Matos L.M. and Afsarmanesh H.,(2004), *Collaborative Networked Organizations,* Kluwer Academic Publisher Boston

When a purchasing request reaches a gas station, the manager analyses it to understand if it can be accepted, taking into account job schedules and resources availability. If the manager accepts the purchasing request, he may decide to perform the job locally or to partially subcontract it, given the gas station resource availability and technical capabilities. If the manager decides to subcontract a job, he starts a negotiation within the collaborative infrastructure with selected participants. ***In case*** that the negotiation results in an agreement, a contract is settled between the subcontractor and the contractor gas station, which defines the business process ***outsourcing*** jobs and a set of obligation relations among participants[2].

The gas station alliance scenario shows a typical example of the SME virtual alliances where partner organizations may be in competition with each other, but may want to cooperate in order to be globally more responsive to market demand.

The collaborative infrastructure, that we describe, should flexibly support negotiation processes respecting the autonomy of the partners.

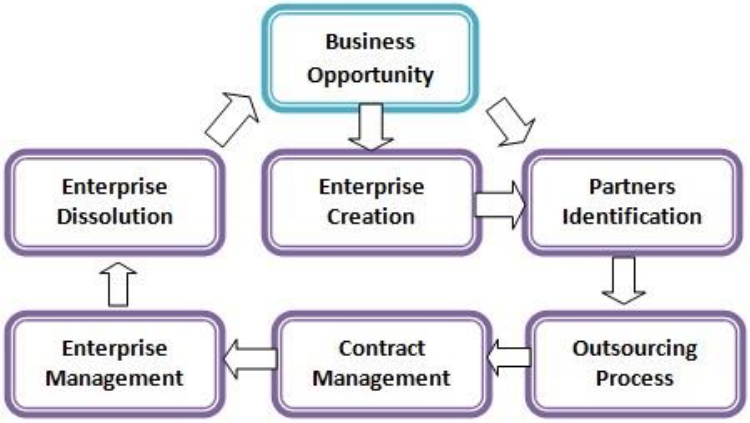
We are starting with a presentation in Section 2 of a VE life cycle model. Section 3 presents a formal interaction model to manage multiple concurrent negotiations by using the metaphor Interaction Abstract Machines (IAMs). Then, we are briefly describing in Section 4 the collaborative negotiation architecture.

The main objective of this paper is to propose an intelligent collaborative mechanism in a dynamical system with autonomous organizations. In Section 5 we define the Coordination Components that manage different negotiations which may take place simultaneously. Finally, Section 6 concludes this paper.

2. The main steps of the Virtual Enterprise life cycle

The life cycle of virtual enterprise is classified into six phases. The relevance in different phases is shown in Figure 1 and the statement for each phase is given as follows:

Fig. 1. Life-cycle of a virtual enterprise



a) VE creation

When a business opportunity is detected, there is a need to plan and create the VE, identify partners, establish the contract or cooperation agreement among partners, in order to manage the processes of the VE.

b) Partners search and selection

The selection of business partners is a very important and critical activity in the operation of a company. Partners search can be based on a number of different information sources, being private, public, or independent. The enterprise's private suppliers' list is a data repository that contains information about the companies that have had commercial relationships with this enterprise. This information composes an *Internal Suppliers Directory (ISD)*. External sources include directories maintained by industrial associations, commerce chambers, or Internet services. This information composes the *External Suppliers Directory (ESD)*. Another emerging solution is the creation of clusters of enterprises that agreed to cooperate and whose skills and available resources are registered in a common *SME Cluster Directory* (CD).

c) Outsourcing of tasks within a VE

In this stage of a VE life cycle, we can assume that a gas station company receives a customer demand. In this respect, the Manager of this company may negotiate the outsourcing of a schedule tasks that cannot perform locally with multiple partners of selected gas station companies, geographically distributed. The Manager can select the partners of the negotiation among the database possible partners according to their declared resources and the knowledge he has about them.

The outcome of a negotiation can be "success" (the task was fully outsourced), "failure" (no

[2] Singh M.P., (1997) *Commitments among autonomous agents in information-rich environments*. In Proceedings of the 8th European Workshop on Modelling Autonomous Agents in a Multi-Agent World (MAAMAW), pp. 141–155

outsourcing agreement could be reached) or "partial" (only part of the task could be outsourced).

d) Contract management in the VE

In case the negotiation process ends in a successful, a contract is established between the outsourcing company and the insourcing ones. The contract is a complex object, which is based of trust in this coordination mechanism. Moreover, it contains a set of specific rules, such as penalties, expressing obligation relations between the participants.

In case of failure of a partner, the Manager will have to supervise if the obligations are honored (for example to oblige the partner to finish his work or to set penalties) and to modify the business process renegotiating parts of the work that have not been realized.

e) Management of the VE

A VE is a dynamic entity in which a new company may join or leave it. Members may need to leave for many reasons, when they change their activity or when they don't want any more to collaborate with the partners of the VE. In case of departure from the VE, the leaving partner may either notify all the partners. It also may leave without giving any information. The departure of a partner from the VE will have an important impact on ongoing contracts especially when this partner is an insourcer of an important amount of task.

f) VE dissolution - after stopping the execution of the business processes.

3. Building the Negotiation Model

In this section we propose a formal model to settle and to manage the coordination rules of one or more negotiations, which can take place in parallel. We will introduce the metaphor of Interaction Abstract Machines (IAMs) to describe the negotiation model. We introduce the Program Formula to define the methods used to manage the parallel evolution of multiple negotiations.

3.1. The Metaphor Interaction Abstract Machines (IAMs)

The metaphor Interaction Abstract Machines (IAMs) will be used to facilitate modeling of the evolution of a *multi-attribute, multi-participant, multi-phase negotiation*. In IAMs, a system consists of different *entities* and each entity is characterized by a state that is represented as a set of *resources* [4]. It may evolve according to different laws of the following form, also called "*methods*":

A1@...@An <>- B1@...@Bm

A method is executed if the state of the entity contains all resources from the left side (called the "*head*") and, in this case, the entity may perform a transition to a new state where the old resources *(A1,…,An)* are replaced by the resources *(B1,…,Bm)* on the right side (called the "*body*"). All other resources of the entity that do not participate in the execution of the method are present in the new state.

The operators used in a method are:

- the operator @ assembles together resources that are present in the same state of an entity;
- the operator <>- indicates the transition to a new state of an entity;
- the operator & is used in the body of a method to connect several sets of resources;
- the symbol "T" is used to indicate an empty body.

In IAMs, an entity has the following characteristics:

- if there are two methods whose heads consist of two sets of distinct resources, then the methods may be executed in parallel;
- if two methods share common resources, then a single method may be executed and the selection procedure is made in a non-deterministic manner.

In IAMs, the methods may model four types of transition that may occur to an entity: *transformation*, *cloning*, *destruction* and *communication*. Through the methods of type *transformation* the state of an entity is simply transformed in a new state. If the state of the entity contains all the resources of the head of a transformation method, the entity performs a transition to a new state where the head resources are replaced by the body resources of the method. Through the methods of type *cloning* an entity is cloned in a finite number of entities that have the same state. If the state of the entity contains all the resources of a head of a cloning method and if the body of the method contains several sets of distinct resources, then the entity is cloned several times, as determined by the number of distinct sets, and each of the resulting clones suffers a transformation by replacing the head of the method with the corresponding body. In the case of a *destruction* of the state, the entity disappears. If the state of the entity contains all the resources of the head of a transformation method and, if the body of the method is the resource T, then the entity disappears.

In IAMs, the *communication* among various entities is of type broadcasting and it is represented by the symbol "^". This symbol is used to the heads of the methods to predefine the resources involved in the broadcasting. These resources are inserted in the current entity and broadcasted to all the entities existent in the system, with the exception of the current entity. This mechanism of communication thus executes two synchronous operations:

- *transformation*: if all resources that are not pre-defined at the head of the method enter in collision, then the pre-defined resources are inserted in the entity and are immediately consumed through the application of the method;
- *communication:* insertion of the copies of the pre-defined resources in all entities that are present in the system at that time instance.

3.2. Modelling the Negotiation Process

According to our approach regarding the negotiation, the participants to a negotiation may *propose* offers and each participant may decide in an autonomous manner to stop a negotiation either by *accepting* or by *rejecting* the offer received. Also, depending on its role in a negotiation, a participant may *invite* new participants to the negotiation. To model this type of negotiation, we will make use of the previously defined particles and we will propose the methods to manage the evolution of these particles.

As we have seen, a characteristic of negotiation is its multi-node image, which allows parallel development of several phases of negotiation. A possibility to continue a negotiation is to create a new phase of negotiation from an existing one. In this regard, the Figure 2 presents the possible evolutions of a ph0 phase of negotiation described by the *atom (s,ph0)*.

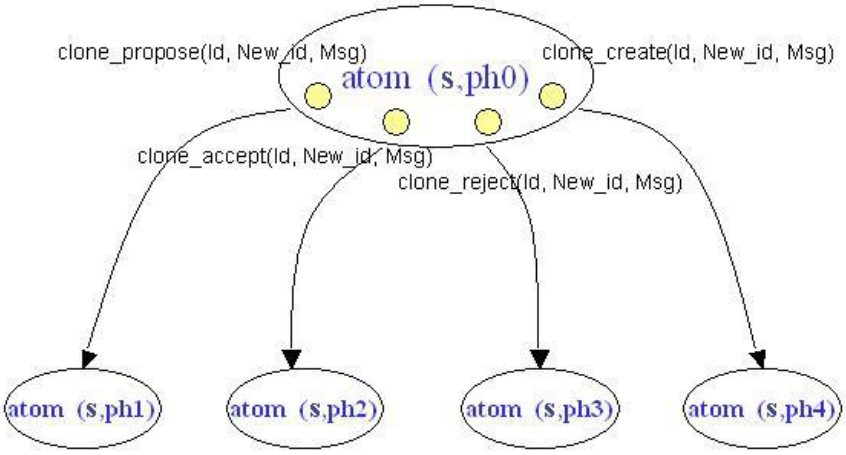


Fig. 2. Evolution of negotiation process by cloning an atom

In accordance with the aspects of negotiation for which changes are made, three new negotiation phases are possible:

- evolution of negotiated attributes and / or of their value from *atom(s,ph0)* to *atom(s,ph1)*: a participant sends a new proposal thus achieving either the *contraction* of the negotiation attributes, or their *extension*, by the introduction of new attributes to negotiate;
- evolution of the negotiation status perceived by one of the sequences sharing the new negotiation phase: one of the participants accepts - *atom(s,ph2)* - or refuses a proposal - *atom(s,ph3);*
- evolution of participants and of dependences among negotiations by the evolution of the number of sequences sharing the same negotiation phase: a sequence can invite a new sequence to share a new phase of negotiation *atom(s,ph4)*.

Through the use of the metaphor IAMs, the evolutions of the negotiation phases correspond to the evolutions at the atoms level. The evolution may be regarded as a process consisting of two stages: a *cloning* operation of the atom existent in the initial stage and a *transformation* operation within the cloned atom to allow for the new negotiation phase.

The *cloning* operation is expressed by a set of methods involving the particles *event* and these methods are used to facilitate the evolution of the negotiation.

We propose the following methods associated to the particles *event* to model the cloning of an atom where new message particles are introduced:

- The method *Propose* is associated to the particle event *clone_propose(Id, New_id, Msg)* and models the introduction of a new proposal (*clone_propose*), made by one of the participants to the negotiation.

This method is expressed:

name(Id) @ enable @ clone_propose(Id, New_ id, Msg)<>- (enable @ name(Id)) & (freeze @ name(New_ id) @ propose(Rname, Content))

The atom identified by the particle *name(Id)* is cloned. The new proposal contained in the particle *propose(Rname, Content)* will be introduced in the new atom *name(New_id)*.

- The method *Accept* is associated to the event particle *clone_accept(Id, New_id, Msg)* and models the case when one of the participants has sent a message of acceptance of an older proposal (*clone_accept*).

This method is expressed:

name(Id) @ enable @ clone_accept(Id, New_ Id, Msg) <>- (enable @ name(Id)) & (freeze @ name(New_ Id) @ accept(Rname))

The atom identified by the *name(Id)* is cloned. The acceptance message contained in the particle *accept(Rname)* will be introduced in the new atom *name (New_id)*.

- The method *Reject* is associated to the event particle *clone_reject(Id, New_id, Msg)* and models the denial of an older proposal (*clone_reject*) made by one of the participants.

This method is expressed:

name(Id) @ enable @ clone_reject(Id, New_ Id, Msg) <>- (enable @ name(Id)) & (freeze @ name(New_ Id) @ reject(Rname))

The atom identified by the particle *name(Id)* is cloned. The refusal message contained in the particle *reject(Rname)* will be introduced in the new atom *name(New_ id).*

- The method *Create* is associated to the event particle *clone_create(Id, New_id, Msg).* This method models the invitation of a new sequence (*clone_create*) made by one of the participants for sharing the newly created negotiation phase.

This method is expressed:

name(Id) @ enable @ clone_create(Id, New_Id, Msg) @ <>- (enable @name(Id)) & (freeze @ name(New_Id) @ create(Rname, Type))

The atom identified by the particle *name(Id)* is cloned, and a particle *create(Rname, Type)* is introduced in the new atom *name(New_ id)* that will further generate the occurrence of a new representation particle for the new sequence participating in the negotiation.

These methods are described in a generic way. Thus, new particles may be added depending on how the current sequence builds negotiation graphs.

By these methods of the event particles, the duplication of an atom has been modeled, in which new message particles are introduced. In the new atom, the representation particles for the current negotiation phase remain identical with those of the first atom.

4. The Collaborative Negotiation Architecture

The main objective of this software infrastructure is to support collaborating activities in virtual 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 3 shows the architecture of the collaborative system:

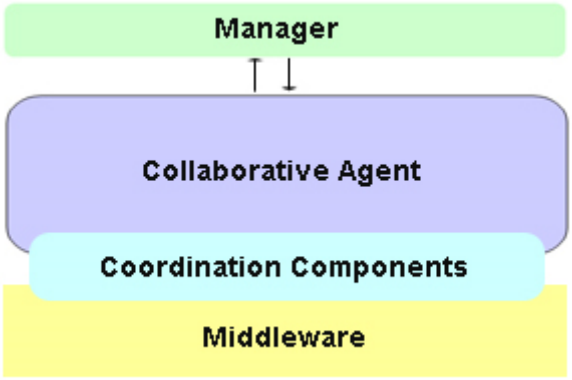


Fig. 3. The architecture of the collaborative system

This infrastructure is structured in ***four*** main ***layers***[1]: 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[2]. The third layer, Coordination Components, manages the coordination constraints among different negotiations which take place ***simultaneously***.

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[3]. The initialization step allows to define what has to be negotiated (Negotiation Object) and how (Negotiation Framework)[4]. A selection of negotiation participants can be made using history on passed negotiation, available locally or provided by the

[1] Cretan A., Coutinho C., Bratu B. and Jardim-Goncalves R., (2011), *A Framework for Sustainable Interoperability of Negotiation Processes.* Paper submitted to INCOM'12 14th IFAC Symposium on Information Control Problems in Manufacturing.

[2] Bamford J.D., Gomes-Casseres B., and Robinson M.S., (2003), *Mastering Alliance Strategy: A Comprehensive Guide to Design, Management and Organization*. San Francisco: Jossey-Bass, pp. 27-38

[3] Sycara K., (1991), *Problem restructuring in negotiation*, in Management Science, 37(10), pp.24-32.

[4] Smith R., and Davis R., (1981), *Framework for cooperation in distributed problem solving*. IEEE Transactions on Systems, Man and Cybernetics, SMC-11, pp. 42-57.

negotiation infrastructure[5]. In the refinement step, participants exchange proposals on the negotiation object trying to satisfy their constraints[6]. The manager may participate in the definition and evolution of negotiation frameworks and objects[7]. Decisions are taken by the manager, assisted by his Collaborative Agent[8]. 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 [9].

5. Coordination Components

In order to handle the complex types of negotiation scenarios, we propose five different components[10]:

- *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;
- *Divide* component manages the propagation of constraints among several slots, negotiated in parallel and issued from the split of a single job;
- *Broker*: a component automating the process of selection of possible partners to start the negotiation;
- *Transport* component implements a coordination mechanism between two ongoing negotiations in order to find and synchronize on the common transport of both tasks.

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[11].

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, Divide)*;
- 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, Transport)*.

Following the descriptions of these components we can state that unlike the components in closed environment (*Subcontracting, Contracting, Block, Divide)* that manage the coordination constraints of a single negotiation at a time, the components in opened environment (*Broker, Transport)* allow the coordination of constraints among several different negotiations in parallel[12].

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. To develop this structure, we proposed a succession of phases that are specific to different stages of negotiation (initialization, negotiation, contract

[5] Zhang X. and Lesser V., (2002), *Multi-linked negotiation in multi-agent systems*. In Proc. of AAMAS, Bologna, pp. 1207 – 1214.
[6] Barbuceanu M. and Wai-Kau Lo, (2003), *Multi-attribute Utility Theoretic Negotiation for Electronic Commerce*. In AMEC III, LNAI, pp. 15-30.
[7] Keeny R. and Raiffa H., (1976), *Decisions with Multiple Objectives: Preferences and Value Tradeoffs*. JohnWilley & Sons.
[8] Bui V. and Kowalczyk R., *On constraint-based reasoning in e-negotiation agents*. In AMEC III, LNAI 2003, pp. 31-46.
[9] Faratin P., (2000), *Automated service negotiation between autonomous computational agent*. Ph.D. Thesis, Department of Electronic Engineering Queen Mary & West-field College.
[10] Cretan A., Coutinho C., Bratu B. and Jardim-Goncalves R., (2011), *A Framework for Sustainable Interoperability of Negotiation Processes.* Paper submitted to INCOM'12 14th IFAC Symposium on Information Control Problems in Manufacturing.
[11] Vercouter, L., (2000), *A distributed approach to design open multi-agent system*. In 2nd Int. Workshop Engineering Societies in the Agents' World (ESAW), pp. 32-49.
[12] Muller H., (1996), *Negotiation principles.* Foundations of Distributed Artificial Intelligence.

adoption) that provided a formal description of the negotiation process.

The advantage of this structure of the negotiation process consists on the fact that it allows a proper identification of the elements that constitute the object of coordination, of the dependencies that are possible among the existing negotiations within the VE, as well as the modality to manage these negotiations at the level of the coordination components.

The negotiation process involves several parties (for several bilateral negotiations), each having different criteria, constraints and preferences that determine their individual areas of interest[13]. Criteria, constraints and preferences of a participant are partially or totally unknown to the other participants. The job under negotiation is described as a multi-attribute object. Each attribute is related to local constraints and evaluation criteria, but also to global constraints drawing dependencies with other attributes[14].

In conclusion, the proposed architecture provides the following features:

- to define the negotiation process structure: participants, interaction protocol, negotiation protocol, tactics and coordination components, the negotiation object and the negotiation strategies;
- the modeling all negotiations for a gas station in the form of a set of bilateral negotiations, which the agent can operate independently;
- the modeling of the coordination among the negotiations based on a set of coordination components and the synchronization mechanisms at the middleware level.

Thus, we can say, that we have proposed an infrastructure that manages, in a decentralized manner, the coordination of multi-phase negotiations on a multi-attribute object and among a lot of participants.

Conclusions

This paper proposes an intelligent mechanism for modeling and managing parallel and concurrent negotiations. The business-to-business interaction context in which our negotiations take place forces us to model the unexpected and the dynamic aspects of this environment. An organization may participate in several parallel negotiations. Each negotiation may end with the acceptance of a contract that will automatically reduce the available resources and it will modify the context for the remaining negotiations. We have modeled this dynamic evolution of the context using IAMs metaphor that allows us to limit the acceptance of a negotiation to the available set of resources. The proposed negotiation infrastructure aims to help the different SMEs to fulfil their entire objectives by mediating the collaboration among the several organizations gathered into a virtual enterprise.

A specific feature that distinguishes the negotiation structure proposed in this work from the negotiations with imposed options (acceptance or denial) is that it allows the modification of the proposals through the addition of new information (new attributes) or through the modification of the initial values of certain attributes (for example, in the case of gas stations the gasoline price may be changed).

In the current work we have described in our collaborative mechanism only the interactions with the goal to subcontract or contract a task. A negotiation process may end with a contract and in that case the supply schedule management and the well going of the contracted task are both parts of the outsourcing process.

In order to illustrate our approach we have used a sample scenario where distributed gas stations have been united into virtual enterprise. ***Take into consideration this*** scenario**,** one of the principal objectives was related to the generic case and means that this proposed infrastructure can be used in other activity domains.

Regarding research perspective continuation, we will focus on the negotiation process and the coordination process taking into consideration the contracts management process. In this way the coordination can administrate not only the dependence between the negotiations and the contracts which are formed and with execution dependences of those contracts.

References

- Camarinha-Matos L.M. and Afsarmanesh H., *Collaborative Networked Organizations*, 2004 Kluwer Academic Publisher Boston
- Singh M.P., *Commitments among autonomous agents in information-rich environments*. In Proceedings of the 8th European Workshop on Modelling Autonomous Agents in a Multi-Agent World (MAAMAW), pp. 141–155, May 1997
- Bamford J.D., Gomes-Casseres B., and Robinson M.S., Mastering Alliance Strategy: A Comprehensive Guide to Design, Management and Organization. San Francisco: Jossey-Bass, 2003
- Sycara K., *Problem restructuring in negotiation*, in Management Science, 37(10), 1991
- Smith R., and Davis R., *Framework for cooperation in distributed problem solving*. IEEE Transactions on Systems, Man and Cybernetics, SMC-11, 1981

[13] Schumacher M., (2001), *Objective coordination in multi-agent system engineering – design and implementation.* In Lecture Note in Artificial Intelligence, No. 2093, Springer Verlag, pp.72-88.

[14] Kraus S., (2001), *Strategic negotiation in multi-agent environments.* MIT Press, pp.56-67.

- Zhang X. and Lesser V., *Multi-linked negotiation in multi-agent systems*. In Proc. of AAMAS 2002 July, Bologna, pg. 1207 – 1214
- Barbuceanu M. and Wai-Kau Lo, Multi-attribute Utility Theoretic Negotiation for Electronic Commerce. In AMEC III, LNAI 2003, pg. 15-30
- Keeny R. and Raiffa H., Decisions with Multiple Objectives: Preferences and Value Tradeoffs. JohnWilley & Sons, 1976
- Bui V. and Kowalczyk R., *On constraint-based reasoning in e-negotiation agents*. In AMEC III, LNAI 2003, pp. 31-46
- Faratin P., *Automated service negotiation between autonomous computational agent*. Ph.D. Thesis, Department of Electronic Engineering Queen Mary & West-field College, 2000
- Cretan A., Coutinho C., Bratu B. and Jardim-Goncalves R., *A Framework for Sustainable Interoperability of Negotiation Processes.* Paper submitted to INCOM'12 14th IFAC Symposium on Information Control Problems in Manufacturing, 2011
- 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
- Vercouter, L., *A distributed approach to design open multi-agent system*. In 2nd Int. Workshop Engineering Societies in the Agents' World (ESAW), 2000
- Muller H., *Negotiation principles.* Foundations of Distributed Artificial Intelligence, 1996
- Hurwitz, S.M., Interoperable Infrastructures for Distributed Electronic Commerce. 1998
- Hu, J., Deng, L., "An Association Rule-Based Bilateral Multi-Issue Negotiation Model," in *Computational Intelligence and Design (ISCID)*, Fourth International Symposium, Volume 2, pp. 234 – 237, 2011
- Luo, X., Miao, C., Jennings, N., He, M., Shen, Z. and Zhang, M.," KEMNAD: A Knowledge Engineering Methodology for Negotiating Agent Development," *Computational Intelligence* ., 28 (1), 51-105, 2012
- Robinson W., and Volkov V., *Supporting the negotiation life cycle.* Communications of the ACM, 1998
- Ossowski S., *Coordination in Artificial Agent Societies*. Social Structure and its Implications for Autonomus Problem-Solving Agents, No. 1202, LNAI, Springer Verlag, 1999
- Schumacher M., *Objective coordination in multi-agent system engineering – design and implementation.* In Lecture Note in Artificial Intelligence, No. 2093, Springer Verlag, 2001
- Sycara, K., Dai, T.,"Agent Reasoning in Negotiation," *Advances in Group Decision and Negotiation*, Volume 4, Handbook of Group Decision and Negotiation, Part 4, pp. 437-451, 2010
- Kraus S., Strategic negotiation in multi-agent environments. MIT Press, 2001

HISTORICAL COST ACCOUNTING OR FAIR VALUE ACCOUNTING: A HISTORICAL PERSPECTIVE

Valentin Gabriel CRISTEA[*]

Abstract

The two paradigms about the accounting valuation systems are discussed: historical cost accounting and fair value accounting. The advantages and disadvantages of the historical cost accounting and fair value accounting in the historical perspective are balanced.

Each of two estimation bases could not resolve all the problems. The value of the items presented in the financial statements is a key aspect, being more dependent on more evaluation systems, that may estimate and reproduce the exact reality of the entity.

In 2009, Bignon, Biondi and Ragot argue that the usage of FVA is limited by asymmetries of information, complementarities and specificities. In presence of these conditions, the evaluations based on fair value can endanger the reliability of accounts and introduce the risk of incorporating financial volatility into the accounts. They have chosen for the historical cost.

In 2008, Ronen considered the fair value as a methodology that encompasses different approaches for the estimation of exit values.

In real economy, the concept of physical maintenance of capital should prevail and, in it, the "original" series should be restricted to the "numeraire" values: cash and cash substitutes. The elements considered as "derivative" value are evaluated by means of the only reliable method: the HCA.

This would allow to define, in the most complex generalization, a mixed "system", where every entity could assess each items that are financial investments then evaluated according to FVA. Then, they are attributed to the first series, and the items belong to a 'physical combination ordered to the production of income'. Then, they are evaluated according to HCA.

Keywords: *historical cost, fair value, fair value measurement, historical cost measurement, valuation, accounting.*

1. Introduction

The *fair value measurement* has got a disputed position within the accounting regulatory committees and the accounting theory since 2008.

As it is known, the fair value measurement implies that financial assets and liabilities are measured at their „market value"[1] where the value under the theoretical assumption of a perfect, efficient and complete market that should therefore imply that the financial statements meet the needs of investors and creditors[2].

IASB proposed to use a model for measuring the value of the flows generated by the assets, if the market is imperfect and incomplete.

The fair value debate is before the financial crisis in 2008.

The analysis of the studies on accounting indicates the existence of critics between the effectiveness of the fair value measurement in time and the stability of the economic system.

In specific literature, there are two opposite central paradigms of evaluation: the *Fair Value Accounting* (FVA) and the *Historical Cost Accounting* (HCA).

1.1. Fair Value Accounting (FVA) versus Historical Cost Accounting (HCA)

By analysing the accounting literature, it seems that they are different because of the typology primary criteria used to choice between FVA and HCA are the different typologies of economic contexts and markets and financial reporting information.

By assuming that the market is perfect and complete, FVA measurement can continue to provide relevant information for investors and creditors.

Laux and Leuz, in 2009, said that adoption of HCA instead of FVA can not be fruitful in times of crisis.

The critics on fair value measurement do not translate in support of historical cost measurement. By assuming that the market is imperfect and incomplete,

HCA measurement can focus on little relevant information to the management while the fair value measurement can provide a misinterpretation of the items of the balance sheet.

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[1] The price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date. (IFRS 13 paragraph 9).

[2] Costa, M., Guzzo, G., Fair Value Accounting versus Historical Cost Accounting: A Theoretical Framework for Judgement in Financial Crisis, VIRTUS NTERPress (2013) pp. 147-153.

2. Fair Value Accounting (FVA) or Historical Cost Accounting (HCA): A Historical Perspective

The choosing of the model of the accounting evaluation has been debated more from traditional evaluation at historical cost to the evaluation at market values to justify the investment decision. The results are the notions as "accounting at market value" or "accounting at fair value".

The need of a fair value measurement for financial reporting appeared mainly from the investors searching better management of their share capital, thus resulting the choice of managers to the concept of shareholder value by maximizing profits. In this view, the managers are interested in increasing the market value of shares, increasing business value and the size of dividends.

Considering that the value may be more useful than the price, managers use evaluation alternatives, usually with favorable implications for the value of the entity's assets. There is a debate that the investors must have equal rights with the suppliers, employees, customers, community, not a coalition of interests.

The managers must search the entity's common wealth maximization, approaching thus the concept of stakeholder value, which regards beyond the monetary value, including a moral value[3].

The IASB conceptual accounting frameworks gives some evaluation bases: historical cost, current cost, realizable value and present value without indicating a preference for one or other of these evaluation bases.

According to IFRS 13, "Fair value is the price that would be received to sell an asset or to pay in order to transfer a liability from a common transaction between the market participants at the date of the evaluation."[4]

In 2009, Deaconu said that the fair value measurement provides better information and comparison on the current and future performance of the entity as it comprises a current information, offered by the market which facilitates comparability of the information[5].

Fair value measurement reduces the difference between the accounting value and the stock value for listed entities, it involves evaluating all or most of the elements of financial statements at amounts based on the capital market information.

Fair value measurement has a more universal character than the historical cost.

As the disadvantages of the fair value, Deaconu enumerated that it does not always provide reliable information because it is difficult to calculate by the staff entity without the contribution of an evaluation expert, especially in the case of unlisted entities for which the stock market does not give a clue.

The fair value creates difficulties in determining distributable income, if we consider that the new values of the assets, equity and liabilities are potential, latent and volatile values.

Fair value measurement provides a short-term vision on the financial situation of the entity.

The compared analysis of the evaluation bases of assets and liabilities based on the entity's financial position is valuated, proves that they differ in terms of credibility and relevance to the users of the information presented in the financial statements, lacking general applicability, and, it is difficult for the accounting standards and setters to satisfy the interests of all users.

At international level, fair value measurement raises a number of issues due to the diversity and complexity of individual cases of the economic reality to be translated.

If no evaluation is absolutely satisfying, the European accounting rules were targeted without specifying historical cost and the fair value, they were later updated so that they could not exclude historical cost combined with other evaluation bases, or using alternatives, thus reproducing the international norms.

The main idea of fair value measurement is that the entity's assets and liabilities are presented in the balance sheet at values close to those existing on the market.

In practice, fair value would be: utility value or the value of future cash flows, market value, replacement value, net book value. In view of international approaches there are debates about the content of the concept of fair value, the methods of obtaining and its applications as it is a much broader concept than the market value.

In 2010, Tournier claimed that the concept of fair value is assigned either the basic quality of evaluation, convention or accounting principle, or an application of the market value and not least an estimation and not a conclusion as with the market value, and an objective of the evaluation[6].

In 2003, Ristea stated that historical cost accounting is the accounting system accepted without reserves by the accounting profession thanks to the merit of being objective, being based on transactions already made and being generally understood by users.

The deficiencies consecrated to the historical are criticized, being considered that they are based on older principles generated by the needs of industrial enterprises, thus explaining the absence of recognition in the balance sheet structures of the derivatives. The historical cost measurement helps leaders to manage financial risks.

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[3] Ene, G.S., Chilarez, D., Dindire, L.M., Relevance and credibility of the fair value measurement during the crisis, Procedia Economics and Finance 8 (2014) p. 308.

[4] IASB, IFRS 13 Fair ValueMeasurement, (2011) http://www.ifrs.org/IFRSs/Documents/IFRS13.pdf ACCA, Policy Paper on Fair Value. www.accaglobal.com/economy.

[5] Deaconu, A., "Valoarea justa. Concept contabil". Bucuresti: Editura Economica (2009).

[6] Tournier J.C., La Révolution Comptable - Du coût historique à la juste valeur Paris Éditions d'Organisation (2000).

As the drawbacks of applying the historical cost evaluation model it is mentioned: the undervaluation or overvaluation of some elements in the financial statement, the real value of the items in the balance sheet and the profit and loss account. The current requirements of fidelity, imposed by the financial statements, is justified to evaluate all elements in the financial statements with the historical cost measurement or other evaluation bases.

The accounting research concentrates on the comparison between two approaches to accounting: the approach based on the principle of *fair value* and the approach based on the prudence and *historical cost* principles. The IASB led to the change of accounting measurements to the FVA, while the European legislation had focused on the Historical Cost Accounting (HCA) before IFRS adoption. Many researchers suggested that FVA standards in the financial reporting played a major role. The crisis shows the trade-off between relevance and reliability of accounting information in markets that are above all imperfect and incomplete.

In crisis situations, there is a gap between market value and real value of assets and liabilities appearing on the financial statement of firms.

In 2009, Bignon, Biondi and Ragot argue that the usage of FVA is limited by asymmetries of information, complementarities and specificities. In presence of these conditions, the evaluations based on fair value can endanger the reliability of accounts and introduce the risk of incorporating financial volatility into the accounts[7]. They have chosen for the historical cost.

In 2008, Ronen considered the fair value as a methodology that encompasses different approaches for the estimation of exit values. Ronen proposed to compare the fair value or the exit value of assets and liabilities with the use value of asset combinations[8].

Edwards and Bell, highlighting income, proposed to use ex post accounting income to evaluate performance on the base of current cost measures.

In 2008, Whittington shows that it is more important not to search for a theoretical and universally valid measurements method, but to define a clear objective and choose the measurement method that best answers that objective with reference to specific problems[9].

An argument against to the fair value measurement in financial reporting is that does not indicate the real and useful 'value' of the items of the balance sheet for the firms.

Besta suggested in the accounting system in Italy the Substitution-Cost Accounting, that belongs, to the main domain of FVA[10].

Paton, in 1922, found a strong ideological support in HCA. The historical cost is a basic criterion of evaluation of nearly all assets and liabilities. The historical cost measured exactly with the cash or cash substitutes ("numeraire") needed for buying (selling).

3. Conclusions

Each of two estimation bases could not resolve all the problems. The value of the items presented in the financial statements is a key aspect, being more dependent on more evaluation systems, that may estimate and reproduce the exact reality of the entity.

Problems arise when the estimation of the evaluation should be made at market value in the event of a market in periods of growth or decline, or in the absence of an active market.

Each situation involves professional judgment and the possibility of manipulation by the person making the necessary estimates.

In real economy, the concept of physical maintenance of capital should prevail and, in it, the "original" series should be restricted to the "numeraire" values: cash and cash substitutes. The elements considered as "derivative" value are evaluated by means of the only reliable method: the HCA.

This would allow to define, in the most complex generalization, a mixed "system", where every entity could assess each items that are financial investments then evaluated according to FVA. Then, they are attributed to the first series, and the items belong to a 'physical combination ordered to the production of income'. Then, they are evaluated according to HCA.

According to Wittington, we must define a clear objective and choose the measurement method that best answers that objective.

References

- AIDEA, Gruppo di studio e di attenzione, L'Analisi degli Effetti sul Bilancio dell'Introduzione dei Principi Contabili Internazionali IAS/IFRS, Vol. 1°, Roma: RIREA (2007)
- Arnold, P. J., Global financial crisis: The challenge to accounting research. Accounting, Organizations and Society, 34, (2009), 803-809
- Besta, F., La ragioneria, Parte Prima – Ragioneria generale, Vol. I. Milano: Casa Editrice Dottor Francesco Vallardi (1922)

[7] Bignon, V., Biondi, Y., Ragot, X., An Economic Analysis of Fair Value: Accounting as a Vector of Crisis, Prisme No. 15, (2009), Electronic copy available at: http://ssrn.com/abstract=1474228, 1-38.

[8] Ronen, J., To Fair Value or Not to Fair Value: A Broader Perspective. Abacus, Vol. 44, No. 2, (2008), 181-208.

[9] Whittington, G. Fair Value and IASB/FASB Conceptual Framework Project: An Alternative View. Abacus, Vol. 44, No. 2, (2008), 139-168.

[10] Besta, F., La ragioneria, Parte Prima – Ragioneria generale, Vol. I. Milano: Casa Editrice Dottor Francesco Vallardi (1922).

- Bignon, V., Biondi, Y., Ragot, X., An Economic Analysis of Fair Value: Accounting as a Vector of Crisis, Prisme No. 15, (2009), Electronic copy available at: http://ssrn.com/abstract=1474228, 1-38
- Bizon M., Poli de opinie cu privire la utilizarea valorii juste în condiţiile economice actuale, Revista Audit Financiar, nr.5. (2010)
- Capron, M., Chiapello, E., Colasse, B., Mangenot, M., Richard, J., Les normes comptables internationales, instruments du capitalisme financier. Paris: La Découverte (2005)
- Costa, M., Guzzo, G., Fair Value Accounting versus Historical Cost Accounting: A Theoretical Framework for Judgement in Financial Crisis, VIRTUS NTERPress (2013) pp. 147-153
- Deaconu, A., "Valoarea justa. Concept contabil". Bucuresti: Editura Economica (2009)
- Deaconu A., Bonaci C., Valuaţion of inventors considering the fair value option, Analele Universităţii din Oradea , Ştiinţe economice, Tom XVII, vol.3. (2008)
- Di Pietra, R., Dai "principi" agli "standards" contabili internazionali. Riflessioni sul cambiamento metodologico in atto. Contabilità e Cultura Aziendale, Vol. 6, Fascicolo 1, (2006), 70-94
- Ene, G.S., Chilarez, D., Dindire, L.M., Relevance and credibility of the fair value measurement during the crisis, Procedia Economics and Finance 8 (2014) 306 – 312
- Hopwood, A.G., Some reflections on "The harmonization of accounting within the EU". The European Accounting Review, 3(2), (1994), 241-253
- Hopwood, A.G., The economic crisis and accounting: Implications for the research community. Accounting, Organizations and Society, 34, (2009), 797-802
- IASB, IFRS 13 Fair ValueMeasurement, (2011) http://www.ifrs.org/IFRSs/Documents/IFRS13.pdf ACCA, Policy Paper on Fair Value www.accaglobal.com/economy KPMG, (2011) http://www.kpmg.com/RO/en/IssuesAndInsights/ArticlesPublications/Newsflashes/Advisory/
- IFRS-Briefingsheet/Documents/IFRS_26_RO_aprobat.pdf
- Laux, C., Leux C., The crisis of fairvalue accounting: Making sense of the recent debate. Accounting, Organizations and Society, 34, (2009a), 826-834
- Laux, C., Leux C., Did Fair-value Accounting Contribute to the Financial Crisis?. National Bureau of Economic Research, Cambridge, Working Paper 15515, (2009b), http://www.nber.org/papers/w15515, 1-41
- Magnan, M., Fair Value Accounting and Financial Crisis: Messenger or Contributor?. Montreal: CIRANO (Centre Interuniversitaire de Recherche en Analyse des Organisations), (2009), 1-16
- Matis D., Bonaci C., Raportarea financiară şi învăţăminte în vremuri de criză, Universitatea Babes Bolyai (2009) www.seap.usv.ro/.../Matis%20and%20Bonaci%20 prezentare.ppt
- Noyer Ch., A review of the financial crisis, Speech at the Hearing before the Finance Commission of the Assemblée nationale, Paris (2008) http://www.bis.org/review/r081028a.pdf
- Paton, W. A., Accounting Theory New York Ronald Press (1922)
- Pizzo, M., Il fair value nel bilancio di esercizio Padova Cedam, (2000)
- Popa, A., Criza financiară face ravagii în Statele Unite şi Europa, (2008) http://www.conso.ro/citeste-comentariu/24/info/Criza-financiara-faceravagii-in-Statele-Unite-si-Europa.html
- Pozen R.C., Is it fair to blame fair value accounting for the financial crisis?, Harvard Business Review (2009), http://fbkfinanzwirtschaft.files.wordpress.com/2009/11/hbr11_09-is-it-fair-to-blame-fair-value-accounting-for-the-financialcrisis.pdf
- Power, M., Fair value accounting, financial economics and the transformation of reliability. Accounting and Business Research, Vol. 40, No. 3, (2010), 197-210
- Prochazka D., Should we really blame fair value accounting for the financial crisis?, Recent Researches in Sociology, Financing, Environment and Health Sciences, (2010) available online at http://www.wseas.us/elibrary/conferences/2011/Meloneras/SOMMEM/SOMMEM-27.pdf
- Quagli, A., Dal fair value al fairy value: coerenza concettuale e condizioni di impiego del fair value negli IFRS. Financial Reporting, 11Fascicolo 1, (2009), 98-118
- Quagli, A., IFRS 13: Fair Value Measurement. Amministrazione e Finanza, Vol. 26, (2011), 6
- Ristea , M., Baze şi alternative în contabilitatea întreprinderii. Bucureşti Editura Economică (2003)
- Ristea , M., Dumitru, G.C., Libertate si conformitate, în standardele şi reglementările contabile. Bucureşti Ed. CECCAR (2013)
- Rodríguez, G., Slof, J., Solà, M., Torrent, M., Vilardell, I., Assessing the Impact of Fair-Value Accounting on Financial Statement Analysis: A Data Envelopment Analysis Approach. Abacus, Vol. 47, No. 1, (2011), 61-84
- Ronen, J., To Fair Value or Not to Fair Value: A Broader Perspective. Abacus, Vol. 44, No. 2, (2008), 181-208
- Shortridge R. P., Schroeder A., Wagoner E., Fair-Value Accounting.Analyzing the Changing Environment, The CPA Journal (2006) http://www.nysscpa.org/cpajournal/2006/406/essentials/p37.htm
- Sprague, C. E., Teh Phylosophy of Accounts, (1908), reprinted by Kessinger Publishing in September 2010
- Stefan-Duicu, V.M., Stefan-Duicu, A.,. Short Presentation of a Futuristic Concept:" The CUNEITALE Judgment". *Global Economic Observer*, *4*(1), (2016) p.130
- Stefan-Duicu, V.M., Stefan-Duicu, A., Trans-boarding the Doctrinal Phenomenon within the Management Sciences towards a Creative Dimension. *Procedia-Social and Behavioral Sciences*, *188*, (2015) pp. 259-263
- Tournier J.C., La Révolution Comptable - Du coût historique à la juste valeur Paris Éditions d'Organisation (2000)
- Whittington, G. Fair Value and IASB/FASB Conceptual Framework Project: An Alternative View. Abacus, Vol. 44, No. 2, (2008), 139-168
- Zappa, G., La determinazione del reddito nelle imprese commerciali. I valori di conto in relazione alla formazione dei bilanci. Roma: Anonima Libraria Italiana (1920-1929)

HISTORICAL COST ACCOUNTING OR FAIR VALUE ACCOUNTING FROM THE EARNINGS AND ASSET IMPAIRMENT PERSPECTIVE

Valentin Gabriel CRISTEA*

Abstract

This article studies the earnings and practice of depreciation of assets through the two accounting valuation systems: fair value accounting or historical cost accounting. It balances the methods used in each of the two accounting valuation systems: historical cost accounting and fair value accounting.

Many firms that did use value in use to arrive at their asset impairment loss will have declined a net realizable value figure as this would have been reduce than the value in use figure. If the firms had used net realizable value instead of value in use, this would have cause a higher asset impairment charge.

For the firms that use net realizable value for the purposes of determining the asset impairment charge this indicates that their net realizable value is higher than any calculated value in use figure.

In this way, that many firms report using more than one valuation method depending on the type of asset that is impaired and the results become difficult to indicate any conclusions based on the information available, despite the initial observation that value in use appears very used.

I claim that the use of fair value concept may have a different effect on the earnings quality for Romania because of less liquid or inactive markets. In this way, fair values will more probably be estimated by the use of valuation techniques which enables earnings management and could lead to lower quality of reported earnings.

Then, earnings under more fair value-based reporting system have less aggregate quality rankings for firms in Romania. I get the evidence that the extent of more fair-value-based other comprehensive income is negatively related to aggregate earnings quality for firms.

Keywords: *historical cost accounting, fair value accounting, valuation, earnings, asset impairment.*

1. Introduction

The concept of asset impairment relates closely to that of an asset write-down[1].

Elliott and Shaw[2] in 1988, Walsh, Craig and Clarke in 1991, Elliott and Hanna in 1996, Jordan and Clarke 2004, Sevin and Schroeder in 2005, Andrews in 2006, Ball and Shivakumar in 2003, Watts in 2003, LaFond and Watts in 2008 claimed that the asset impairment loss recognition is linked to both the issue of earnings management and the principle of conservatism.

Trueman and Titman[3] in 1988, Walsh et al in 1991, Bartov in 1993, Basu in 1997, Burgstahler and Dichev in 1997, Healy and Wahlen in 1999, Shaw in 2003, Jordan and Clark in 2004, Sevin and Schroeder in 2005 staed that asset impairment constitutes a form of income smoothing in terms of managing the earnings.

Basu[4] in 1997, Ball and Shivakumar in 2003 obtained the fact that in the current financial reporting regime, earnings tends to be skewed towards loss recognition.

1.1. The fair value accounting of earnings qualities

Christensen and Demski[5] in 2003, Ronen and Yaari[6] in 2008 showed that earnings quality provide valuation relevant information and provide contracting-relevant information. The accounting information have two roles: informativeness and stewardship.

Ronen and Yaari accentuate that informativeness role appeares from investors' demand for information to predict future cash flows and assesses their risk.

In 1990, Watts and Zimmerman showed that he stewardship objective of accounting comes from separation between ownership and management in public companies.

We wonder: Is income growth the result of changing regulations related to asset depreciation testing?

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[1] Alciatore, M., Dee, C. G., Easton, P., Spear, N., 'Asset write-downs: A decade of research', Journal of Accounting Literature, Vol. 17, ., (1998) pp.1-39.

[2] Elliott, J., A., Shaw, W., H., 'Write-Offs as Accounting Procedures to Manage Perceptions,' Journal of Accounting Research, Vol. 26, Supplement, (1988) pp. 91-119.

[3] Trueman, B., Titman, S., 'An Explanation for Accounting Income Smoothing,' Journal of Accounting Research, Vol. 26 (Supplement), (1988) pp. 127-139.

[4] Basu, S., 'The conservatism principle and the asymmetric timeliness of earnings,' Journal of Accounting and Economics, Volume 24, Issue 1, (1997) pp. 3-37.

[5] Christensen, J. A., Demski, J. S., Accounting theory: an information content perspective: McGraw-Hill/Irwin (2003).

[6] Ronen, J., Yaari, V., Earnings Management: Emerging Insights in Theory, Practice and Research Springer (2008).

2. The earnings and asset impairment perspective

According to IFRS 13, "Fair value is the price that would be received to sell an asset or to pay in order to transfer a liability from a common transaction between the market participants at the date of the evaluation[7]."

Nissim[8], in 2003, Hitz[9], in 2007, Ryan[10], in 2008, Fiechter and Meyer[11], in 2009, Chen et al.[12], in 2010, stated that the estimation of fair value (marking-to-model) creates opportunities for the exercise of management judgment which can decrease the quality of financial reporting.

Dechow and Schrand, in 2004, define that a high-quality reported earnings reflect actual operating performance, indicate further performance.

The majority of the studies on fair value accounting and earnings quality are oriented on developed, market-oriented countries.

Barth[13], in 1994, Ahmed and Takeda in 1995, Petroni and Wahlen, in 1995, Eccher et al, in 1996, Venkatachalam in 1996, Park et al., in 1999, Carroll in 2003, Khurana and Kim in 2003, Hassan et al., in 2006, Bhat in 2008, Goh et al., in 2009, Kolev in 2009, Song et al, in 2010, Bischof et al., in 2011, studied fair values of financial assets, while Barth and Clinch[14], in 1998, Aboody et al., in 1999, Richard Dietrich et al., in 2000, Easton et al., in 2003, worked on fair values of fixed assets. Moreover, Aboody et al.[15], in 1999, in their research, have given the existence of association between the changes in fair values of fixed assets and future operating cash flow and future earnings.

Hill[16], in 2009, underlined that the empirical results regarding predictive ability of fair values could not be generalized to more volatile market conditions and more subjective applications of fair value valuation.

Dhaliwal et al.[17], in 1998, Biddle and Choi, in 2006, Casta et al., in 2007, Chambers et al, in 2007, Goncharov and Hodgson, in 2008, Kanagaretnam et al., in 2009, Jones and Smith, in 2011, investigated fair value gains and losses through other comprehensive income.

Hitz[18], in 2007, pointed that change in fair value consists of an expected and unexpected component, so gains and losses from fair value re measurement could be correlated in time for some assets.

IAS 36 Impairment of Assets[19] claims that an asset is impaired when the recoverable amount of the asset is lower than the book value.

Then, recoverable amount is exact as the higher of net realizable value and value in use. In this view, value in use represents the budgeted discounted future cash flows expected from continued use of the asset.

Value in use has been the preponderent disclosed valuation method and this can appear to indicate a high degree of discretionary choice in terms of management's decision of the amount of an asset impairment charge.

Moses[20], in 1987, Strong and Meyer, in 1987, Beatty and Weber, in 2006, Cotter et al., in 1998, Zucca and Campbell, in 1992, Beattie et al., in 1994, Francis et al., in 1996, Peek, in 2004, Jordan and Clark, in 2004, Sevin and Schroeder, in 2005, Walsh et al., in 1991, Elliott and Shaw, in 1988 and Riedl, in 2004 outlined that there was a discretionary choice available to firms for fair value measurement to determinate the asset impairment loss.

Using the annual reports of the sample of 94 corporations in U.K., experts has analyzed to assess the preferred method of valuation used in the determination of an asset impairment loss.

Bonbright[21], in 1937, claimed that "the valuation method employed in order to arrive at the reported asset impairment loss is important as the decision is based on the deprival value concept".

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[7] IASB, IFRS 13 Fair ValueMeasurement, (2011) http://www.ifrs.org/IFRSs/Documents/IFRS13.pdf ACCA, Policy Paper on Fair Value. www.accaglobal.com/economy.

[8] Nissim, D., Reliability of banks' fair value disclosure for loans. Review of Quantitative Finance and Accounting 20 (4) (2003) pp. 355-384.

[9] Hitz, J.-M., The decision usefulness of fair value accounting–a theoretical perspective. European Accounting Review 16 (2) (2007) pp. 323-362.

[10] Ryan, S. G., Fair value accounting: understanding the issues raised by the credit crunch, White Paper prepared for the Council of Institutional Investors (2008).

[11] Fiechter, P., and C. Meyer. 2009. Big bath accounting using fair value measurement discretion during the financial crisis: Mimeo.

[12] Chen, F., Lam, K., Smieliauskas, W., Ye, M., Fair value measurements and auditor versus management conservatism Evidence from the banking industry Working paper, University of Toronto, (2010).

[13] Barth, M. E., Fair value accounting: Evidence from investment securities and the market valuation of banks. Accounting Review (2000) pp. 1-25.

[14] Barth, M. E., Clinch, G., Revalued financial, tangible, and intangible assets: Associations with share prices and non-market-based value estimates, Journal of Accounting Research 36, (1998) pp. 199-233.

[15] Aboody, D., Barth, M. E., R. Kasznik., Revaluations of fixed assets and future firm performance: Evidence from the UK. Journal of Accounting and Economics 26 (1) (1999) pp. 149-178.

[16] Hill, M. S., Fair value earnings as a predictor of future cash flows, Working paper, University of Alabama (2009).

[17] Dhaliwal, D., Subramanyam, K., Trezevant, R., Is comprehensive income superior to net income as a measure of firm performance? Journal of Accounting and Economics 26 (1) (1999) pp. 43-67.

[18] Hitz, J.-M., The decision usefulness of fair value accounting–a theoretical perspective. European Accounting Review 16 (2) (2007) p. 351.

[19] IASB, International Financial Standard 13 – Fair Value Measurement, edited by I. A. S. C. Foundation. London IASB (2011).

[20] Moses, O. D., 'Income Smoothing and Incentives: Empirical Tests Using Accounting Changes' The Accounting Review , Vol. 62, No. 2, (1987) pp. 358-377.

[21] Bonbright, J.C., The Valuation of Property, McGraw-Hill (1937).

Barth et al[22], in 1995, Bernard et al[23], in 1995, Hodder et al.[24], in 2006, Plantin et al.[25], in 2008, Sole et al.,[26] in 2009, Magnan[27], in 2009, Sun et al.[28], in 2011, emphasized that historical-cost-based reporting does not recognize changes in values until the asset is sold. Some empirical studies almost prove that the move towards fair value accounting leads to increased earnings. Barth, in 1994, underlined that financial statement volatility was not an indication of flawed financial reporting. Barth said that the uncertainty and timing of future cash flow is a complete financial reporting. Barth has found three possible sources of financial statements volatility associated with fair values: inherent volatility, estimation error volatility and mixed measurement volatility.

Practicing of the concept of fair value accounting, it involves recognition of economic losses as well as economic gains and less asymmetry of losses relative to gains[29].

Goncharov and Hodgson[30], in 2008, have empirically confirmed that unrealized fair value gains (losses) in other comprehensive income. They pointed out that that use of fair value concept may have significantly different effect on the earnings quality for Eastern European countries due to business entities in continental Europe rely to a greater extent on debt capital.

To resume, when analyzing previous research regarding the association between application of fair value accounting and earnings quality measures, we get the following conclusions: there is mixed and inconsistent evidence. There were previous research examines earnings quality using single earnings attributes or a subset of earnings attributes.

Fair value accounting is established by income approach. Then changes in fair values can be stated as gains and losses through net income or other comprehensive income.

Andrew[31], in 2009, claimed that the corporations had used net realizable value instead of value in use, this would have produced a higher asset impairment charge and lower reported earnings and asset values then has been stated.

Thus, we examine the influence of fair value gains (losses) through other comprehensive income and through net income on earnings.

Bad news are reflected by conservative earnings more quickly than good news. Thus, historical cost accounting causes timely recognition of losses than gains.

Historical cost accounting causes improves quality of accounting information in the context of corporate governance and loan agreements. Asymmetric recognition of losses relative to gains is defined as conditional conservatism.

3. Conclusions

I agree with Ball and Shivakumar that "defines loss recognition as arbitrary, not contemporaneously related to any particular event due to the arbitrary nature of bias in terms of reporting low book values and incomes unconditionally as a result of being conservative"[32].

Many firms that did use value in use to arrive at their asset impairment loss will have declined a net realizable value figure as this would have been reduce than the value in use figure. If the firms had used net realizable value instead of value in use, this would have cause a higher asset impairment charge.

For the firms that use net realizable value for the purposes of determining the asset impairment charge this indicates that their net realizable value is higher than any calculated value in use figure.

In this way, that many firms report using more than one valuation method depending on the type of asset that is impaired and the results become difficult to indicate any conclusions based on the information available, despite the initial observation that value in use appears very used.

I conclude that the use of fair value concept may have a different effect on the earnings quality for Romania because of less liquid or inactive markets. In this way, fair values will more probably be estimated by the use of valuation techniques which enables earnings management and could lead to lower quality

[22] Barth, M. E., Landsman, W. R., Wahlen, J. M., Fair value accounting: Effects on banks' earnings volatility, regulatory capital, and value of contractual cash flows, Journal of Banking and Finance 19 (3) (1995) pp. 577-605.

[23] Bernard, V. L.,. Merton, R. C ., Palepu. K. G., Mark-to-market accounting for banks and thrifts: Lessons from the Danish Experience Journal of Accounting Research 33 (1) (1995) pp. 1-32.

[24] Hodder, L. D., Hopkins, P. E., Wahlen, J. M., Risk-relevance of fair-value income measures for commercial banks, The Accounting Review 81 (2) (2006) pp. 337-375.

[25] Plantin, G., Sapra, H., Shin, H. S., Marking-to-Market: Panacea or Pandora's Box? Journal of Accounting Research 46 (2) (2008) pp. 435-460.

[26] Sole, J., Novoa, A., Scarlata, J. G., Procyclicality and fair value accounting. Vol. 9 (2009) International Monetary Fund.

[27] Magnan, M. L., Fair Value Accounting and the Financial Crisis: Messenger or Contributor? Accounting perspectives 8 (3) (2009) pp. 189-213.

[28] Sun, P., Liu, X., Cao, Y., Research on the Income Volatility of Listed Banks in China: Based on the Fair Value Measurement, International Business Research 4 (3) (2011) pp. 228.

[29] Basu, S., 'The conservatism principle and the asymmetric timeliness of earnings,' Journal of Accounting and Economics, Volume 24, Issue 1, (1997) pp. 3-37.

[30] Goncharov, I., Hodgson, A., Comprehensive Income In Europe: Valuation, Prediction And Conservative Issues Annales Universitatis Apulensis Series Oeconomica 1 (10) (2008).

[31] Andrews, R., Fair Value, earnings management and asset impairment: The impact of a change in the regulatory environment, Procedia Economics and Finance 2 (2012) pp. 16 – 25.

[32] Ball, R., Shivakumar, L., Earnings quality in UK private firms: comparative loss recognition timeliness. Journal of Accounting and Economics 39 (1) (2005) pp. 83-128.

of reported earnings. Some empirical findings from research support experts' predictions[33].

Then, earnings under more fair value-based reporting system have less aggregate quality rankings for firms in Romania. I get the evidence that the extent of more fair-value-based other comprehensive income is negatively related to aggregate earnings quality for firms.

I noticed that many studies on this topic are realized in common law countries such as US, United Kingdom or Australia and there is few research regarding fair value accounting in countries of Eastern Europe.

References

- Aboody, D., Barth, M. E., R. Kasznik., Revaluations of fixed assets and future firm performance: Evidence from the UK. Journal of Accounting and Economics 26 (1) (1999) pp. 149-178
- Accounting Standards Board, 'Financial Reporting Standard 11, Impairment of Assets,' London, ASB (1998)
- Ahmed, A. S., Takeda, C., Stock market valuation of gains and losses on commercial banks' investment securities An empirical analysis. Journal of Accounting and Economics 20 (2) (1995) pp. 207-225
- Alciatore, M., Dee, C. G., Easton, P., Spear, N., 'Asset write-downs: A decade of research', Journal of Accounting Literature, Vol. 17, ., (1998) pp.1-39
- Allen, F., Carletti, E., Mark-to-market accounting and liquidity pricing. Journal of Accounting and Economics 45 (2) (2008) pp. 358-378
- Andrews, R., Fair Value, earnings management and asset impairment: The impact of a change in the regulatory environment, Procedia Economics and Finance 2 (2012) pp. 16 – 25
- Ball, R., Shivakumar, L., Earnings quality in UK private firms: comparative loss recognition timeliness. Journal of Accounting and Economics 39 (1) (2005) pp. 83-128
- Barth, M. E., Fair value accounting: Evidence from investment securities and the market valuation of banks. Accounting Review Vol. 69 No. 1 (1994) pp. 1-25
- Barth, M. E., Clinch, G., Revalued financial, tangible, and intangible assets: Associations with share prices and non-market-based value estimates, Journal of Accounting Research 36, (1998) pp. 199-233
- Barth, M. E., Landsman, W. R., Wahlen, J. M., Fair value accounting: Effects on banks' earnings volatility, regulatory capital, and value of contractual cash flows, Journal of Banking and Finance 19 (3) (1995) pp. 577-605
- Bartov, E., 'The Timing of Asset Sales and Earnings Manipulation,' The Accounting Review, Vol. 68, No. 4 (1993) pp. 840-855
- Basu, S., 'The conservatism principle and the asymmetric timeliness of earnings,' Journal of Accounting and Economics, Volume 24, Issue 1, (1997) pp. 3-37
- Beattie, V., Brown, S., Ewers, D., John, B., Manson, S., Thomas, D. And Turner, M., 'Extraordinary items and incomes smoothing: A positive accounting approach,' Journal of Business Finance and Accounting, Vol. 21, Iss. 6, (1994) pp. 791-811
- Beatty, A., Weber, J., 'Accounting Discretion in Fair Value Estimates: An Examination of SFAS 142 Goodwill Impairments,' Journal of Accounting Research, Vol. 44 No. 2, (2006) pp. 257-288
- Bernard, V. L.,. Merton, R. C ., Palepu. K. G., Mark-to-market accounting for banks and thrifts: Lessons from the Danish experience. Journal of Accounting Research 33 (1) (1995) pp. 1-32
- Bhat, G., Risk relevance of fair value gains and losses, and the impact of disclosure and corporate governance. Available at SSRN 1094183 (2008)
- Biddle, G. C., Choi, J.-H., Is comprehensive income useful? Journal of Contemporary Accounting & Economics 2 (1) (2006) pp. 1-32
- Bischof, J., Daske, H., Gebhardt, G., Fair value accounting and the business model of banks. Paper read at IAAER international conference Accounting Renaissance, Università Ca'Foscari, Venezia (2011)
- Bonbright, J.C., The Valuation of Property, McGraw-Hill (1937)
- Burgstahler, D., and Dichev, I,. 'Earnings management to avoid earnings decreases and losses,' Journal of Accounting and Economics, Vol. 24, Iss. 1, (1997) pp. 99-126
- Cairns, D., 'The Use of Fair Value in IFRS', Accounting in Europe, Vol. 3, No. 1, (2006) pp. 5 – 22
- Carroll, T. J., Linsmeier, T. J., Petroni, K. R., The reliability of fair value versus historical cost information: Evidence from closedend mutual funds. Journal of Accounting, Auditing & Finance 18 (1) (2003) pp. 1-24
- Casta, J.-F., Ramond, O., Lin, S., Value relevance of comprehensive income and its components Evidence from major European capital markets (2007)
- CFA Institute, A Comprehensive Business Reporting Model: Financial Reporting for Investors. Charlottesville, VA (2005) CFA
- Chambers, D., Linsmeier, T. J., Shakespeare, C., Sougiannis, T., An evaluation of SFAS No. 130 comprehensive income disclosures. Review of Accounting Studies 12 (4) (2007) pp. 557-593
- Chen, F., Lam, K., Smieliauskas, W., Ye, M., Fair value measurements and auditor versus management conservatism Evidence from the banking industry Working paper, University of Toronto, (2010)

[33] Šodana, S., The impact of fair value accounting on earnings quality in eastern European countries, Procedia Economics and Finance 32 (2015) pp. 1769 – 1786.

- Choi, J.-H., Das, S., Zang, Y., Comprehensive Income, Future Earnings, and Market Mispricing (2007)
- Christensen, J. A., Demski, J. S., Accounting theory: an information content perspective: McGraw-Hill/Irwin (2003)
- Cotter, J., Stokes, D., Wyatt, A., 'An analysis of factors influencing asset writedowns,' Accounting and Finance, Vol. 38, (1998) pp. 157-179
- Dechow, P., Ge, W., Schrand, C., Understanding earnings quality: A review of the proxies, their determinants and their consequences. Journal of Accounting and Economics 50 (2) (2010) pp. 344-401
- Dechow, P. M., Schrand, C. M., (2004) Earnings quality
- DeFond, M. L., Earnings quality research: advances, challenges and future research. Journal of Accounting and Economics 50 (2) (2010) pp. 402-409
- Dhaliwal, D., Subramanyam, K., Trezevant, R., Is comprehensive income superior to net income as a measure of firm performance? Journal of Accounting and Economics 26 (1) (1999) pp. 43-67
- Easton, P., H., Eddey, P., H., Harris, T., S., 'An Investigation of Revaluations of Tangible Long-Lived Assets,' Journal of Accounting Research, Vol. 31 Supplement 1993, (1993) pp. 1-38
- Eccher, E. A., Ramesh, K., Thiagarajan, S. R., Fair value disclosures by bank holding companies. Journal of Accounting and Economics 22 (1) (1996) pp. 79-117
- Elliott, J., A., Shaw, W., H., 'Write-Offs as Accounting Procedures to Manage Perceptions,' Journal of Accounting Research, Vol. 26, Supplement, (1988) pp. 91-119
- Goh, B. W., Ng, J. , Yong, K. O., Market pricing of banks 'fair value assets reported under SFAS 157 during the 2008 Economic Crisis (2009) Document de travail disponible à l'adresse Internet suivante: http://papers. ssrn. com/sol3/papers. cfm
- Goncharov, I., Hodgson, A., Comprehensive Income In Europe: Valuation, Prediction And Conservative Issues Annales Universitatis Apulensis Series Oeconomica 1 (10) (2008)
- Fiechter, P., Meyer. C., Big bath accounting using fair value measurement discretion during the financial crisis: Mimeo (2009)
- Healy, P., Wahlen, J., M., 'A Review of the Earnings Management Literature and Its Implications for Standard Setting,' Accounting Horizons, Vol. 13 No. 4, (1999) pp. 365-383
- Hill, M. S., Fair value earnings as a predictor of future cash flows, Working paper, University of Alabama (2009)
- Hitz, J.-M., The decision usefulness of fair value accounting–a theoretical perspective. European Accounting Review 16 (2) (2007) pp. 323-362
- Hodder, L. D., Hopkins, P. E., Wahlen, J. M., Risk-relevance of fair-value income measures for commercial banks, The Accounting Review 81 (2) (2006) pp. 337-375
- Hung, M., Accounting standards and value relevance of financial statements: An international analysis. Journal of Accounting and Economics 30 (3) (2000) 401-420
- IASB, International Financial Standard 13 – Fair Value Measurement, edited by I. A. S. C. Foundation. London IASB (2011)
- IASB International Accounting Standards Board, (2006), 'Fair Value Measurements,' Discussion Paper, London, IASB
- International Accounting Standards Board (2004) 'International Accounting Standard 36, Impairment of Assets, Revised,' London
- Jarva, H., 'Do Firms Manage Fair Value Estimates? An Examination of SFAS 142 Goodwill Impairments,' Journal of Business Finance & Accounting, Vol. 36, Iss. 9, (2009) pp. 1059–1086
- Jones, D. A., Smith, K. J., Comparing the value relevance, predictive value, and persistence of other comprehensive income and special items. The Accounting Review 86 (6) (2011) pp. 2047-2073
- Jordan, C., Clark**,** S., "Big bath earnings management: the case of goodwill impairment under SFAS No. 142", Journal of Applied Business Research, Vol. 20, No. 2, (2004) pp 63-70
- Kanagaretnam, K., Mathieu, R., Shehata, M., Usefulness of comprehensive income reporting in Canada. Journal of Accounting and Public Policy 28 (4) (2009) 349-365
- Khurana, I. K., Kim, M.-S., Relative value relevance of historical cost vs. fair value: Evidence from bank holding companies, Journal of Accounting and Public Policy 22 (1) (2003) 19-42
- Kolev, K., Do Investors Perceive Marking-to-model as Marking-to-myth? Early Evidence from FAS 157 Disclosure, New York University, (2009) Graduate School of Business Administration
- LaFond, R., Watts, R. L., 'The Information Role of Conservatism,' The Accounting Review, Vol. 83, No 2, (2008) pp. 447-478
- Landsman, W. R., 'Is fair value accounting information relevant and reliable? Evidence from capital market research' Accounting and Business Research Special Issue: International Accounting Policy Forum. (2007) pp. 19-30
- Magnan, M. L., Fair Value Accounting and the Financial Crisis: Messenger or Contributor? Accounting perspectives 8 (3) (2009) pp. 189-213
- Moses, O. D., 'Income Smoothing and Incentives: Empirical Tests Using Accounting Changes' The Accounting Review , Vol. 62, No. 2, (1987) pp. 358-377
- Nissim, D., Reliability of banks' fair value disclosure for loans. Review of Quantitative Finance and Accounting 20 (4) (2003) pp. 355-384
- Park, M. S., Park, T., Ro, B. T., Fair value disclosures for investment securities and bank equity: evidence from SFAS No. 115. Journal of Accounting, Auditing & Finance 14 (3) (1999) pp. 347-370

- Peek, E., 'The Use of Discretionary Provisions in Earnings Management: Evidence from The Netherlands,' Journal of International Accounting Research, Vol. 3, Iss. 2, (2004) pp. 27-43
- Petroni, K. R., Wahlen, J. M., Fair values of equity and debt securities and share prices of property-liability insurers. Journal of Risk and Insurance (1995) 719-737
- Plantin, G., Sapra, H., Shin, H. S., Marking-to-Market: Panacea or Pandora's Box? Journal of Accounting Research 46 (2) (2008) pp. 435-460
- Richard Dietrich, J., Harris, M. S., Muller III, K. A., The reliability of investment property fair value estimates. Journal of Accounting and Economics 30 (2) (2000) 125-158
- Ronen, J., Yaari, V., Earnings Management: Emerging Insights in Theory, Practice and Research Springer (2008)
- Ryan, S. G., Fair value accounting: understanding the issues raised by the credit crunch, White Paper prepared for the Council of Institutional Investors (2008)
- Schervish, M.J., "P Values: What They Are and What They Are Not," The American Statistician, Vol. 50 , Iss. 3, (1996) pp. 203–206
- Sevin, S., Schroeder, R., 'Earnings management: evidence from SFAS No. 142 reporting,' Managerial Auditing Journal, Vol. 20, Iss. 1, (2004) pp. 47-54
- Shaw, K., W., 'Corporate disclosure quality, earnings smoothing, and earnings' timeliness,' Journal of Business Research, Vol. 56, (2003) pp. 1043– 1050
- Sole, J., Novoa, A., Scarlata, J. G., Procyclicality and fair value accounting. Vol. 9 (2009) International Monetary Fund
- Song, C. J., Thomas, W. B., Yi, H., Value relevance of FAS No. 157 fair value hierarchy information and the impact of corporate governance mechanisms. The Accounting Review 85 (4) (2010) pp. 1375-1410
- Stefan-Duicu, V.M., Stefan-Duicu, A., Professional judgment of the financial analyst in the context of normative and positive theories of accounting directed by the economic resilience. *From Person to Society*, (2014) p.1003
- Stefan-Duicu, V.M., Stefan-Duicu, A., Economic and Social Mutations-Interacting with the Subject and Paradigms of Management Sciences. *Ovidius University Annals, Series Economic Sciences, 13*(1) (2013)
- Strong, J., Meyer, J., 'Asset write-downs: Managerial incentives and security returns,' Journal of Finance, July, (1987) pp. 643-661
- Sun, P., Liu, X., Cao, Y., Research on the Income Volatility of Listed Banks in China: Based on the Fair Value Measurement, International Business Research 4 (3) (2011) pp. 228
- Šodana, S., The impact of fair value accounting on earnings quality in eastern European countries, Procedia Economics and Finance 32 (2015) pp. 1769 – 1786
- Trueman, B., Titman, S., 'An Explanation for Accounting Income Smoothing,' Journal of Accounting Research, Vol. 26 (Supplement), (1988) pp. 127-139
- Venkatachalam, M., Value-relevance of banks' derivatives disclosures, Journal of Accounting and Economics 22 (1) (1996) pp. 327-355
- Walsh, P., R. Craig, F. Clarke, 'Big Bath Accounting Using Extraordinary Items Adjustments: Australian Empirical Evidence,' Journal of Business Finance & Accounting, Vol. 18, No. 2, (1991) pp. 173-189
- Watts, R. L., 'Conservatism in accounting part I: Explanations and implications', Accounting Horizons, Vol 17, Iss 3; (2003) pp. 207-221
- Watts, R. S., Zimmerman, J. L., 'Towards a Positive Theory of the Determination of Accounting Standards,' The Accounting Review, Vol. LIII, No. 1, (1978) pp. 112-134
- Watts, R. L., Zimmerman, J. L., Positive accounting theory: a ten year perspective, Accounting Review, (1990) 131-156
- Zijl, T., Whittington, G., 'Deprival value and fair value: a reinterpretation and a reconciliation,' Accounting and Business Research. Vol. 36. No. 2. (2006) pp. 121-130
- Zucca, L., Campbell, D., 'A closer look at discretionary write downs of impaired assets,' Accounting Horizons, September, (1992) pp. 30-41

A RESEARCH ON POLICIES FOR GREEN ECONOMY IN DEVELOPED AND DEVELOPİNG COUNTRİES WİTHİN THE SCOPE OF SUSTAINABLE DEVELOPMENT

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Abstract

With the increasing population since the existence of mankind technology has developed the use of resources which increased with development of technology and production and environmental destruction has been the result of this. The process of environemntal degredation, especially after the industrial revolution, was accelerated since the Second World War and become a global problem. It had a more important role in terms of sustainable development of intellectual property in arrangement to use resources efficiently and effectively to reduce the environmental damage and to increase the social wealth and to leave a clean world in the future generations. The green economiy thought, which in the light of sustainable development compress, expresses reconstruction of environmental activities differently in the thought of mainstream economy on the basis of green neworder eceonomics. The objective of this study is to investigate the environmental politicl inclusion of the green ecenomy is and examine regional and global results individually and in groups on behalf of both developed and developing countries.

Keywords: *Sustainable Development, Green Economy, Environment, Developed Countries, Developing Countries.*

1. Introduction

The ongoing consumption need since mankind's existence, the complexity of production relations with the development of societies, with the growing population and technology, it has reached another point in today's world. At its inception, the needs met in individual or small masses emerged from the economic activities of the individual as a result of population growth and the development of the societies, together with the social structure. The capitalist system, which develops inaccordance with the development and change of economic, political and social activities, it has been decisive in the shaping of social relations as the prevailing economic view that suggests an increase in consumption for individual and social well-being. Depending on this situation, it is necessary to increase the consumption of the source of individual wealth and increase the production to increase the consumption. The increase in production leads to economic growth. Countries that are in the struggle for economic growth will enter into competition and this situation has caused environmental damage due to increasing population, wealth and consumption need. The questions which come to mind at the same time is that How do the countries improve their level of development and the worsened environment as their welfare increases? or how to improve their prosperity levels without distorting the environment? have gained importance. On the other hand, developing countries are involved in production activities in order to converge with the developed countries and to increase their prosperity levels. However, these countries do not pay much attention to environmental activities as developed countries. Both developed and developing countries must implement some policies to reduce environmental degradation and leave a cleaner world for future generations as well as increase prosperity. In order to increase social welfare and prevent environmental degradation, the concept of sustainable development has emerged and the concept of green economy has been introduced as one of the most important complementary elements of sustainable development. Since the environment is the living space of all individuals on a global scale, each individual falls into this responsibility. In this context, the responsibility for the environment and the desire to research and put forth applied policies constitute the main objective of this work. The scope of the work will first be the study of sustainability and green economy concepts that are theoretically framed and the development of green economy policies in sustainable development in developed and developing countries. In the light of the policies implemented, the countries will try to explain what they can do differently, supported by the studies in the literature. Another aim of the study is to review the results obtained from the studies in the literature and to present different views on this subject. In addition, the work to be done later is to draw attention to the subject by holding a light.

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1.1. Sustainable Development

The increase in production after World War II did not come to the forefront in terms of environment until the 1970s, but since 1970, economic growth has become a matter of importance along with the process. In particular, the fact that some biological species have come to the stage of extinction, the problem of global warming has come to the forefront, production and consumption have increased at a considerable rate, has become a subject that needs to be emphasized (Yalçın 2016, 751). Despite the increase in production, the continuing social problems are a sign of the need for the development of societies. The environmental damage caused by economic growth is another important aspect. Consequently, in order to solve the social problems aimed at the society, it has been both to maintain the development process and to reduce the environmental damage to the minimum level. In this context, for the first time, a conference was held in Stockholm in 1972 where environmental activities and economic relations were jointly addressed. The most important aspect of the conference is to see the world as one from the point of view of all individuals and to accept It is also an important event in the name of globalization. (Özcan 2007, 764**).**

The Stockholm conference is a sign that environmental issues are emerging along with developmental problems, as well as the global scale of these problems. It is also an important event in the name of globalization. The expression of environmental problems as not only a region or an entire country, but an entirely problematic problem is an important deterrent to globalization. In this context, the concept of sustainable development was first expressed in the World Protection Strategy Report prepared by the United Nations Environment Program (UNEP) in 1980 but became widespread after the use of the "Common Future" report prepared by the United Nations Environment and Development Commission in 1987. According to the report, it is necessary to meet today's needs without interfering with the needs of future generations (Kayikci 2012, 14-15). This situation has two important consequences. The first of these is to draw attention directly to environmental pollution. Secondly, expressing the ideology of development in a way will produce both a policy for the generation of future generations and a global environment to deal with a clean environment. The concept of sustainable development has an important character in terms of globalization. As a consequence, the Earth Summit in Rio, which aimed at rationally realizing sustainable development on a global scale long ago in 1992, focused on the concept of sustainable development at the Johannesburg Summit in 2002 and published a statement of 37 principles (Kayıkçı 2012, 14-15).

In the Common Future Report, the aims of development policies can be expressed as follows:

1. To increase growth by improving the quality of growth,
2. To meet basic requirements such as food, clean water, housing, health,
3. Determining a sustainable population level and enriching it by protecting it,
4. To take the environment into consideration when making decisions on economic policies. (Our Common Future 1987, 78-80

1.2. Green Economy in the Context of Sustainability

The green economy is one of the important parameters of sustainable development, while sustainable development is the link between environment and economy. Concepts such as green economy, green growth, environmentally friendly growth contribute to the integration of the idea of environment and economy in the sustainable development plan. The Green Economy Thought was launched by UNEP in 2008 and can be expressed as a system of production and consumption of goods and services that will sustain both present and future generations from environmental risks as well as sustaining increases in welfare for individuals in the long term. At the heart of the green economy is the use of efficient resources and the development of a healthier, livable environment, along with an increase in individual wealth. The understanding of capitalist economic growth is particularly influential in increasing environmental pollution through fossil fuel consumption. This situation, on the other hand, is making green environment policies more prominent in terms of creating a livable world. The implementation of green economic policies has an important role to play in governments and international organizations. The use of renewable energies, eco-friendly policies and green jobs, which are new areas of employment that will result from the healthy implementation of these policies, will lead to economic and social relations entering a new process.

Green economy gains importance that is important after 2012 Rio+20 United Nations Sustainability Conference. According to United Nations Environment Programme (UNEP) green economy is a new growth strategy that eliminated ecological and environmental risks that is a new era for mankind for healthy living on the other hand increase individual welfare and struggle social equality (Özçağ and Hotunluoğlu 2015, 313).

A green economy idea has new green technologies, renewable energies, decreasing carbon emissions, incresing sources efficiency, new green jobs, reducing air pollution, claening water resources, increasing social equality with economic and social development. Green economy idea is a new world.

Market-based practices for environmentally friendly and green growth Yalçın (2016) are described under 3 headings:

- Taxes,
- Registration Permits,
- subvention on

Taxes are a different form of raising costs in the production process, while taxation leads to the creation of economic activity and the polluting producers to produce with more environmentally friendly methods by increasing their costs in the production process. While pollution permits are an application for pollutants producing on a larger scale, taxpayers are a suitable instrument for producers of smaller scale production. Today, about 90% of the tax revenues for the environment are derived from fossil fuels and emissions-generating vehicles. In this case, if the capitalist economic system is thought to encourage continuous production, environmental tax should also be encouraged for a greener world. Another application for the environment is subsidies. Subsidies are an important step in making the economy more environmentally friendly. The green economy is the most important instrument in the transformation period, which is the most important incentive foot, promoting environmentally friendly practices. However, even if subsidies are a source of problems in terms of effective resource use, environmentalist practices will contribute economically, socially and socially significant in terms of both current and future generations.

2. Green Economy Application Examples

Many countries in the world are implementing policies towards the green economy transition process. Among these, two of the leading countries are China and South Korea. In particular, South Korea has an important place in the name of environmentally friendly economy transition with long-term green growth strategies. Among the policies Korea implements are low carbon emissions, new and environmentally friendly engines, massive environmental friendly public investments in public transport, improved water quality in Jeju Island and seed quality enhancing practices for producers, public support for R & D applications is at the forefront in the low carbon production process in energy and other sectors. Taxes for environmental pollution, corrective measures for the market, and company regulations for environmental pollutants can be expressed in other measures taken (Matthews 2012, 354).

Choi also expresses that South Korea intends to reduce its dependence on climate change and energy dependence, raise its quality of life, and create a new economic structure with green technologies (Choi 2014, 5-8).Germany is another example with South Korea.

Germany's most important goal in the green economy transformation process is to use fossil fuel for renewable energy use. Germany, which has made nuclear energy use a policy goal before, has made the use of renewable and environmentally friendly clean energy a policy goal. One of Germany's most important policy goals is to reduce coal use and increase the use of renewable electricity (GGGI 2015, 55-57).

China is another green economy policy target. China is one of the world's leading countries with intense energy use and production activities. For this reason, China's policies are of great importance on an international scale. There are practices in the forefront of China to control energy consumption. Taxes for environmental pollution, corrective measures for the market, and company regulations for environmental pollutants can be expressed in other measures taken (Matthews, 2012: 354).

Another country that sets policy in the green economy process, the UK has set both its resource efficiency and a cleaner production process with low carbon emissions. However, international cooperation in the policy goal is the main element of the UK's advocacy (GGGI 2014, 86-87).

Again South Africa is a policy-making country in its green growth target. South Africa emphasized public support for the policy objective, emphasized emission reductions and high-tech products to be produced in the future (Yalcin 2016, 173-174).

Norway, on the other hand, set innovation as a policy target in the green growth process. Energy, petroleum, health, agriculture, tourism and maritime sectors in the human welfare and environment-friendly technologies with the research methods aimed to develop.

Brazil, on the other hand, aimed to reduce poverty (GGGI 2015,19), as well as reducing agricultural incomes and increasing productivity with pioneering practices in agriculture.

The Netherlands is an important example for the public and private sectors to cooperate in the green economy transition process. A project company named DBFMO (Design, Build, Finance, Maintenance and Operation) was established between the government and the private sector. A consortium has been established in practice with participation in other private companies and the investments to be made have been committed to reducing carbon emissions by at least 21%. This will ultimately result in low carbon emissions and a cleaner environment (GGGI 2014, 185-186).

Singapore is the first state to introduce a green plan in Johannesburg in 2002. Green plan suggests that more clean more green country and increase life quality, protect natural resources. One of the most important goal the plan is to create awareness about the cliamte change and environemntal regulations. Singapore Sustainable Development Commission create a new plan for 2020. “Blue Plan for Sustainable Singapore” was created in 2009. Plan includes long run goals like reducing air pollution, increasing energy efficiency, increasing life quality, limiting water consumption, increasing public transport (GGGI 2014, 141-142).

Costa Rica is one of the prominent countries to increase the environmental quality. Important policy of country is oil taxation. It is a plan for funding

environmental activities. 60 percent of received taxes is funding for ecosystem services (GGGI 2014, 158).

Morocco is also policy aim about green economy. Morocco's most important policy for greeen economy is solar energy system. For cleaner economy is country's solar energy sources and solar energy sector investment has an important role. Morocco established Morocco Solar Energy Agenda (MASEN) to funding more effective and easy for solar energy investments. MASEN is a public investment. Masen is an important that show about the role of government to transition process of green economy (GGGI 2014, 165).

3. Conclusion

With the development of technology, the intense production increase that has taken place has destroyed the environment and the living problem became a global problem. From the 1960s onwards, environmental issues began to have an important place in international meetings. It maintains the idea of creating a more livable world and providing individual wealth prosperity as a means of capitalist economic thought through economic growth and development. In this direction, the idea of sustainable development for countries emerges. In order to leave a cleaner environment for both the present and future generations, policies have been formed to shape the economies through the idea of sustainable development. In this direction, countries are making efforts to transition to the use of renewable energies in their interests. While various policies are applied in the foreground countries in this study, various policies are applied in the transition period of green economy in many countries not included in the study. The aim of the work is to put out the prominent policies in the countries covered. As there will be no specific policy for each country, the policy applied in one country is not valid for other countries. Because the aim of each country first is to create a cleaner world in the name of the world in its own society and then the world. Each country will create its own policies for its own problems. The economic, social and financial structures of countries will play an important role when policies are set. Nevertheless, economic development continues to be a more developed society and aims to create the world. Therefore, sustainable development is a widely accepted idea at many points. However, it is not possible to say that all countries have fully participated in this idea or that this idea has produced appropriate policies. Some countries see development and industrialization policies in front of clean environmental policies. This situation causes the policies towards green economy to be delayed or prevented. However, environmental pollution is a global problem and in order to create a healthier environment, countries that do not have a program will also be able to make programs. Countries that cooperate with policies implemented by countries and implement policies based on green economy need to make suggestions on this issue. As the UK has suggested, international co-operation towards environmental pollution should be undertaken. On behalf of the environment, the activities of international non-governmental organizations should be increased and communities should be made aware of worldwide. The emerging new technologies must be environmentally friendly and it is important that the transformation of the industry 4.0 new technology, which is especially in the foreground worldwide, is in harmony with environmentally friendly policies.

Energy is something that all nations need. Renewable energy policies in particular have a very important place in the name of countries in the process of green economy transition. As a matter of fact, the process of transition from fossil fuel use to renewable energies is among the leading policies of many countries. The high rate of taxation of environmental pollution and the fact that the areas to be newly invested are environmentally friendly are important in the transition period to green economies. Innovation plays an important role in the green economy transition process, as some countries have set policy objectives as innovation. Innovation plays an important role especially in developing countries' high-tech product manufacturing processes. Using clean technology through innovation will contribute to the green economy transition phase. It will also contribute to the production of high-tech products by providing policy for developing countries' environmental pollution. The formation of this situation is of great importance in terms of the idea of sustainable development. However, public private cooperation plays a sıgnıfıcant role for implementing the afore-mentioned policies. The public sector should not be alone to pass on the private sector policies. There is a considerable need for government support, especially in developing countries where entrepreneurship and capital shortages are experienced. Public-private cooperation is a matter of issue in terms of environmental policies, and in our opinion, it has the most important place among the politics.

References

- Barbiroli, Giancarlo 2011. "Economic Consequences of the Transition Process Toward Green and Sustainable Economies: Costs and Advantages" *International Journal of Sustainable Development & World Ecology*. 18(1): 17-27. https://doi.org/10.1080/13504509.2011.541592
- Bracking, Sarah. 2015. "Performativity in the Green Economy: how far does climate finance create a fictive economy?" *Third World Quarterly*. 36(12): 2337-2357. https://doi.org/10.1080/01436597.2015.1086263

- Brockington, Dan. Ponte, Stefano. 2015. "The Green Economy in the Global South: Experiences, Redistributions and Resistance." *Third World Quarterly* 36(12): 2197-2206. https://doi.org/10.1080/01436597.2015.1086639
- Caprotti, Federico. 2015. "Golden Sun, Green Economy: Market Security and the US/EU-China 'Solar Trade War'." *Asian Geographer* 32(2): 99-115. https://doi.org/10.1080/10225706.2015.1057191
- Choi, Sang Dae. 2012. "The Green Growth Movement in Republic of Korea Options or Necessity." *Sustainable Development Network of the World Bank*. 1-8. http://documents.worldbank.org/curated/en/388651468293111131/pdf/83287-REVISED-BRI-PUBLIC-Box394818B-kggp-kn01-GG-macro-Strategy.pdf
- Faccer, Kristy. Nahman, Anton. Audouin, Michelle. 2014. "Interpreting the green economy: Emerging discourses and their considerations for the Global South". *Development Southern Africa*. 31(5): 642-657. https://doi.org/10.1080/0376835X.2014.933700
- Fisher, Aled. 2014. "Human Rights in the Transition to a "Green Economy" – Critical Human Rights-Based Approaches to Climate Change in Norway." *Nordic Journal of Human Rights* 32(3): 258-279. https://doi.org/10.1080/18918131.2014.937211
- Gibbs, David. O'Neill, Kirste. 2016. "Future Green Economies And Regional Development: a Research Agenda." *Regional Studies* 51(1): 161-173. https://doi.org/10.1080/00343404.2016.1255719
- Global Green Growth Institute. 2014. "Green Growth in Practice Lessons From Country Experiences." http://www.greengrowthknowledge.org/resource/green-growth-practice-lessons-country-experiences.
- Global Green Growth Institute. 2015. "Clean Energy Industrial Investments and Expanding Job Oppprtunities". https://www.unido.org/sites/default/files/2015-05/GLOBAL_GREEN_GROWTH_ REPORT _vol2_ final_0.pdf
- Global Green Growth Institute. 2016. "Strengthening Policies for Green Growth" http://report.gggi.org/2016/wp-content/uploads/2017/06/GGGI_annual_report_2016-1.pdf
- Goodman, James. Salleh, Ariel. 2013. "The Green Economy: Class Hegemony and Counter Hegemony" *Globalizations.* 10(3): 411-424. https://doi.org/10.1080/14747731.2013.787770
- Gouvea, Raul. 2014. "Building an equitable green economy: a Brazilian perspective." *International Journal of Environmental Studies.* 71(2): 182-199. https://doi.org/10.1080/00207233.2014.898372
- Kayıkçı, Murat. 2012. *Çevre ve Kalkınma Söylemi.* Ankara: Orion Yayınevi
- Matthews, John A. 2012. "Green growth Strategies: Korean and Chinese Initiatives." *Carbon Management* 3(4): 353-356. http://dx.doi.org/10.4155/cmt.12.43
- Özcan, Sezer. 2007. "Küresel Konferanslar ve Çevre Sorunları: Çevre Kalkınma ve Etik Açısından Eleştirel Bir Değerlendirme". *Uluslararası Asya ve Kuzey Afrika Çalışmaları Kongresi*. ICANAS 38. 761-780
- Özçağ, Mustafa. Hotunluoğlu, Hakan. 2015. "Kalkınma Anlayışında Yeni Bir Boyut: Yeşil Ekonomi." *Celal Bayar Üniversitesi Sosyal Bilimler Dergisi.* 13(2). 304-324. http://dx.doi.org/10.18026/cbusos.85473
- Peng, Sizhen. Xinzhang, Sun. 2015. "Research on Challenges and Strategies for China's Green Economy Development" *Chinese Journal of Population Resources and Environment* 13(2): 127-131. https://doi.org/10.1080/10042857.2015.1005342
- Sustainable Development. "Green Economy" Accessed February 28, 2018. https://sustainabledevelopment.un.org/index.php?menu=1446
- Svenssen, Gert. 2012. "Environmental Reviews and Case Studies: From a Brown to a Green Economy: How Should Green Industries Be Promoted?" *Environmental Practice.* 15(1): 72-78. https://doi.org/10.1017/S146604661200049X
- United Nations, 1987. "Our Common Future." http://www.un-documents.net/our-common-future.pdf
- UNEP. 2011 "Towards a Green Economy, Pathways to, Sustainable Development and Poverty Eradication." Geneva
- Yalçın, A.Zafer. 2016. *Yeşil Büyüme.*. Bursa: Ekin Yayınevi
- Yalçın, A.Zafer. 2016. "Sürdürülebilir Kalkınma İçin Yeşil Ekonomi Düşüncesi ve Mali Politikalar." *Çankırı Karatekin Üniversitesi İİBF Dergisi*. 6(1): 749-775. http://dx.doi.org/ 10.18074/cnuiibf.282

EXTERNAL TRADE OF ROMANIA – TEN YEARS AFTER EU ACCESION (2007-2016)

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Abstract

Advantages of the EU single market and the costs related to adaptation the Community context and requirements, the impact of the international economic and financial crisis and the difficulties in accessing EU Structural and Social Cohesion Funds are among the major factors that have influenced the economic evolution of Romania in the period 2007-2016, including the external trade in goods. There have been changes in the structure of Romania's external trade, determined, on the one hand, by the accession to the EU, and on the other hand, by the impact of the international economic crisis started in 2008.

The way in which the Romanian external trade has responded to the aforementioned factors is analyzed in this paper, on the basis of the following criteria: the evolution of specific indicators to the field of foreign exchanges of goods, in the year 2016 as compared to the year 2007; the magnitude of the economic downturn in 2009 and 2010 years as a result of the negative impact of the crisis; the decline recovery in years; resilient economic sectors. International comparisons are used in order to evaluate the position of Romania as against the neighboring EU Member States as well as its main EU trading partners in the context of the EU integration process.

Keywords: *trade balance, deficit, export, import, European Union.*

1. Introduction

The benefits and costs of the economic integration and participation in the international division of labour are well grounded in the specific literature, referring both to the static and dynamic effects, generated by the comparative advantages and by the better allocation of scarce resources, as well as, resulting from higher competition, larger scale economies, knowledge diffusion and technological progress.

In fact, the EU accession process has contributed significantly to the macroeconomic stabilization, trade opening, increased FDI flows, improved legal and institutional framework that have been the key factors for the economic success of the new EU member states, in the last decade (Zhelev&Tzanov, 2012).

Five years after the 2004 wave of the EU enlargement, the European Commission has announced that this contributes to unleashing the growth potential and increasing the resilience of the European economy by strengthening economic integration, fostering a more efficient division of labour and boosting EU competitiveness as a whole. (European Commission, 2009)

Romania's accession to the EU, more than ten years ago, on 1st of January 2007, marked the beginning of a new stage of economic development, focusing on the principle of economic and social cohesion, underlining the promotion of economic growth conditions, reducing regional disparities and ensuring high level of employment and a balanced and sustainable development.

From the external trade point of view, this new stage brought a number of advantages but also disadvantages, benefits and costs. Removing barriers to the free movement of goods and services should stimulate the creation of trade. In theory, this is beneficial for all Member States because it allows them to specialize in those goods and services that they produce relatively more efficiently. In this context, Romania's exports benefit from a market dimension over half million consumers but must face to a stronger competition, both as a price-quality ratio and as a technological level, respecting the new EU competition requirements. As far as imports are concerned, they increase the competitive pressure on domestic production.

The integration into the EU of a country like Romania that many years belonged to a different system than of the West European one, is difficult and will last for many years, due to the structural changes required (Iancu, 2010).

The changes made in the last 10 years in the Romanian economy are important and generally positive, but have been obtained under difficult conditions, marked by the market transition uncertainties and by the overlapping between the EU accession and the global financial crisis, at the end of 2008.

A review of Romania's economic development since 2007, primarily means the story of managing the impact of the global financial crisis and only to a lesser extent an assessment of the impact of EU membership itself. The Romanian economy passed through a complete "cycle of boom-bust-boom" in the last ten years. (Gabor Gunya 2017)

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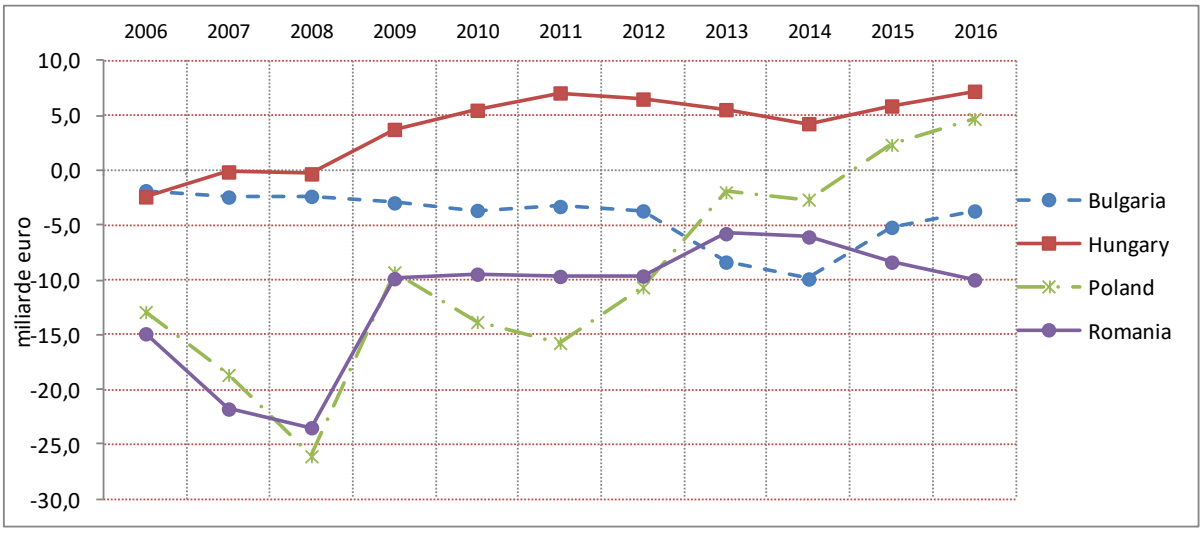
Undoubtedly, Romania's international economic relations in the post-accession period 2007-2016 were an important factor in directing the evolution of the country's external trade under the EU rigorous requirements, but also in the complex processes of globalization and increasing interdependencies between national economies. At the same time, these relations have played an important role as an interface in terms of capitalizing the potential of the national economy, on one hand and the opportunities occurred under the conditions of liberalizing external trade flows and increasing international competition, on the other hand.

The present paper analyses the Romania's international trade relations in the post-accession period 2007-2016, having as main objective the identification of the principal features, tendencies and structural changes of external trade, considered a potential factor for the sustainable development of the national economy, the benefits of integration and globalization, as well as bearing the costs and efforts they imply. The methodological approach of the research has an international comparative dimension, to highlight some similarities and peculiarities of the Romanian foreign trade regarding the tendencies of convergence and divergences manifested at EU 28 level.

2. Evolution of the external trade specific indicators before and after Romania's accession to the EU

In the ten years that followed the Romania's accession to the EU, the advantages and challenges of the membership have been partly overshadowed by the impact of the global financial crisis in 2008, which has had a strong and prolonged impact on the Romanian economy, in terms of GDP, imports and exports decline. However, the statistical figures show that exports increased 4.59 times and imports increased 4.61 times, in 2016 as compared to 2000, when the negotiations for the EU accession officially began. The value of imports of goods has always been higher than that of exports, which has led to the persistence of a weak trade balance. Romania's accession to the EU, practically, meant a (negative) trade balance of -114 billion euro in the post-accession period (2007-2016), compared to -47 billion euro during the pre-accession period (2001-2006). Romania's trade balance registered the largest deficit in 2008 when it reached the level of -23,5 billion euro, then it gradually decreased to -6 billion euro in 2014, afterwards increasing again to -10 billion euro, in 2016 (Figure 1).

Figure 1 Annual trade balance (FOB-CIF) evolution in the period 2006-2016



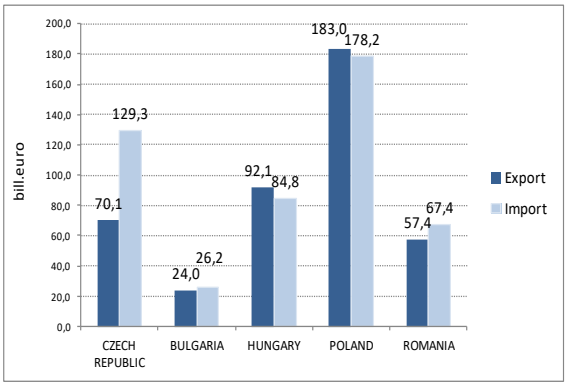
Source: Eurostat, New Cronos database

An analysis of a country's trade flows gives us a measure of its degree of openness to the external market and its competitiveness in international trade. In the case of Romania, it is interesting to see not only the evolution of the trade relations with the EU but also the performance compared to the neighbouring countries, former communist ones, which were in transition at the same time with Romania and who subsequently became EU members.

International comparisons highlight the fact that Romania, although having a population, territory and potential higher than other EU countries, from the export point of view, it is underperforming. Thus, in 2016, Romania's export was lower 3.2 times than Poland's; 2.6 times lower than Czech Republic's; 1.6 times lower than Hungary's and 1.2 times lower than of Slovakia's.

Regarding the imports, their values were in 2016, 2.7 times higher in Poland; 1.3 times higher in Hungary and 1.9 times higher in the Czech Republic compared to Romania (Figure 2).

Figure 2 Exports and imports of goods in 2016, in Romania compared to other EU Member States



Source: Eurostat, New Cronos database

The existing gaps between Romania and the compared countries highlight, on the one hand, a relatively large pressure on the trade balance, respectively on imports and, on the other hand, a lesser use of the potential of the human, natural and material resources our country has.

If the negative trade balance, with higher or lower variations in different periods, was a chronic factor in case of Romania, there are also member states for which accession to the EU had a positive impact on trade balance. For example, Hungary, since 2009 (after 5 years of 2004 EU accession) and Poland since 2015 (after more than a decade), have managed to maintain an upward trend in the positive trade balance (Figure 1). In the case of Poland, a detailed analysis may be needed to identify the factors that have led to such remarkable evolution of the trade balance, considering that this country had a quite similar trade pattern as Romania up to 2011.

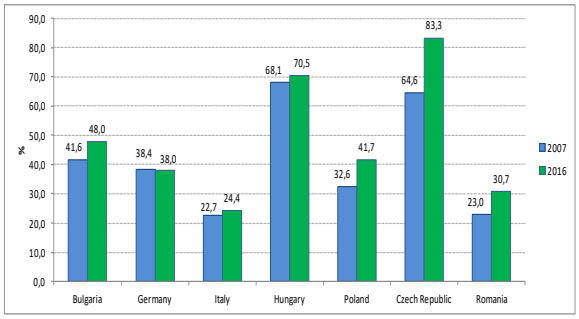
Countries having trade deficit fail to capitalize on imports by export efficiency and competitiveness. In these countries, foreign currency earnings resulted from export do not cover the corresponding expenditure, reason for which the exports cannot be considered as a source of currency for diminishing the negative current account balance and paying foreign debt.

According to Zaman, most experts believe that a country's persistent trade deficit is unfavourable and not proper to sustainable GDP growth, as trade deficit is a component of the current account deficit and requires external loans or sales of assets to finance the procurement of goods and services. Others consider as damaging only those deficits generated by the loans for financing current consumption to a large extent rather than financing long-term investments. As beneficial, and even acceptable are regarded those trade deficits supporting long-term investments, generate jobs, incomes and other investments as well as economic creditability. (Zaman, 2013)

The diversity of views on the impact of trade deficits is explained by the particularities and differences between national economies. There are situations where trade deficits and surpluses can be beneficial or completely negative depending on the concrete circumstances of each country. In the case of Romania, a country with an emerging economy and a relatively low level of development, the chronicity of the trade deficit with a long-term growth trend cannot be considered as beneficial.

The extent to which national producers are export-oriented is given by the share of goods exported in GDP. Although increasing over the pre-accession period, Romania's share goods exports in GDP is only around 30%, which is below the levels recorded by Bulgaria, Hungary and Poland.

Figure 3 Export orientation in 2016 versus 2007, in some EU Member States



Source: Own calculation based on Eurostat, New Cronos database; exports are according to the ITGS methodology

The size of the economy is relevant in this analysis - countries with large territories and populations (Poland, Romania and Germany) are less dependent on the exports than small countries, such as Hungary, Czech Republic or even Bulgaria. However, in the case of Poland, which is larger than Romania, the degree of openness is higher by 11 percentage points (Figure 3).

The small market share held by Romania (0.37% in the world export in 2016), combined with the low share of exports in GDP clearly indicates the potential for increased trade gains, in the Intra-EU and Extra-EU areas.

Both imports and exports recorded higher growth rates in the pre-accession period (2001-2006) compared to the growth rate of 2007-2016, for most of the countries under review. In the case of Romania, during the pre-accession period the average annual growth rate of imports was higher than those for export (+4.4 pp). Contrary, in the 2007-2016 period, the average annual growth rate of exports is higher than for imports, with +2.5 pp (for most of the countries analyzed, Table 1). It is noticeable that the average annual growth rates of Romania and Bulgaria, Hungary and Poland, as well, are two to three times higher than the annual growth rates at EU level, both in 2001-2006 and in 2007-2016 (but not the average export per capita, for example).

Table 1 Average growth rate of export and import in the period 2007-2016 versus the period 2001-2006

	Export		Import	
	2001-2006	2007-2016	2001-2006	2007-2016
	%			
Romania	**14.9**	**8.9**	**19.3**	**6.4**
Bulgaria	14.6	8.5	14.1	7.1
Hungary	12.0	4.9	10.3	3.8
Poland	17.2	8.0	11.6	6.7
Germany	6.8	3.6	5.2	3.3
Italy	4.2	2.8	5.4	1.0
France	1.9	1.7	2.8	2.2
EU28	5.6	3.3	5.8	2.7

Source: Own calculation based on Eurostat, New Cronos database

Compared with GDP growth rate, the export and import growth were higher, with few exceptions, the most significant being in 2008.

2. Geographic orientation of the external trade flows

Given that Romania belongs in Europe, most of the trade is taking place with European countries, especially with the 28 EU Member States (75.1% of exports and 77.1% of imports in 2016), with traditional relations, propelled by intra-community factors of "trade creation".

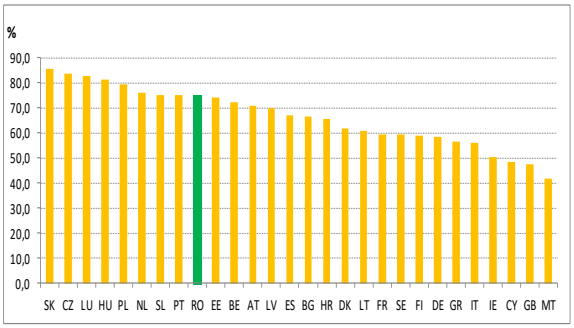
On the other hand, the globalization process objectively extends the variants and opportunities for Romania's external trade to the non-EU area as well, which in some cases makes possible the manifestation of the growth trend of the extra-EU trade - for example, with Turkey, China, Russian Federation, USA.

In conclusion, depending on the national economic interests of each Member State, which can be met in different proportions by the extra-EU and intra-EU partners, we find that the degree of concentration of external trade with EU countries varies from one country to another and over time.

Generally, a problem to be elucidated is that of trade efficiency, if a business variant is more profitable in extra-EU or intra-EU area. In this case, criteria, principles as well as economic and financial considerations should prevail. However, there are situations e.g. geo-strategically or political group of interests, which may prevail over the economic and financial advantages of one or other of the alternatives.

In fact, no EU Member State conducts external trade exclusively with other EU Member States. On the contrary, there are theories that economic integration is a factor for promoting sustainable growth, which offers availability and potential not only for the development of intra-EU economic relations, but also for the creation of additional resources for extra-EU trade.

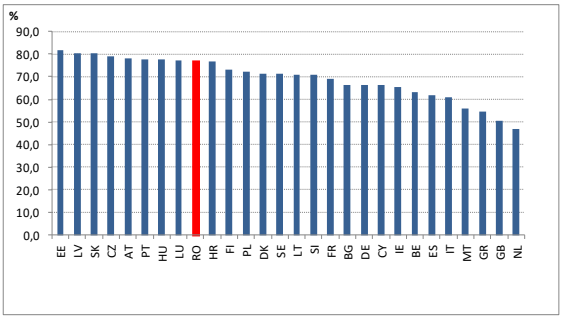
Figure 4 Share of the intra-EU28 exports in the total exports, in 2016



Source: Eurostat, New Cronos database

According to Eurostat, exports to the EU prevail in all member states, with the exception of Cyprus, the United Kingdom and Malta. In 2016, the value of the goods exported by the EU member states amounted 4860 billion euro, of which 64% were destined for other EU member states (intra-EU trade). In 2016, the largest shares of exports within the EU were recorded by Slovakia (86% of total EU exports), Czech Republic (84%), Luxembourg (83%), Hungary (81%), and Poland (80%). On the other hand, Cyprus (49%), United Kingdom (47%) and Malta (42%) were the only member states that exported more goods to non-EU countries than within the EU, in 2016. Romania is placed on the 9th position on export (as share in total EU exports) (Figure 4).

Figure 5 Share of the intra-EU28 imports in the total imports, in 2016



Source: Eurostat, New Cronos database

The largest shares of imports within the EU were recorded by Estonia (81.7% of total EU imports), Latvia (80.5%), Slovakia (80.2%), Czech Republic (79.2%), and Austria (78%). On the other hand, the Netherlands (47.1%) was the only member state that imported more than half of goods from the non-EU countries, in 2016. Similar to export, Romania is on the 9th position, as share in total import (Figure 5).

As the figures show us, the intra-EU trade shares varies between 41% and 85%, depending on the flow, which implies that integration is not only a "trade creation" factor but also a "trade diversion" ones, as a result of at least two elements of influence:

- integration stimulate the economic development of a country, which allows not only intra-trade growth

but also creates a potential for trade with extra EU28 countries.

- the globalization process acts objectively in the direction of Romania's trade opportunities with the extra-EU countries, when the criterion of economic efficiency, understood by applying the win-win principle prevails.

Table 2 Changes in the top ten Romania's partner countries of export, 2016 versus 2007

Top position 2016	Country	2007		2016	
		Billion euro	%	Billion euro	%
0	**TOTAL EXPORT**	**29.5**	**100**	**57.4**	**100.0**
	from which				
1	Germany	5.0	17.0	12.3	21.5
2	Italy	5.0	17.0	6.7	11.6
3	France	2.3	7.7	4.1	7.2
4	Hungary	1.7	5.7	3.0	5.2
5	Great Britain	1.2	4.1	2.5	4.3
6	Bulgaria	0.9	3.2	1.9	3.2
7	Turkey	2.1	7.0	1.8	3.2
8	Spain	0.7	2.3	1.7	3.0
9	Poland	0.7	2.3	1.7	2.9
10	Czech Republik	0.4	1.4	1.5	2.6
Concentration top 10 partner countries of export		20.0	67.7	37.2	64.7

Source: Own calculation based on Eurostat, New Cronos database

In the top 10 export partners, the switch between the two top positions is notable, with Germany overtaking Italy in the post-accession period (Table 2).

Although the cumulative weight of the first 10 export partner countries declined by 3 percentage points in the post-accession period, the value of the exports made by the top 10 partners in the post-accession period is almost double that of the pre-accession period.

Table 3 Changes in the top ten Romania's partner countries of import, 2016 versus 2007

Top position, 2016	Country	2007		2016	
		Billion euro	%	Billion euro	%
0	**TOTAL IMPORT**	**51.3**	**100.0**	**67.4**	**100.0**
	from which				
1	Germany	8.8	17.2	13.8	20.5
2	Italy	6.5	12.7	6.9	10.3
3	Hungary	3.6	6.9	5.1	7.5
4	France	3.3	6.4	3.7	5.5
5	Poland	1.7	3.4	3.5	5.1
6	China	1.7	3.3	3.4	5.1
7	Netherlands	1.9	3.6	2.8	4.1
8	Turkey	2.8	5.4	2.6	3.8
9	Austria	2.5	4.8	2.4	3.6
10	Bulgaria	0.6	1.2	2.1	3.1
Concentration top 10 partner countries of import		33.3	64.9	46.2	68.6

Source: Own calculation based on Eurostat, New Cronos database

With regard to the top 10 import partners, there are no major changes, with the exception of the Russian Federation exit (as a result of the reduction in crude oil imports) and the increase in the share of imports from China.

In the top 10 export partner countries, we have only one third country - Turkey, while two third countries are included in the top 10 import partner countries, Turkey and China.

The largest Romania's trade deficit was registered with EU member countries. Analyzing the trade balance of Romania with EU partner countries is important in order to identify possible ways and priorities for reducing the pressure of the deficit. Among the EU partners, we distinguish:

- countries with which Romania has a trade surplus - in 2016, namely: United Kingdom (+953 million euro); France (+410); Sweden (+162); Croatia (+50);
- countries with which Romania has a trade deficit - Hungary (-2077 million); Poland (-1801); Germany (-1505); the Netherlands (-1313); Austria (-1033); Slovakia (-574); Belgium (-472); Czech Republic (-395); Bulgaria (-242); Italy (-239), etc.

The main challenge for Romania is the very large trade deficit with new emerging countries (including some neighboring countries), such as Hungary, Bulgaria, Poland, Slovakia, the Czech Republic and with old member states, Germany, the Netherlands, Austria, Belgium, Italy and others. Romania has to increase its exports to these countries and / or to reduce its imports in order to reduce the trade deficit.

To this end, the Romania's National Export Strategy 2014-2020 should be operational, granting a special attention to the policies, instruments and measures to promote exports with high value added and those for which Romania has a great potential, such as, for example, the food industry, agricultural products, etc.

3. Changes in the structure of exports, imports and balance of trade balance

The structure of exports after EU accession is significantly improved (Table 4), by increasing the share of higher value-added product groups, for example:

- During the period 2001-2006 the exports were dominated by textiles and related products (21.1%), machinery and equipment electrical; sound recording and reproduction apparatus and equipment (17.6%), common metals and their products (14.4%), mineral products (9.0%).
- In the period 2007-2016, exports included: electrical machinery, apparatus and equipment; recorders or reproducers sound and images (26.2%, +8.6 pp compared to 2001-2006), vehicles and associated transport equipment (15.6%), common metals and articles thereof (10.9%); and textiles and textile products (8.5%).

Table 4. Structure of the main exported and imported products groups in-from Romania, in the post-accession period vs. pre-accession periods

	EXPORT		IMPORT	
	share in total export (%)		share in total import (%)	
	2001-2006	2007-2016	2001-2006	2007-2016
Agro-food products (inclusive beverage and tobacco)	0.7	9.0	2.8	8.6
Mineral products	9.0	5.9	14.2	10.6
Chemical products	4.1	4.2	7.8	9.7
Plastics, rubber and articles thereof	3.5	5.4	5.9	6.9
Wood and articles of wood, excluding furniture	4.1	3.3	0.9	0.9
Textiles and textile articles	21.1	8.5	11.8	6.6
Footwear, headgear, umbrellas and similar articles	6.7	3.0	1.3	1.1
Base metals and articles of base metal	14.4	10.9	8.6	10.7
Machinery and mechanical appliances; electrical equipment; sound and image recorders and reproducers	17.6	26.2	23.7	26.9
Vehicles and associated transport equipment	7.3	15.6	9.0	9.3

Source: Own calculation based on Eurostat, New Cronos database

Focusing on a limited number of product groups - such as electrical equipment, mechanical devices and means of transport - indicates an export vulnerability in case of a possible reduction in external demand in certain economic circumstances. At the same time, a vulnerable aspect of exports is given by the relatively significant weight of vegetal, minerals and metals raw materials, to the detriment of the products with value added by their processing in the Romania.

Imports during the pre-accession period were directed mainly towards the needs of production (machinery, appliances, technologically advanced equipment, raw materials, and energy products) but also for the consumption of the population.

The main structural changes on import side refer to the significant decreasing of the mineral products and textile article shares while the electric machines, appliances and equipment, base metals and articles thereof, chemical products and agro-food products have increased their shares in total imports.

4. Technological structures of exports and imports

The relatively weak competitiveness of Romanian external trade is determined by the low degree of diversification of exports, as well as by the low volume of exports and imports of high technology.

Compared to the pre-accession period, the top 10 most exported product groups in the post-accession period are significantly different (Table 5), because:

- the share of the top 10 product groups (in terms of value) decreased from 49.1% in 2001-2006 to 38.6% in 2007-2016;
- the technological level of the top 10 products is higher - more products incorporate medium and high technology compared to the pre-accession period;
- foreign direct investment has helped improvement of the structure of Romanian exports, from a technological level perspective, but without equating the results of other neighboring Member States.

The large share of exports of high-tech products to the total exports of a country is the best indication that the country has a higher level of competitiveness and added value for exported products.

Exports of high-tech products tended to increase in the post-accession period compared to the previous period. However, if we take into account the annual evolution of the share of exports of high-tech products, in Romania, their trend is slightly decreasing starting with 2011, explained by the impact of some short-term factors, given that, from 2014, weights have seen increases over previous years. In absolute terms, exports of high technology products increased by around 7% in 2016 compared to 2015.

As far as the imported product groups are concerned, the technological level has also improved and contains less low tech products in the top 10 groups (Table 6).

In absolute terms, imports of high technology products increased, by about 6% in 2016, compared to 2015.

Table 5 Top 10 exported product groups, by share in total exports in the pre-accession and post-accession periods (SITC 3), %

Group of products	2001-2006		Group of products	2007-2016	
	Share in total export (%)	Type of tehnology		Share in total export (%)	Type of tehnology
Petroleum oils or bituminous minerals	7,6	RB	Parts & accessories of vehicles	6,6	MT
Women's clothing, of textile fabrics	7,3	LT	Equipment for distributing electricity	5,8	MT
Footwear	6,6	LT	Motor vehicles for the transport of	5,1	MT
Men's clothing of textile fabrics, not knitted	5,8	LT	Petroleum oils or bituminous minerals	4,6	RB
Equipment for distributing electricity,	4,8	MT	Furniture & parts	3,3	LT
Flat-rolled prod., iron, non-alloy steel, not coated	4,3	LT	Apparatus for electrical circuits; board, panels	3,0	MT
Furniture & parts	4,2	LT	Footwear	2,9	LT
Articles of apparel, of textile fabrics, n.e.s.	3,4	LT	Telecommunication equipment	2,8	HT
Parts & accessories of vehicles	2,7	MT	Women's clothing, of textile fabrics	2,3	LT
Wood simply worked, and railway sleepers of wood	2,2	RB	Rubber tyres, tyre treads or flaps & inner tubes	2,2	RB
Cumulative share of top 10 products groups	***48,9***		***Cumulative share of top 10 products groups***	***38,6***	

Source: Own calculation based on UNCTAD database

Table 6. Top 10 imported product groups, by share in total imports in the pre-accession and post-accession periods (SITC 3), %

Group of products	2001-2006		Group of products	2007-2016	
	Share in total import (%)	Type of tehnology		Share in total import (%)	Type of tehnology
Petroleum oils, oils from bitumin. materials, crude	6.8	PP	Petroleum oils, oils from bitumin. materials, crude	5.5	PP
Motor vehicles for the transport of persons	3.6	MT	Medicaments (incl. veterinary medicaments)	3.5	HT
Natural gas, whether or not liquefied	2.8	PP	Telecommunication equipment	3.4	HT
Fabrics, woven, of man-made fabrics	2.7	MT	Parts & accessories of vehicles	3.2	MT
Telecommunication equipment	2.5	HT	Apparatus for electrical circuits; board, panels	2.8	MT
Medicaments (incl. veterinary medicaments)	2.4	HT	Motor vehicles for the transport of persons	2.7	MT
Cotton fabrics, woven	2.3	LT	Equipment for distributing electricity	2.3	MT
Leather	2.2	LT	Manufactures of base metal	2.1	LT
Apparatus for electrical circuits; board, panels	2.0	MT	Petroleum oils or bituminous minerals	1.8	RB
Equipment for distributing electricity	1.9	MT	Articles of plastics	1.5	LT
Cumulative share of top 10 products groups	**29.3**		**Cumulative share of top 10 products groups**	**28.6**	

Source: Own calculation based on UNCTAD database

PP	Primary products	MT	Medium technology manufactures
RB	Resource-based manufactures	HT	High technology manufactures
LT	Low technology manufactures		

5. The impact of the global economic crisis and the resilience of exports

The global dimension of the crisis highlighted the high degree of interconnection between different financial, goods and services markets, and a rapid propagation of unfavourable negative effects of the crisis on the world's regions (Ghibuţiu, 2011). For instance, the size of the negative economic impact of the global economic crisis on the external trade generated a drop in the EU countries demand for imports from Romania.

The crisis has unequivocally drawn attention to the fact that the external opening of an economy, which relies on mutual gains in external trade, must be protected by providing a level of resilience that is necessary and sufficient to remain resistant to external shocks.

The evolution of Romania's international trade after 1990 was marked by the efforts for accession and integration into the EU. Unfortunately, the impact of the 2008 global economic and financial crisis overlapped the effects of the entry into the EU, which took place on 1st January 2007, making it particularly difficult (if not impossible) to define the influence of each event on evolution of the external trade since 2009.

The external trade during the 2007-2016 period was influenced by a mixture of factors, including:

- the advantages of the EU single market and the cost of accommodation with the context and the Community's requirements;
- the impact of the international economic and

financial crisis triggered in September 2008;

- difficulties in accessing the Structural and Social Cohesion Funds, allocated by the EU.

After 2007, there have been changes in the structure of the exported and imported goods, determined both by the EU accession and crisis impact. Exports, except for the textile and based metals, increased in 2016 compared to 2007, even more than 3 times for goods such as vegetal products, fats and oils, animals; food, beverages, tobacco.

In the 2009 and 2010 crisis years there were no reductions in exports of live animals and animal products, food, beverages and tobacco, wood pulp, paper and cardboard, transport vehicles and equipment, optical and photographic instruments and apparatus , medical-surgical. These exports proved to be resilient to the shocks of the crisis, most of them being raw materials and semi-finished products offering the importers the possibility of further processing them and emerging from the crisis more quickly.

Exports of vehicles and transport equipment increased by +17.59%, while those of optical, photographic, cinematographic, medical and surgical instruments, watches, musical instruments, parts and accessories increased by 11.78%, which is explained by a favorable conjuncture for demand and relatively advantageous purchase price on the respective markets.

Groups of products with the highest export decline in 2009 (over the total export average decrease of -13.76%) were the following: animal products (-43.22%); based metals (-40.85%); chemicals (-25.07%); raw leather, tanned, fur (-15.53%); fabrics (-18.17%); footwear (-17.35%); articles of stone, plaster, cement, ceramics, glass (-17,12%); animal and vegetable fats and oils (-16.98%); plastics, rubber and articles thereof (-16.07%). These declines were a strong shock for several sectors of the national economy and emphasized the vulnerabilities of the "lohn" type production and export.

Reducing exports and imports for all SITC product groups had a positive effect on the trade balance, reducing the very large negative size of it, reached in 2007 and 2008.

Regard the recovering from the economic and financial crisis, exports have recovered much faster than imports. Thus, in the case of 14 SITC product groups, the level of their exports in 2010 was higher than those before the crisis, while the textiles and shoes groups needed two years to recover from the crisis.

6. The evolution of Romania's export competitiveness in an international context during 2006-2016

The post-accession period 2007-2016 represented a new stage for the export of Romania in terms of structure and evolution of its competitiveness in the world. In order to identify the main trends of competitiveness of Romanian exports on the SITC three-digit level, we used the UNCTAD primary data, in an international comparative context.

Positions won

We considered that changing Romania's position in the global export hierarchy by country, in the year 2016 compared to 2006, is a sui-generis export competitiveness indicator, depending on the number of positions won / lost in the world ranking. In other words, as Romania ascends into the world hierarchy, as a place or position, the higher the competitive capacity. Conversely, the more losing positions in the respective hierarchy, the lesser the competitive power in the respective group of exports.

In 2016, Romania was ranked 40th, climbing 14 positions compared to 2006 (54th place), in the hierarchy of exporting countries.

Table 7. Total Won (+) / Lost (-) positions by Romania in the world hierarchy of exports, on the main commodity markets, according to the volume of their annual value in the years 2016 and 2010 as compared to 2006

Years	Total positions won	Total positions lost	Total positions kept
2010	89	157	10
2016	150	98	8

Source: own calculation based on UNCTAD database (http://unctad.org/en/Pages/statistics.aspx)

Total number of positions won by Romania in the world export hierarchy, was more than 50% higher than that of the lost positions (150 positions won in 2016 compared to 98 positions lost in 2016), which practically reflects a favourable trend in the evolution of the export competitiveness in the post-accession period (from the view point of the number of won / lost positions).

The place of Romania's exports in the world hierarchy by countries is cuantified by a diversity of positions, depending on the range of each exported group of products.

Best performance of the products exported by Romania and some neighbour countries, in 2016:

Romania

Equipment for distributing electricity - 5th position in 2016 vs. 13th position in 2006

Maize (not including sweet corn), unmilled - 7th position vs 20th position in 2006

Wheat (including spelt) and meslin, unmilled 9th position vs 19th position in 2006

Barley, unmilled - 9th position in 2016 vs 25th position in 2006

Oil seeds and oleaginous fruits (excluding flour)- 9th position in 2016 vs 13th position in 2006

Ball or roller bearings - 9th position in 2016 vs. 18th in 2006

Tobacco - 11th position in 2016 vs 78th in 2006

Hungary

Manufactures of leather, saddlery and harness - 4th position in 2016 for vs 8th in 2006

Internal combustion piston engines, parts - 6th position, constant evolution

Television receivers, whether or not combined - 7th position in 2016 vs 8th position in 2006

Maize (not including sweet corn), unmilled - 8th position in 2016 vs 6th position in 2006

Trailers & semi-trailers - 10th position in 2016 vs 12th position in 2006

Poland

Tobacco and Wood manufacture – 3rd position in 2016

Cereals, unmilled (excluding wheat, rice, barley), Structures & parts of iron, steel, alumini, Household type equipment, electrical or not, furniture & parts - 4th position in 2016

Television receivers, whether or not combined - 5th position in 2016 vs 3rd position in 2006.

Conclusions

The catching-up process advanced rapidly after accession, but developments were very uneven across the Romanian regions.

The analysis of Romania's international trade during the 2007-2016 period leads to the following analysis:

- the volume of foreign trade has increased throughout the period both on export and on import, with the exception of the year 2009, when the impact of the international financial crisis has declined, so that at present it can be said that the Romanian economy has a relatively high external exposure;
- as a result of traditional trade relations, but also of EU integration, exchanges

Romania's trade with EU countries account for around 70% of the total volume of foreign trade, in recent years there has been a tendency to intensify trade relations with the extra EU-28 countries;

- the largest chronic deficit is recorded by Romania's foreign trade, with some EU countries, especially with Germany, Italy, the Netherlands, France, Austria, etc., countries to which Romania's foreign trade is highly dependent;
- the structure of commodity exports of Romania is dominated by the low and medium technology level, with relatively low added value;
- analysis of competitiveness of exports of Romanian products (SITC two-digits), based on the positions won / lost in the hierarchy of world exports highlights the fact that Romania occupies relatively significant positions (among the top 15-20 exporters especially in products with relatively low processing level, generally being on the foreign markets "price-taker" rather than "price-maker ", in 2016, compared to 2001, Romania gained positions in the world export ranking, to 150 groups of goods and lost positions to 98 groups, which shows a favourable trend to increase the competitiveness of the trade Romanian society, extremely necessary, but still insufficient to reduce the gaps that separate us from the developed countries.

References

- Albu, Liviu (coord), Impactul aderării României la Uniunea Europeană asupra economiei românești. Analiză sectorială (industrie, agricultură, servicii etc.), Studii de Strategie și Politici SPOS 2017, Studiul nr.1, IER, Bunuresti 2018
- Bitzenis, Aristidis; Andronikidis, Andreas - Cost and benefits of integration in the european union and in the Economic Monetary Union (EMU) 2006
- Băcescu-Cărbunaru, Angelica, Condruz-Băcescu, Monica, The benefits and costs of Romania post-accession to the European Union, The Bucharest Academy of Economic Studies
- Ciupagea, Constantin, Jula Dorin, Marinas, Laura, Turlea, Geomina, Unguru Manuela, Gheorghiu Radu, Evaluating costs and benefits of Romania's integration into the European Union), Romanian journal of european affairs vol. 4 No. 4, 2004
- Hunya, Gábor - Romanian journal of european affairs, Vol. 17, No. 1, June 2017
- Iancu, Aurel - Transition, integration and convergence - the case of Romania - Romania: Ten Years of EU Membership
- Popovici, Oana Cristina, Zaman, Gheorghe, Impact of foreign trade on Romania's economic sustainability during the pre- and post-accession periods, 1st International Conference'Economic Scientific Research - Theoretical, Empirical and PracticalApproaches', ESPERA 2013
- Gábor Hunya - Romanian journal of european affairs Vol. 17, No. 1, June 2017
- Nuroglu, Elif - The Impact on the EU and SEE Countries, Faculty of Business and Administration, International University of Sarajevo Bosnia and Herzegovina, Journal of Economic and Social Studies, vol 2, no 2 julie 2012
- Zhelev, Pascal, Tzanov, Tzvetomir, Bulgaria's export competitiveness before and after EU accession, Journal of Economics and Business, Vol. XV – 2012, No 1 & 2 (107-128)
- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the regions and the European Central Bank Five years of an enlarged EU – economic achievements and challenges

REFORM OF RULES ON EU VAT

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Abstract

In January 2018 the EU has released two proposal designed to simplify the VAT system, specifically around reduced rates, and to reduce compliance costs of smaller businesses in respect of VAT.

The EU's common rules on VAT rates do not treat Member States equally. More than 250 exemptions allow several Member States much more flexibility in setting VAT rates than others. While these derogations are due to expire once the reformed VAT system comes into place, the rates proposal will ensure that all Member States have the same flexibility and a uniform structure in which to set their own VAT rates.

The second proposal is designed to make trading in other EU member states easier for smaller businesses. Currently, small businesses may benefit from generous thresholds in their state of establishment, but zero thresholds exist for non-established businesses, meaning higher compliance costs. The intended proposals will provide simplification measures (around invoicing, record keeping etc.) for businesses with a turnover not exceeding €2 million and will allow member states to apply thresholds to non-established businesses with a turnover not exceeding €100,000.

Keywords: *standard rate of VAT, reduced rate of VAT, VAT registration thresholds, VAT compliance, VAT reform.*

1. Introduction

The European Union Value Added Tax (EU VAT) applies to all member states. The current VAT system dates from 1993 and was intended to be a transitional system. The abolition of fiscal frontiers between Member States and the taxation of goods in the country of origin required common rules for VAT rates to avoid distortion in cross-border shopping and trade.

The second section of this work gives an overview of the VAT rates, VAT registration and VAT return, applicable this year in each Member States.

A definitive VAT system that works for the Single Market has been a long-standing commitment of the European Commission. The **2016 *VAT Action Plan***[1] explained the need to come to a single European VAT area that is simpler and fraud-proof. Following the adoption of this Action Plan, the European Commission has made a series of proposals to work towards its completion.

In **October 2017** the European Commission agreed on four fundamental principles (named "cornerstones") of a new definitive single EU VAT area:[2]

- **Tackling fraud**: VAT will now be charged on cross-border trade between businesses. Currently, this type of trade is exempt from VAT, providing an easy loophole for unscrupulous companies to collect VAT and then vanish without remitting the money to the government.
- **One Stop Shop:** It will be simpler for companies that sell cross-border to deal with their VAT obligations thanks to a *One Stop Shop*. Traders will be able to make declarations and payments using a single online portal in their own language and according to the same rules and administrative templates as in their home country. Member States will then pay the VAT to each other directly, as is already the case for all sales of e-services.
- **Greater consistency:** A move to the principle of 'destination' whereby the final amount of VAT is always paid to the Member State of the final consumer and charged at the rate of that Member State. This has been a long-standing commitment of the European Commission, supported by Member States. It is already in place for sales of e-services.
- **Less red tape:** Simplification of invoicing rules, allowing sellers to prepare invoices according to the rules of their own country even when trading across borders. Companies will no longer have to prepare a list of cross-border transactions for their tax authority (the so-called 'recapitulative statement').

In **November 2017** the European Commission proposed new rules on administrative cooperation between Member States' administrations in order to fight VAT fraud more efficiently.

In **January 2018** the EU has released a two-fold proposal designed to simplify the VAT system, specifically around reduced rates, and to ease the administrative burden and compliance costs of smaller businesses in respect of VAT. These proposals are detailed in the third section.

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[1] http://europa.eu/rapid/press-release_IP-16-1022_en.htm

[2] http://europa.eu/rapid/press-release_IP-17-3443_en.htm

2. Overview and comparison of VAT in EU Member States

2.1. VAT rates in EU member states

Each member state's national VAT legislation must comply with the provisions of the Directive no. 112/2006 which sets out a number of general rules on VAT rates. Member States shall apply a standard rate, which may not be lower than 15%, but the Directive does not specify any maximum limit.

Because VAT rates has not been harmonised, every year the European Commission publishes the official list of VAT rates applied in each member state. ***Table 1*** contains the list of VAT rates for 2018.

As we see in ***Graph 1*** the country with the lowest **standard rate of VAT** is Luxembourg (17%) while Hungary is the country with the highest standard rate of VAT (27%). In 2018 the average standard rate of VAT in EU28 is 21.46%. In EU15 this rate is 21.67% while in EU13 the average standard rate of VAT is 21.23%.

With the exception of Romania, where the standard rate of VAT has decreased from 20% in 2016 to 19% in 2017, in EU Member States, standard rates have not changed in the last two years.

Regarding **reduced VAT rates,** the differences between Member States are significant: 10 states have one reduced rate, 16 states have two reduced rates, Greece has three reduced rates and Denmark is the single state which doesn't have reduced rate. The minimum reduced rate of 5%, value imposed by European Directives is found in Croatia, Cyprus, Italy, Lithuania, Hungary, Malta, Poland, Romania and United Kingdom. The highest values of reduced rate are found in Hungary (18%), Greece (17%), Czech Republic (15%) and Finland (14%).

These reduced rates of VAT are applied to different categories of goods and services like: food products, water supplies, pharmaceutical products, books, newspapers, hotel accomodation etc.

Over-reduced rates (under 5%) are applied only in five states: Spain (4%), France (2.1%), Ireland (4,8%), Italy (4%) and Luxemburg (3%), for goods and services as: food products, water supplies, pharmaceutical products, books, admission to cultural services, shows (cinema, theatre, sports), agricultural inputs etc.

A characteristic met among EU countries is represented by the **parking rate**. Member States which, at 1 January 1991, were applying a reduced rate to the supply of goods or services other than those specified in Annex III may apply the reduced rate to the supply of those goods or services, provided that the rate is not lower than 12 %. The parking rate is applied in five Member States (12% in Belgium, 13% in Austria and Portugal, 13.5% in Ireland and 14% in Luxemburg) for certain goods as: certain energy products, wine, agricultural tools and utensils, washing and cleaning products etc.

According to Title VIII, Chapter 4 of the VAT directive 2006/112/EC, the zero rate is applied by seven states: Belgium, Denmark, Ireland, Malta, Finland, Sweden and United Kindom for newspapers, supplies of pharmaceuticals, medicines, supplies of food products for human consumption etc.

2.2. EU VAT compliance

For businesses with an EU VAT registration, and providing taxable supplies of goods or services, there are a number of requirements to follow to ensure they are fully compliant with European VAT regulations. These rules are detailed in the VAT Directive. All member states of the EU must implement these VAT compliance obligations into their own laws.

Companies providing taxable supplies must obtain a valid, unique EU VAT number from their home country. If they are also buying and selling goods in another EU country, they may have to register there, too. This will give them a valid VAT number which they can record all transactions against. Businesses can also provide this number to their foreign EU customers to ensure they are correctly charged nil VAT on intra-community supplies of goods or services.

Table 2 contains a summary of the 2018 VAT registration annual thresholds for **resident** companies in the 28 EU member states. The great variations regarding the annual threshold for VAT registration represent a real trap for those who intend to develop their businesses in different Member States. The threshold varies from zero (Greece, Hungary, Malta, Spain and Sweden) till 85000 euro (UK), so the local advice is necessary even from first stages of a business start-up.

EU Member States are free to set their own calendars for VAT return reporting, as we see in ***Table no. 3***. Countries typically follow the format below:

- **Monthly** reporting is the most common cycle.
- **Quarterly** reporting is the majority of other situations.
- **Annual** reporting is required in addition in certain countries (e.g. Italy). Other countries may only require a single annual return if there is very limited activity (e.g. Germany).
- **On an activity basis** which is very rarely allowed (e.g. France) for companies with irregular trading.

Irrespective of the period of submission, the mandatory information of VAT return are: chargeable VAT, deductible VAT, net VAT amount (payable or receivable), total value of input transactions and total value of output transactions.

3. Reform of rules on EU VAT

On January 18th of 2018, the European Commission made two proposals to improve the EU VAT system:

- Equal treatment of Member States in setting VAT rates;
- Elimination of foreign EU VAT obligations for small enterprises.

3.1. Equal treatment of Member States in setting VAT rates

At the moment, VAT rules agreed by all EU countries allow for two distinct categories of products to benefit from a reduced VAT rate of as low as 5% in each country. A number of Member States also apply specific derogations for further reduced rates.

The proposed definitive regime is based on taxation at destination instead of origin, as initially envisaged. Restrictive rules on the application of rates are therefore no longer essential to avoid distortion of competition.

The new rules will give all EU Member States flexibility to apply the following reduced rates to products and services:

- 2 separate rates to be set between 5% and the standard rate
- 1 rate to be set between 0% and the reduced rates
- 1 rate of 0%

The current list of goods and services to which reduced rates can be applied will be abolished and replaced by a new list of products to which the standard rate of minimum 15% must always be applied. This list will include products such as alcoholic beverages, gambling, smartphones, precious metals, consumer electronics, weapons, household appliances, tobacco products, fuel, petrol & diesel, weapons, passenger vehicles.

Synthesising, the difference between the current rules and the new rules is reproduced in the table below:

Current rules	New rules
System based on exceptions	System based on general rules
No uniform application of rules	Uniform application across the EU

To safeguard public revenues, Member States must also ensure that the weighted average of all VAT rates applied is at least 12%.

3.2. Elimination of foreign EU VAT obligations for small enterprises.

On 18 January 2018, the European Commission proposed exempting small enterprises (SMEs) from cross-border VAT obligation.

Currently, EU small businesses selling in their own country are exempt from VAT if their sales are below a set threshold. This threshold varies between member states, e.g. €10,000 in France; and £85,000 in the UK. However, when selling in other EU states, SME's must register and charge local VAT on the first sale. This imposes a VAT compliance cost on small companies and restricts the free operation of the Single Market for SME's.

The EU is now proposing:

- A €2 million revenue threshold across the EU, under which small businesses would benefit from simplification measures, whether or not they have already been exempted from VAT;
- The possibility for Member States to free all small businesses that qualify for a VAT exemption from obligations relating to identification, invoicing, accounting or returns;
- A turnover threshold of €100,000 which would allow companies operating in more than one Member State to benefit from the VAT exemption

4. Conclusions

Under the current EU VAT directive, Member States have the option of applying a maximum of two reduced rates, not lower than 5% to a fairly restricted list of goods and services, which are listed in Annex III of the VAT Directive. Examples of these categories include foodstuffs, water supplies, admission to sporting events and medical care.

Existing reduced rates and derogations will expire upon the introduction of the definitive VAT regime (still being negotiated), and at this time new harmonised and flexible rules will be introduced. In summary, these are:

- Standard rates must remain at 15% or above
- Member states may introduce two reduced rates between 5% and 15%
- Member states will be permitted to implement one zero rate
- A further reduced rate between 0% and 5% may be implemented

In addition to the above, the restrictive list of goods and services to which the reduced rate may apply will be removed, and in its place will be a list of the goods and services to which a reduced rate cannot apply (items such as alcohol, tobacco, smartphones, fuel, precious metals etc.).

The second proposed measure follows up on the *VAT Action Plan towards a single EU VAT area*[3] presented in April 2016 and *the Plans for the biggest reform of EU VAT rules*[4] proposed by *European Commission* in October 2017. Businesses trading cross-border currently suffer from 11% higher compliance costs compared to those trading only domestically. The intended proposals will provide simplification measures (around invoicing, record keeping etc.) for businesses with a turnover not exceeding €2 million and will allow member states to apply thresholds to non-established businesses with a turnover not exceeding €100,000.

These legislative proposals will now be submitted to the European Parliament and the European Economic and Social Committee for consultation and to the Council for adoption.

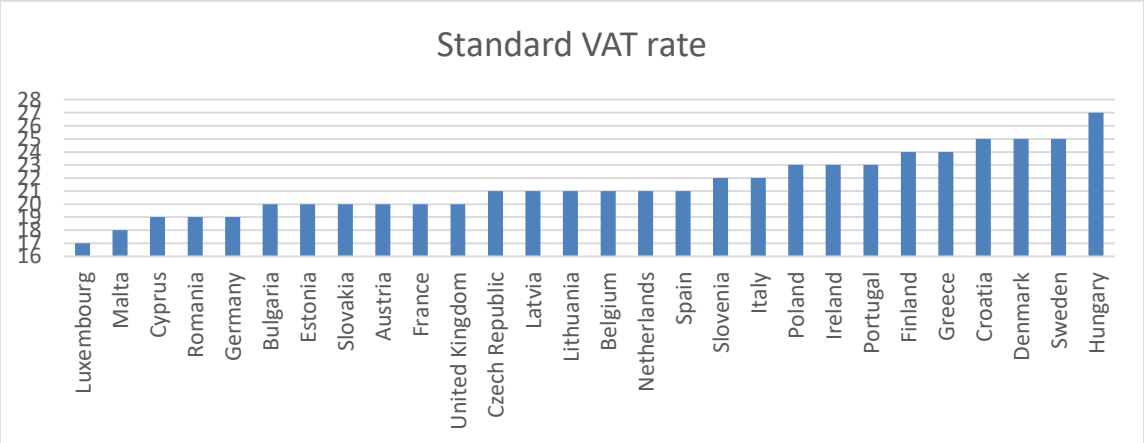
[3] http://europa.eu/rapid/press-release_IP-16-1022_en.htm
[4] http://europa.eu/rapid/press-release_IP-17-3443_en.htm

Table no. 1. VAT rates in the Member States (01.01.2018)

	Member States	Standard Rate (%)	Super Reduced Rate (%)	Reduced Rate (%)	Parking Rate (%)
1.	Austria	20	-	10/13	13
2.	Belgium	21	-	6/12	12
3.	Bulgaria	20	-	9	-
4.	Croatia	25	-	5/13	-
5.	Cyprus	19	-	5/9	-
6.	Czech Republic	21	-	10/15	-
7.	Denmark	25	-	-	-
8.	Estonia	20	-	9	-
9.	Finland	24	-	10/14	-
10.	France	20	2,1	5,5/10	-
11.	Germany	19	-	7	-
12.	Greece	24	-	6,5/13/17	-
13.	Hungary	27	-	5/18	-
14.	Ireland	23	4,8	9/13,5	13,5
15.	Italy	22	4	5/10	-
16.	Latvia	21	-	12	-
17.	Lithuania	21	-	5/9	-
18.	Luxembourg	17	3	8	14
19.	Malta	18	-	5/7	-
20.	Netherlands	21	-	6	-
21.	Poland	23	-	5/8	
22.	Portugal	23	-	6/13	13
23.	Romania	19	-	5/9	-
24.	Slovakia	20	-	10	-
25.	Slovenia	22	-	9,5	-
26.	Spain	21	4	10	-
27.	Sweden	25	-	6/12	-
28.	United Kingdom	20	-	5	-

Source: https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/ how_vat_works/ rates/vat_rates_en.pdf

Graph no. 1. VAT rates in the Member States



Source: https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/how_vat_works/rates/vat_rates_en.pdf

Table no. 2. EU VAT registration thresholds 2018

	Member States	VAT Thresholds
1.	Austria	€30,000
2.	Belgium	€25,000
3.	Bulgaria	BGN 50,000

4.	Croatia	HRK 300,000
5.	Cyprus	€15,600
6.	Czech Republic	CZK 1million
7.	Denmark	DKK 50,000
8.	Estonia	€40,000
9.	Finland	€10,000
10.	France	Goods €82,800; Services €33,200
11.	Germany	€17,500
12.	Greece	nil
13.	Hungary	nil
14.	Ireland	Goods €75,000; Services €37,500
15.	Italy	€60,000
16.	Latvia	€40,000
17.	Lithuania	€45,000
18.	Luxembourg	€30,000
19.	Malta	nil
20.	Netherlands	€1,345
21.	Poland	PLZ 150,000
22.	Portugal	€12,500
23.	Romania	ROL 300,000
24.	Slovakia	€49,790
25.	Slovenia	€50,000
26.	Spain	nil
27.	Sweden	nil
28.	United Kingdom	£85,000

Source: https://www.vatlive.com/eu-vat-rules/eu-vat-number-registration/vat-registration-threshold/?sessionId=1522776716266&referrer=https%3A%2F%2Fsearch.yahoo.com%2F&lastReferrer=www.vatlive.com

Table no. 3. VAT Return

	Country	**Periodicity of VAT returns**	**Annual VAT declaration deadline**
1.	Austria	Monthly / Quarterly	April
2.	Belgium	Monthly / Quarterly	Not Applicable
3.	Bulgaria	Monthly	Not Applicable
4.	Croatia	Monthly / Quarterly	Not Applicable
5.	Czech Republic	Monthly / Quarterly	Not Applicable
6.	Cyprus	Quarterly	Not Applicable
7.	Denmark	Monthly / Quarterly	Not Applicable
8.	Estonia	Monthly	Not Applicable
9.	Finland	Monthly / Quarterly / Annually	Not Applicable
10.	France	Monthly / Quarterly / Annually	Not Applicable
11.	Greece	Monthly / Quarterly	May, 10
12.	Germany	Monthly / Quarterly	May
13.	Hungary	Monthly / Quarterly / Annually	Not Applicable
14.	Ireland	Biannually / Quarterly / Annually	Not Applicable
15.	Italy	Annually	Not Applicable
16.	Latvia	Monthly / Quarterly / Biannually	1 May
17.	Lithuania	Monthly / Biannually	Not Applicable
18.	Luxembourg	Monthly / Quarterly / Annually	May
19.	Malta	Quarterly / Annually	March
20.	Netherlands	Monthly / Quarterly / Annually	March
21.	Poland	Monthly / Quarterly	Not Applicable
22.	Portugal	Monthly / Quarterly	15th July
23.	Romania	Monthly / Quarterly / Biannually / Annually	Not Applicable

24.	Slovenia	Monthly / Quarterly	Not Applicable
25.	Slovakia	Monthly / Quarterly	Not Applicable
26.	Spain	Monthly / Quarterly	January
27.	Sweden	Monthly / Quarterly / Annually	Not Applicable
28.	United Kingdom	Monthly / Quarterly / Annually	Not Applicable

Source: http://europa.eu/rapid/press-release_MEMO-13-926_en.htm

References

- http://europa.eu/rapid/press-release_IP-16-1022_en.htm
- http://europa.eu/rapid/press-release_IP-17-3443_en.htm
- https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/vat/how_vat_works/rates/vat_rates_en.pdf
- https://www.vatlive.com/eu-vat-rules/eu-vat-number-registration/vat-registration-threshold/?sessionId=1522776716266&referrer=https%3A%2F%2Fsearch.yahoo.com%2F&lastReferrer=www.vatlive.com
- http://europa.eu/rapid/press-release_MEMO-13-926_en.htm

QUALITY SCHEDULING INDEX WITHIN PRODUCT'S LIFECYCLE AND THE MONDERN SOCIETY

George Cristian GRUIA*

Abstract

The purpose of this article is to provide a starting point for application of Quality Scheduling Index within the production process with an emphasis on the product lifecycle and a comparison with our society where due to demand there is an offer which should be in time, at the required level of quality and at the corresponding place of selling. The scope of the article is the expansion of the application of newly developed Quality Scheduling Index within several other branches of industry and an initial evaluation of its implementation. The article presents outputs of the author's yet not published research and work in the filed of management and economics of the industrial enterprise and wants to become a starting point of the implementation of Quality Schedulin Index in enterprises which want to innovate their production process and reduce costs and dead time of the products / services within their lifecycle.

Keywords: *inovation, quality, management, production, lifecycle, Quality Scheduling Index.*

1. Introduction

The Management of Product Lifecycle is aimed in driving all the particular areas, which have a direct influence on some of the life cycle stages such as maintenance, quality, information systems and costs - research, development, production management, etc. Among the life cycle management there are a number of methods and techniques with different approaches regarding the necessary data input and as well as the results we get from them. The common element is the valuable information supporting the management, which helps us make the right decision and choose the optimal way of solving the economic problem. Among the aforementioned methods belongs the design cost, LCA - Life Cycle Assessment, LCE - Life Cycle Engineering, LCC - Life Cycle Costing, WLCC - Whole Life Cycle Costs, PDM - Product Data Management, etc. Until now were created many tools, methods and techniques for managing the life cycle, but these tools are limited to the evaluation of certain selected specific tasks. The models have a number of assumptions and initial conditions, in order to allow universal applicability for a wide range of users.

We consider the following approach of using the product lifecycle stages for delimiting and showing the aplicability where newly developed Quality Scheduling Index can be used and/or these product lifecycle to be used as starting point for computing the necessary variables which are being used in the computation of Quality Scheduling Index.

This research is part of a greater project where based on the philosophy that all the necessary resources should be in place at the right processing table where at the specific, requested time should be processed without any or minimizing the delays (dead time) also the society should be organized so that our daily activities to be most efficient and to get the maximum output without overworking the worker / processing machine. An analysis is being made from a social – economic point of view where first the government should be working Just-In-Time, to be efficient and to become a model for other private companies from different domains, because after all, the processes can be divided in time and according to a manufacturing production line. However in this article only an initial overview of this idea is being presented.

2. Quality Scheduling Index and Product's lifecycle

The current article is based on the author's previous work, where Quality Scheduling Index (QSI) was developed[1] *as an answer to the below Research Questions, which can be continuously updated to answer the actual market conditions:*

- How can we achieve the desired level of quality of our services / products by using the available resources with the condition of minimizing the costs?
- Where should we consider the quality within the product lifecycle and with what costs?
- How can we optimize the production process from the quality, time consumption and indirect costs point of view?

These Research Questions are part of the author's yet not published work and due to article constrains we consider only some part of them in the present article. We will consider further the implication of Quality Scheduling Index within the production process and how can we use it within the product's lifecycle.

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[1] Gruia George Cristian and Kavan Mihal „A New Managerial Tool For Scenarios In Scheduling", *Global Economic Observer*, Institute for World Economy of the Romanian Academy, vol. 2(2), (2014): 4-13

The Quality Scheduling Index was developed for small and middle size enterprises as a management tool which can be used in finding the optimum function of costs, time consumption and quality from different scenarios due to the request from several managers from different European companies. A survey was carried out in this sense and the result was the need from the market of such a tool which can show managers how to basically optimize and innovate the production process. I consider that managers should come together and decide about the next step in the company's future on the market and to do so they need scenarios:

- Optimistic;
- Most probably;
- Pesimistic

Scenarios are part of the selecting process of the right strategy for the required segment of the market.

In my opinion, managers in manufacturing companies can use the newly developed index, which can be implemented in different scenarios to help them decide which strategy to adopt on the desired market, according to their initial goals and budgets.

Innovation is part of the company's business model and each company should decide which innovation portfolio to adopt according to the competitive environment. As Davila (2012) considers in his book[2], I too consider that the right amount of innovation at the right time, can differentiate winners from the losers of the customers. Thus we will further consider that there are two types of strategies (Play To Win Strategy and Play Not To Lose Strategy), which companies must consider on a long term to achieve their goals. In the same sense in different studies it was considered that the innovation and development of the public sector[3] are also important in the good development of the state[4], and thus the area of applicability of my quality scheduling index can be broaden in the private as well as in the public sector.

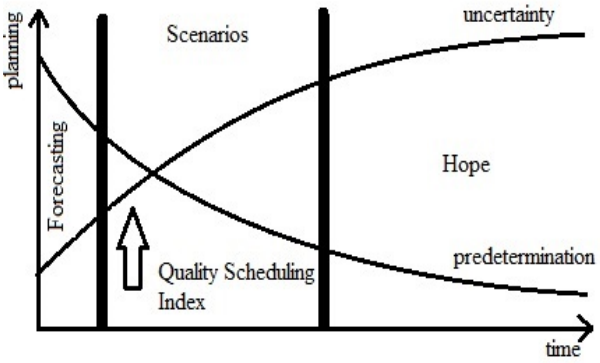
Based on my research, I can consider different scenarios based on different values of the index QSI. The main goal of the index is, based on the input data, to find the best value for obtaining maximum value for the requested quality level by the customers, with minimum production costs and time usage.

The level of quality is settled according to the utility level, different customers consider for the desired products. In collaboration with the marketing and CRM/CI departments, companies should find the needs and the problems of the customers and develop strategies based on different scenarios, which in turn are based on the computational values of the Quality Scheduling Index, for different levels of quality desired by different customer segments from different markets.

With the help of the Quality Scheduling Index, based on the operational output, different scenarios can be stated and some strategic decisions can be taken accordingly. The usage of the index is for the area in time when the level of uncertainty is bigger and the level of predictability is lower than in the area of planning based on forecasting, i.e. the area of planning based on scenarios for the development of new business strategies. This can be better seen from the figure 1 below.

Companies should use time and quality of time consumption in planning and deciding next steps for maintaining the same or better level on the market. With the help of the Quality Scheduling Index, one can improve the productivity of work within company and thus can produce better and faster outputs with the same inputs (resources, financial and non-financial).

Fig. 1 – Position of QSI in planning using scenarios



Source: Own contribution

We all know that productivity is the ratio between output and input,

$$productivity = \frac{output}{input}$$

and if we know that the input is according to the standards (for e.g. the raw material is delivered in time, at the required quality standard imposed by us, the company, the people are trained and chosen by the HR department to work within our company according to our needs and financial resources and our equipment is advanced enough to perform well our manufacturing operations), the only way to improve the productivity of the company and our work is to increase the our output to the market. By output I understand either a bigger number of products (but which must comply with quality standards and not to overburden the machines and / or workers) or the same amount of products, but with better quality, thus to lower the rebute and the faulty products which will be refused by the quality audit. In the second case, the quality of the products is improved, thus the company reduces its

[2] Davila, T., Epstein, M., Shelton, R.: *Making Innovation Work: How to Manage It, Measure It, and Profit from It*, Updated Edition, FT Press, 2012.

[3] Gruia George and Gruia George Cristian: „The role of state powers in the development of business environment", *Perspectives of Business Law Journal*, [online], vol.2, no.1: 105-112.

[4] Gruia, George. *Politici Publice.* (Craiova: Sitech: 2014), 130-156.

time (and accordingly its costs) dealing with service, rework or maintenance of our products, when they broke. Also customers will recommend our qualitative products to their acquaintances and relatives and our market share will raise, qualitative products being one of our competitive advantages.

If we consider either two cases, we can increase the output of the company by organizing the resources on the production line to produce faster and better products, without any additional costs. That is why I have developed the Quality Scheduling Index which can improve the output of the company and in this way the management can use it as managerial tool to improve the productivity within the company and plan on larger time interval, than the one, where forecasting is used, in order to expand on other markets, destroy the actual competition and faster innovate the products in radical way, rather than semi-radical one.

A manufacturing company can thus better implement a radical innovation in either the technology or in the business model, or in both actually, by reducing the risk involved with this kind of innovation, because, now, after implementing the QSI on the production line, the time usage of the workers is without any "dead" time, the company doesn't lose money from this, nor uses additional resources than the one which are absolutely needed for the production process and can relocate these resources in the R&D department for next generation products.

However, without strong leadership and vision from the top management, the innovation is not likely to be achieved and implemented in the company's culture. The difference between the two possible types of strategy is given by internal as well as external factors of the company. Between the internal factors, we can recall:

- Technical possibilities
- Organizational abilities
- Success of the actual business model
- Finances
- Vision of the company

I can add to the internal factors, which drive innovation through the company, also:

- Innovation culture and willingness to improve the process within the product lifecycle, without any financial drive incentives---and this factor can be easily solved with the help of the QSI.

The index can be also used as part of the top management's vision of innovation the business model, by adding value to the produced final products, by increasing the quality and reducing the time spent with their production. Here by "reducing time", I consider reducing of the unnecessary time spent of the product on the production lines, reducing or even elimination of the waiting / dead time of the products from their technological processes and manipulation.

2.1. Scenarios and QSI

Whatever part of the innovation process we want to improve (business model or the technology), we should also increase productivity of the processes, by reducing the time spent with them and correspondingly the costs, and increasing the quality of the processes and of the products.

The success of the actual business model, as one of the internal factors which influence the choosing of the right innovation strategy, can be analysed from the productivity point of view. Managers must look at the processes and based on different scenarios, made from the data from the customers and suppliers, i.e. data from CRM and CI, they should improve the time spent in the factory with the production of their goods, but without reconsidering the quality level required by the standards on one hand (ISO 9001, 14 000, 18 000, etc.) but also by the customers, on the other hand.

I consider that a manufacturing small or middle size company can develop its innovation strategy based on scheduling the internal processes in a productive way. In other words the following main scenario mainframe should be maintained when dealing with a new scenario, as part of the future strategy:

1. Arrange the working areas with the corresponding tools in a greedy manner so that each worker can be accounted responsible for his work, if any fault will appear.
2. Prioritize the work according to the available resources and the main skills of the workers so that the time and quality can be maintained within standards.
3. Consider and arrange the machines in a parallel way in order to increase productivity and schedule the manufacturing operations with a focus on quality, time and their corresponding costs.
4. Deliver goods to the market and receive feedback from both the customers and workers in order to improve the process.
5. Adjust the short term and long term strategy of the company, based on the feedback and obtain approval from the stakeholders, with regard to the fulfilment of their needs.

Scenarios are very difficult to create and implement in a company, i.e. because when we talk about scenarios we should consider different points of view of the same problem in order for managers to come to a single generally accepted idea.

The scenario should take in consideration the companies outside environment as well as the internal one, which is responsible for production and shipment of the goods.

2.2. Product's lifecycle stages and QSI

We focus on improving the strategy, by managing the internal processes of the company in a productive time manner from the early stages of the product's lifecycle.

When talking about product's lifecycle we should consider the following stages:

- Introduction to the market – where after a R&D stage the new product is introduced based on customers' feedback and requirements;

- Growth – where our product is already known by some customers and due to its qualities and marketing campaigns, it acquires more visibility and more and more customers are willing to buy it;
- Maturity and Saturation of the market from our product – here all of the market targeted segment know our product and there is only a matter of time to buy it;
- Decline – where due to product's end of life or end of sale we or due to competition take out the product which became obsolete and replace it with a newly developed one.

A company can apply the QSI in the first stage by arranging the machines and working stations into a parallel way so that the required level of quality from the customer's feedback to be attained. Actually this first stage is connected to the last stage of our product's lifecycle if we choose to Decline our product to make room for the new one, which in most of the cases is done due to legal or ecological regulations or due to another competitor who developed a better product than ours and the only way to Win is to completely innovate and launch anew product.

In the second stage, where our product gets momentum and is being seen by more and more potential customers, QSI can be used to adjust the production costs and time used in production (even if our goal is to have them at minimum, due to some technical constraints some parts of our product might spend a higher time on a machine that others and this is due to the requirements of the desired quality level). However there levels of quality even if they are according to the norms can be lowered in order to minimize costs and thus get the product to more customers than before and this also can be done by adjusting the Quality Scheduling Index.

The Quality Scheduling Index is to be implemented into the production process as stated before, however this is in direct relation with the product's lifecycle because the desired level of quality should be at least the same with the initial requirements from the market, in all of the sales stages within time from introduction to the market until the decline, where we can take feedback from customer and adjust our index levels so that it answers the new requirements of quality.

As we all know, manufacturers are not willing to invest into a product to be more qualitative than the requirements from the market, because for an example a market is not mature enough and there is not enough money to cover the costs related with the 100% quality level ideally required by our market segment and that is why we can adjust our QSI if our strategy requires so based on an optimistic scenario. The management of a company can decide that in certain circumstances to prolongue the Maturity stage of the product's lifecycle by changing level of the quality up so some specific point, based on the research and feedback from the market. And this can be easily attained in the automated and semi – automated production stages, where a change of operation and machine processing can be done relatively fast in comparison with human operated working stations where we cannot do anything without a proper training and investment in long term positions. An example can be seen into the automotive industry where after a new model is launched and it acquires momentum from the market, the producers decide to innovate the product by changing the design of the headlights, which gives another boost in the sales, even if the technical functionality of the car didn't change and the previous and the new headlight give the passagers the same light on the road.

My QSI was developed as a management tool which can be applied and used to innovate the production line, which in terms, as shown above, influences the stages of the product's lifecycle.

2.3. What is Quality and EFQM?

Quality is always evaluated and determined by an entity, which can be: a person, a buyer, a customer. This evaluation process has a strong distinctive and personal character! For example the same "qualitative" product for a buyer, where costs are crucial, is different seen by a person who wants to buy that product no matter what the cost is, due to its features and because is an innovation / new thing on the market.

Quality is assessed primarily by the buyer - customer (agent)! He is paying the requested cost and therefore his opinion is authoritative and always right! There is an old saying that "Our customer is always right", which translates in different cultures in slightly similar ways, but the idea is the same.

Quality can be assessed by non-target agents - not just customers, but

- Manufacturers;
- Competitors;
- Creators;
- Service providers;
- Experts, valuers;
- Bureaucrats and clerks.

One can attribute the value of quality to things he does create or does not create:

- Quality of casting;
- Quality of service;
- Quality of process;
- Quality of environment;
- Quality of life;
- Quality of people, etc.

based on their observations, utility, use or consumption.

One can also evaluate and rate quality based on:

- Selection;
- Sorting;
- Classification;
- And predictions of corresponding use.

If there is no quality definition, then the quality cannot be measured! If something cannot be measured, it cannot be on purpose and efficiently improved.

In this sense we consider the newly developed index, i.e. Quality Scheduling Index, which evaluates

the time consumption of each operation with regard to the quality of the work and associated with indirect costs. In order to apply this index in any manufacturing small or middle size company, a new methodology (standard) for its implementation was also developed with its evaluation scale, however this is part of the author's other published work[5].

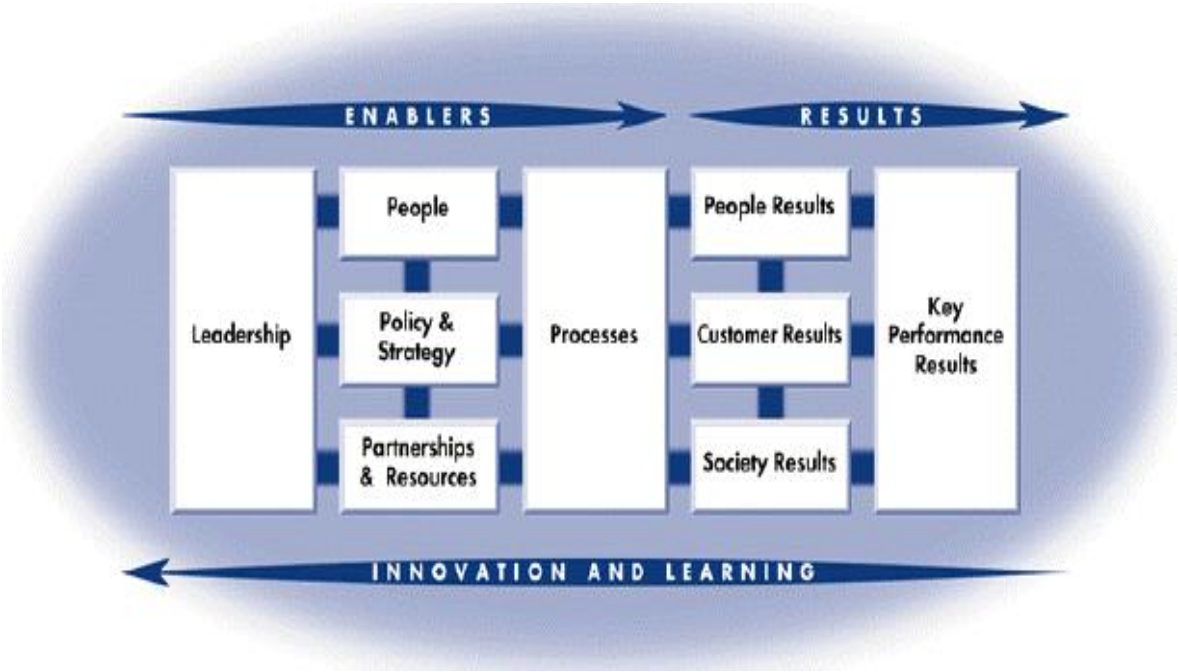
For the sake of this study I will only mention the mathematical formula of the index, my purpose being to focus more on the managerial point of view and how we can extrapolate the philosophy behind the need of its creation to the modern society where time usage is critical and we should improve our daily activities, especially the quality of the time usage and the indirect costs associated with them.

$$QSI = \frac{\sum_{i=1}^{h}\sum_{k=1}^{f}(ew_{ki}E_{ki}y_{ik} + tw_{ki}T_{ki}z_{ik} + w_{ki}C_i)}{\sum_{i=1}^{h}\sum_{k=1}^{f}\frac{q_i}{tc_i * (E_{ki} + T_{ki} + C_i)}}$$

From the production point of view the improvement of quality of time usage and the indirect costs associated with it, we can use the index as showed above to improve the product's lifecycle stages, because every manager wants to develop its products with the minimum production costs, at the highest quality and in the fastest way possible, so that he can take the lead in the market with the innovation of the product.

For better visual aid we can use the European Quality Award Model, which was created as a reward for companies from public and private sector where the resources are scarce and according to their website[6] : "The EFQM Excellence Model provides a framework that encourages the cooperation, collaboration and innovation that we will need to ensure this goal is achieved."

Figure 1 – Enablers of EFQM model

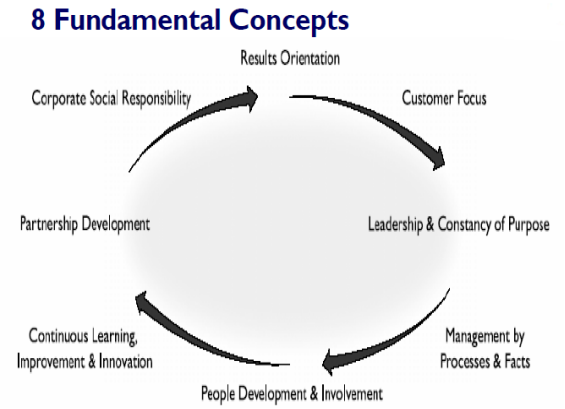


The European Quality Award Model is based on the above enables from Figure 1 and on the below fundamental concepts:

[5] Gruia George Cristian and Gruia George "Sustainable growth with the help of Quality Scheduling Index", *Procedia of Economics and Business Administration* (2014)

[6] The EFQM Leading Excellence Model www.efqm.org

Figure 2



The scope of the article is not to explain nor to present the EFQM model and how it appeared, however I consider that the above figures are suggestive in my approach to integrate the QSI within the requirements and needs of the modern society. If we consider only partly Figure 1 we can state that the enablers (leadership, people, policy & strategy, partnership & resources, processes) give results which in turn help companies to learn from their outputs and further innovate. However the innovation cannot come without the 8 fundamental concepts from Figure 2.

3. Conclusions

In the above article I have presented a short result of the initial outputs of my work, where newly developed Quality Schedulin Index was implemented in the production phases of the product and its versatility was prolongued to the product's lifecycle by the empirical analysis and evaluation of the each of the phases of product's lifecycle.

There is still room for further research in this filed and I consider that the product's lifecycle and the newly developed QSI can further be applied in other disciplines where product or service can be divided in several production phases as well as lifecycle steps. The connection with the modern society is that due to the ever changing conditions on the market due to diversity and the multitude of choises a customer is bombarded from different marketing channels, including without doubt the social media, the time is "precious" as the old saying where "time is money". In this modern society where the amount of smartphones are almost the same as the number of people in the world, the time consumption and overhead costs associated with our daily activities must be lowered in order to remain productive and to answer the daily demand from the society to the individual.

One can read this study and check and evaluate if he/she can become better by using the same monetary and non-monetary resources, because this is the fundamental stone in my research: how can we improve the processes and products by using the available resources, because additional resources are scarce in today's market and investors are difficult to find and convices of our "innovated product" on the paper in order for them to invest and get the ROI as fast as possible.

If we look back at the 2008 economic crisis and check the social and economic status in several European countries, one can predict that the next cycle of the crisis will soon come, thus the option of using resources (money) as commercial or governmental loans is not a good idea as the next crisis might come sooner than expected and instead of Play to Win stategy we might Play Not to Get bankrupted strategy from different changes in exchange rates and interests or even governmental decisions due to social instabilities.

I consider thus that one individual should become better in everything what he/she does as long as they maintain a moral, ethic and legal code according to the country / region they live it and in this scope one can analyse their daily activities and improve the quality of time consumption, indirect costs in order to achive and innovate its processes. Starting from the individual level in time the modern society will evolve and we can even state that the human race can achieve intellectual and scientific progress faster than usual because we solve our daily requirements faster and better and we have more tme for innovation and developing new ideas and conceps.

References

- Davila, T., Epstein, M., Shelton, R.: Making Innovation Work: How to Manage It, Measure It, and Profit from It, Updated Edition, FT Press, 2012
- EFQM Leading Excellence Model www.efqm.org
- Gruia, George, *Politici publice,* , Craiova, Sitech, 2014
- Gruia, George Cristian and Kavan, Michal „A New Managerial Tool For Scenarios In Scheduling", *Global Economic Observer*, Institute for World Economy of the Romanian Academy, vol. 2(2), (2014): 4-13. http://nos.iem.ro/123456789/674
- Gruia George Cristian and Gruia George "Sustainable growth with the help of Quality Scheduling Index", *Procedia of Economics and Business Administration* (2014) ftp://ftp.repec.org/opt/ReDIF/RePEc/icb/wpaper/ICESBA2014_20GRUIA_P160-167.pdf
- Gruia George and Gruia George Cristian: „The role of state powers in the development of business environment", Perspectives of Business Law Journal, [online], vol.2, no.1: 105-112. https://ideas.repec.org/a/sja/journl/v2y2013i1p105-112.html

ALTERNATIVE FUNDING THECNIQUES. COMPARATIVE ANALYSIS

Elena Mihaela ILIESCU[*]
Aurel PLETEA[**]

Abstract

The main objective of this paper is to highlight the dynamics, diversity and especially the availability of an alternative financial market, developed outside of the traditional banking system, on online trading platforms, a market that can constitute an efficient solution, at the expense of entities open to fast funding, wide raging, with limited guaranties and minimum procedural and legislative formalities.

For this purpose, we shall analyze briefly the main alternative financing methods, both empirically and qualitatively, in terms of similarities and differences between the two of them, inclusively of the amount that can be employed in this process through different methods.

The current paper aims to be a practical guide meant to support those facing difficulties in obtaining financing for start-ups, implementing or/and developing business and entrepreneurship initiatives, and also a guide for those who want to be informed regarding the latest funding techniques. Another aspect to be considered is the legal framework in which this process takes place, because the regulation for these levers remains constantly behind the development process of new methods.

The classic financiers should also consider reviewing the lending policy as the amounts attracted and accessed through these alternative methods increase exponentially from one year to the other, the volume of sums involved surpassing each time the forecasts, making thus possible the transformations of these paradigms from the financial sector into preponderant financial funding's.

Keywords: *alternative financing, venture capital, entrepreneurship, crowdfunding, peer to peer.*

1. Introduction

Attracting the financial resources needed to start and develop business and entrepreneurship initiatives represented a permanent challenge for the promoters.

If initially accessing the external financial resources was the prestige of financial institutions, we have witnessed unprecedent changes in recent decades.

Drastic reduction in access to classical financial instruments, caused by the global economic-financial global crisis, the decline of trust in consecrated saving, investment and lending mechanisms, as well as innovations in digitals technologies have led to the emergence of alternative lending and investment methods.

A first step has been made by venture capitals and Angel Investors who implemented method considered to be unconventional for funding businesses, often start-ups.

Small investments, up to 100.000 euro designed to financially support a business until it starts generating its own income is included in the seed financing category. Business angel investments (the investors investing in start-ups in exchange for part of the business) usually use these seed financing[1].

This type of investment is generally used also for the financial capital offered to scalable start-ups that have great potential for development and which, until the time of the investment have registered spectacular growths. We are referring here to venture capital (private equity). Thus, business angel investments are regulated by Law no. 120/2015, with its subsequent regulations and amendments. The first private network investors in technological startups in Romania was TechAngels (http://www.techangels.ro). Also, the Venture Capital funds are represented in Romania also (Digital Catalyst Fund).

An important development has also been recorded in the alternative financing segment, made through the online platforms, outside the traditional banking system. These new unconventional financing sources, known in Romania as participatory financing or multifinancing, will manifest itself mainly in the form of investment of private equity through crowdfunding or peer to peer financing and its characterized by a collective effort of some investors who usually finance, usually online, various projects started by other people or companies.[2]

Globally, the first multi-funding platform was set up in 2001 by the American company ArtistShare, and the largest multi-funding project was "Star Citizen", a

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[1] http://akcees.com/cum-finantezi-un-startup, accessed on 2 september 2017

[2] Silviu Marian Banila, THE ANALYSIS*: History for multifinancing* 20 Jan. 2014, aricle available online http://www.manager.ro/articole/economie-139/analiza-o-istorie-a-multifinantarii-57713.html, accesat la 6 septembrie 2017

space-based video game for which they gathered in 2014 over $ 36 million[3].

Internationally, we can also mention other popular sites such as Kickstarter, Indiegogo or Crowdfunder, and in Romania, creştemidei.ro or potşieu.ro.

Peer to peer funding, however, is based on "person to person" lending and can be done for both entrepreneurs and individuals.

Among the platforms setup successfully for this purpose, we can mention: Zopa (the first company of its kind, set up in 2005 in the UK), Prosper, Lending Club, Bondora (established in Estonia, this platform facilitated the development of the well-known Skype).

Romania also ranks among the countries with a low degree of assimilation of new trends, with the volume of alternative financing amounting to 1.17 million euros, with the last position among the countries of South Eastern Europe. That is why the present paper has as its main objective the popularization of these new financing levers by highlighting the dynamics, diversity and especially the availability of an alternative financial market, developed outside the traditional banking system, on online trading platforms. Thus, this market can be an effective solution, for entities willing to use fast-paced, large-scale, low-guarantee and minimum procedural and legislative formalities financing. For this purpose, empirical data, published by the Cambridge Center for Alternative Finance in "The European Alternative Finance Benchmarking Report" (2014-2018) was used.

2. The dynamics of the main types of alternative financing

Alternative funding is a branch of financial services with an accelerated growth. If initially they were considered as alternative financing methods crowdfunding and peer-to-peer loans, later on other methods such as invoice trading and reward services were also included in the analysis. The volume of funding involved in these funding mechanisms increases significantly each year, from EUR 8,50 billion in 2013 to 32,77 in 2014, and 130,02 billion in 2015, reaching EUR 261,14 billion in 2016.

Table 1. Evolution of Global Alternative Financing

	Europa	**America**	**Asia**	
2013	1,130	3,240	4,130	8,500
2014	2,830	9,650	20,290	32,770
2015	5,430	29,980	94,610	130,020
2016	7,670	31,810	221,660	261,140
Total	17,060	74,680	340,690	

Source: Personal processing based on data published by Cambridge Center for Alternative Finance in The European Alternative Finance Benchmarking Report (2014-2018).

But, given the specificity of national culture as well as the level of different financial education from one area to another, from one country to another, for a complete and correct picture of this financial behavior, the amounts to be traded should be analyzed by geographical regions (Europe, America and Asia along with the Pacific area).

For each of these regions there is a country whose weight is overwhelming. Thus, for Europe, the largest share is held by the United Kingdom, in America the United States of America, and for Asia the largest share is held by China.

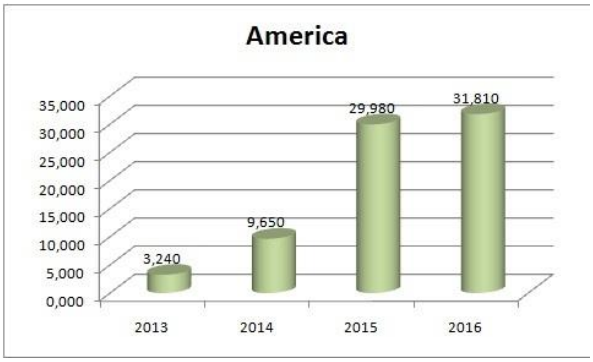
For our area of interest, which is Europe, UK had each year more than 70% of the amounts involved in such funding.

Globally, the area in which these mechanisms have been most used is Asia.

For each area, the graphical analysis reveals interesting aspects of the dynamics of the sums involved in this process.

Thus, America, the region that initiated this process and where alternative funding has the greatest experience, has come to suffer, with an increase of only 6% in 2016 compared to 2015 compared to previous growth rates of about 200%.

Chart 1 Evolution of Alternate Funding in America in 2013-2016



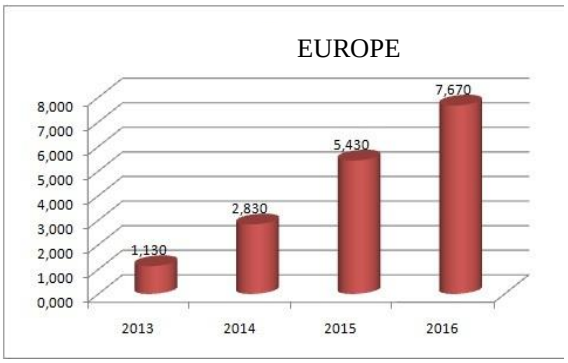
Source: Personal processing based on data published by Cambridge Center for Alternative Finance in The European Alternative Finance Benchmarking Report (2014-2018)

A similar phenomenon, but on a smaller scale can also be observed in Europe (limiting growth to 41% compared to much higher growth rates in previous years). This is due to the saturation of the financial market with such offers, the number of platforms offering such services rising each year, which is not always satisfying in terms of the quality of the services offered, having as proof the fact that a great share of platforms analyzed within the original study in 2015(regarding the 2013 and 2014) is no longer

[3] Silviu Marian Banila, ANALIZA*: O istorie a multifinantarii*, 20 Ian. 2014, aricol disponibil online pe http://www.manager.ro/articole/economie-139/analiza-o-istorie-a-multifinantarii-57713.html, accesat la 6 septembrie 2017

working. Another factor for the less accentuated growth is the emergence of cryptocurrencies (completely new technological platforms not regulated by financial markets) and which absorb a large amount of the sums needed for very large startup projects**.**

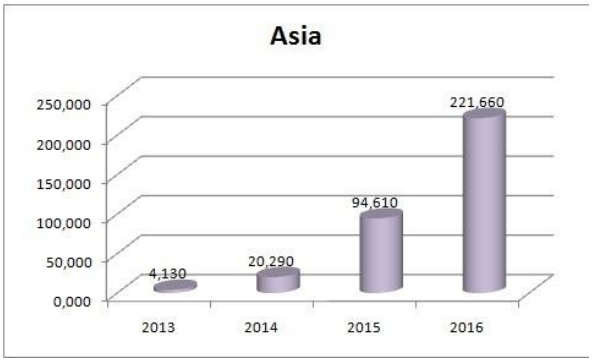
Chart 2. Evolution of the volume of alternative funding in Europe over the period 2013-2016



Source: personal processing based on data published by the Cambridge Center for Alternative Finance in The European Alternative Finance Benchmarking Report (2014-2018)

The Asia-Pacific region has continued to grow further, a trend that can continue in the years to come, as China and South Korea have opted not to allow cryptocurrencies for trade on their territory.

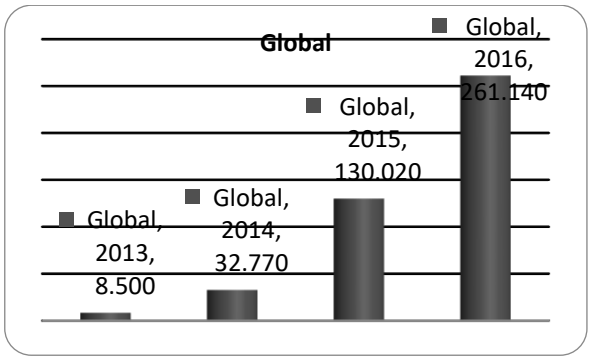
Chart 3. The evolution of the volume of funding by alternative methods in Asia & Pacific during 2013-2016



Source: Personal processing based on data published by Cambridge Center for Alternative Finance in The European Alternative Finance Benchmarking Report (2014-2018)

On a global scale, however, there is a steady increase in the amounts involved in the alternative financing mechanism.

Chart 4. The evolution of the global volume of funding by alternative methods in 2013-2016



Source: personal processing based on data published by the Cambridge Center for Alternative Finance in The European Alternative Finance Benchmarking Report (2014-2018)

The values involved in this process as well as the impressive annual growth rate indicate the imposition of these methods on the financial market, especially for small firms, based mostly on innovative business ideas, namely the startups which most often, the classic and unconventional funding systems (Angel Investors and Venture Capitals) ranks them at too high a risk.

These amounts are accessed through alternative funding methods grouped into three broad categories: crowdfunding, peer-to-peer (direct loans) and invoice trading. We will analyze them in detail, by category, in order of importance in the share of collected amounts.

Thus, **P2P Consumer Lending**, meaning the loans from individuals or legal entities accessed by a natural person, are carried out within web platforms specialized in such services. The financier knows only the project and not the beneficiary of the loan. Most often, this loan returns to the lender with a higher value, the borrower receiving also interest.

P2P Consumer Lending managed to accumulate EUR 696.81 million in 2016, accounting for 33.80% of the market for alternative financing methods, the average amount considered to be defining for this type of financing being **EUR 10,000**.

P2P Business Lending has the same features as P2P Consumer Lending, only this time loans are accessed by legal entities from individuals or businesses in order to fund a business.

In 2016, the accumulated amount was of EUR 349.96 million, representing 17.00% of the total alternative funding for this period, the defining amount for this type of loan being EUR **100.000;**

Instead, **P2P Property Lending** is covered by risk, being loans from individuals or legal entities guaranteed by a property, which is not the case for the other two options presented above. Otherwise, the features are the same. The amounts accrued in 2016 by this type of funding were 95.15 million Euro, representing 4.6% of the total.

For the **equity-based crowdfunding** case, the necessary amounts are obtained through the sale of shares held by the company but, this mediation is carried out by those web platforms, eliminating thus

other intermediaries, and with diminished commissions. The link between the investor and the creditor is greatly facilitated by the specialized online platform, without which it would be difficult for the two entities to get in touch.

In 2016, the amounts accumulated from this type of financing totaled EUR 218.64 million, or 10.60%, the average amount being accessed through this method being EUR **459,000**.

The amounts involved in 2016 for **Real Estate Crowdfunding** alternative financing, meaning loans from natural or legal persons granted for real estate investments, amounted up to 109.45 million Euro, meaning 5.3% of the total.

At the same time, 9.20% of the total amount of alternative funding for 2016, meaning 190.76 million Euro, was covered **by Reward-based Crowdfunding**, **a mechanism for financing** people, projects or companies in exchange for rewards or products, but not in monetary form).

Invoice Trading, meaning the sale of invoices to be withdrawn at a discount value compared to their nominal value, in order to obtain rapid liquidity, accumulated in 2016 a total of 251.87 million Euro respectively 12.20% of the total alternative financing.

Debt-based investment funds, widely known as **Debt-based Securities**, have been used in the field of unconventional energy. Another feature distinguishing them from other types of alternative funding is the guarantee they provide to creditors as well as the reimbursement system of funding in annual installments and a large number of years. Although the amounts involved are not as high as in other cases (EUR 22.85 million), this type of alternative funding is worth mentioning due to the innovative nature of the technologies in which it is being invested and the way of reimbursement.

In addition to these techniques, there are a number of less useful methods, but their share is less than 1% of the total amount of money circulated.

All of these methods have as their main feature that they are operating on a web platform that links investors and borrowers. The mode of granting credits is much more permissive, depending largely on the creditworthiness of the borrower and on the pertinence of the project he is proposing to finance.

The risks to which the sponsor and the borrower are subject to having two components: the classic one, valid for both classical or unconventional loans and a specific one, determined by the characteristics of this type of credit intermediation. Thus, the borrower bears the risk of being exposed to the innovative ideas of the business he wants to initiate, since the innovative idea needs to be shared, at least in part, to convince potential investors. At the same time, the investor is no longer an expert in financial transactions, having to make a decision largely based on intuition and less on financial experience or good practices. There are few ways to guarantee the investment.

Another relevant aspect in the analysis of this sector is represented by the evolution of the number of web platforms involved in alternative funding mechanisms, especially for our area of interest, which is Europe. Thus, if at the beginning of the 2013 study the number was modest and distributed in only a few countries (UK - 65, Germany - 31, France - 33, Spain - 34, Netherlands - 31) in 2016, meaning a 3-year time span, the number of those benefiting from such platforms increased, the European countries having (with the exception of the former Yugoslavia and Albania) at least one such facility.

But the Eastern European countries have a sad record of 1 to 3 platforms, followed by the Baltic countries with 4 to 6 developed platforms, carrying significant amounts. Estonia, for example, is among the countries with high GDP per capita, ranking second, after the UK. In this country, the unprecedented development of communications infrastructure and Estonian support for web applications of all kinds, including in the public administration sphere, has played an important role.

3. Conclusions

The period following the global financial crisis has created the climate for developing alternative funding mechanisms, against the backdrop of growing distrust in classical or unconventional mechanisms. Also, as a result of this mistrust, surplus money that was usually aimed at savings or pension funds was reoriented to alternative savings / investments. It can be said that, alternative financing methods have been forced to emerge due to the need of both market forces - demand and supply of financing. The existence of new methods of promoting and using web platforms has facilitated and generated this new lending mechanism. It has benefited in particular to startups, characterized by innovative but also resource-poor ideas, as well as small investors, who thus have the opportunity to make advantageous savings.

The phenomenon has intensified, the significant increase in yearly interim amounts, requiring new financial regulations in the United States, Canada and Europe.

Also, in the last report of the University of Cambridge (The 3rd European Alternative Finance Industry Report, 2018, p.38), the increase in the institutionalization level is brought to discussion. In fact, this means increasing involvement of large players on the financial market in alternative funding mechanisms. Nominated are the pension funds, investment funds, banks, Venture Capitals and Angel Investors. Thus, classical funding methods as well as unconventional methods have transformed this competition of alternative methods into a means to reinvest their funds.

The difference consists of the interest they would have had if these amounts were offered in a classic credit for an innovative project and the much lower

profit it would obtain by subscribing those funds within crowdfunding or peer-to-platform -peer.

Startups can therefore benefit from fast alternative funding methods, with few guarantees and less formalities. Lenders can benefit from higher earnings from these funding by replacing banks or investment funds with web platforms whose commissions are most often applied to the borrower.

The phenomenon seems to be a win-win situation for both investors and startups, which explains the explosive evolution of recent years.

As a result, the phenomenon can no longer be ignored by traditional players on the financial market, their lending policy showing a tendency to relax.

The growth limitation from 2016 can be explained through adjusting the banks and Ventures Capital companies lending policies, on the one hand, and by the emergence of cryptocurrencies, funding mechanisms for innovative, large-scale financial projects, not yet regulated (China and South Korea forbidding them as lending mechanisms) but extremely advantageous and at the same time risky both for startups and for investors.

All the information presented above as well as the prospects for market evolution, open the way for new research directions on this topic, especially since, for the time being, the complexity of the analysis methods is based on the limited database, given that the Cambridge Center for Alternatives Finance, the global benchmarking institution in this field, publishes annual reports from 2015, the time frame covered so far being only between 2012-2016.

References

- Silviu Marian Banila, *The Analysis: a history for multifinancing*, 20 Jan. 2014, article available online http://www.manager.ro/articole/economie-139/analiza-o-istorie-a-multifinantarii-57713.html, accessed on 6 september 2017
- Marian Dinu si Cristina Bucur. *Crowdfunding – an alternative for start-ups?*, Wall-Street.ro, 2013, available online on https://www.wall-street.ro/articol/Legal-Business/157145/crowdfunding-o-alternativa-pentru-start-up-uri.html, accessed on 10 march 2018
- European Parliament, *Crowdfunding in Europe:Introduction and state of play*, Briefing, 2017, available online http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/595882/EPRS_BRI(2017)595882_EN.pdf, accessed on 1 april 2018
- Marius Ghenea. Antrepreneurship - The road from ideas to opportunities and business success, Editura Universul Juridic, 2011
- Erin Griffith, *Why startups fail, according to their founders*, articol disponibil online pe http://fortune.com/2014/09/25/why-startups-fail-according-to-their-founders/, accesat la 1 aprilie 2018
- Bryan Zhang, Robert Wardrop,Tania Ziegler, Alexis Lui,John Burton,Alexander James,Kieran Garvey. *Sustaining momentum: the 2nd european alternative finance industry report*, Cambridge Centre for Alternative Finance, University of Cambridge, United Kingdom, 2016
- Tania Ziegler,Rotem Shneor,Kieran Garvey,Karsten Wenzlaff,Nikos Yerolemou,Rui Hao,Bryan Zhang. *Expanding horizons: the 3rd european alternative finance industry report*, Cambridge Centre for Alternative Finance, University of Cambridge, United Kingdom, 2018
- Robert Wardrop, Bryan Zhang, Raghavendra Rau and Mia Gray, *Moving Mainstream: The European Alternative Finance Benchmarking Report* Cambridge Centre for Alternative Finance, University of Cambridge, United Kingdom, February 2015
- http://akcees.com/cum-finantezi-un-startup, accessed on 2 september 2017

THE USE OF BLOCKCHAINS. AN R APPROACH

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Nicoleta JULA[**]

Abstract

The cryptocurrency is a hot topic and understanding the blockchain is very important. Also, understanding what blockchain may lead to more decentralized services and applications to be used, not only in relation to financial applications. Today, blockchains can be used to for smart contracts, decentralized networks, governments and non-profit organizations, banks and even photography copyright recordings and smart contracts for music artists. Even World Economic Forum predicted that by 2015 about 10% of global GDP will be stored on blockchain technology. The blockchain technology cosists in creating a chain of blocks, validated with a hash function and under a "proof of work" concept, which limits speed of creating new blocks. The new technology is open source, but recently has attracted the attention of big software players, like Microsoft and other companies (BBVA, UBS). In this paper, we present a simple R implementation of a blockchain, containing a initial block, creation of each blocks (including hash and proof of work) and the creation of the chain. Data validation and the lack of so-called middle man, minimization of the fees, increasing the speed of transactions, security and anonymity provided by this technology are good arguments for ensuring the continuous development of the technology and its spreading in everyday activities.

Keywords: *blockchain, cryptocurrency, R, proof of work, technology.*

1. Introduction

1.1. History of blockchain

One cannot start an analysis about blockchain without mentioning its public debut: when Satoshi Nakamoto, whose true identity is still unknown, released the whitepaper Bitcoin: A Peer to Peer Electronic Cash System in 2008 that described a "purely peer-to-peer version of electronic cash" known as Bitcoin. Many years the two concepts (blockchain and Bitcoin) were seen together. Of course, without blockchain, there will be no Bitcoin, but blockchain technology is a lot more than just cryptocurrency: it has potential to impact every industry, from financial, manufacturing to education and evan creative arts.

It is worth mentioning that, from the beginning, the technology behind blockchain was offered as an open source. The term "open source" describes the practice of producing or developing certain finished products, allowing users to access the production or development process freely. Some specialists define the "open source" as a philosophical concept; others think it is a pragmatic methodology.

The most important aspect that blockchain brings to the masses is that it records important information in a public space and doesn't allow anyone to remove it, it's transparent, time-stamped and decentralized. Sally Davis, a reporter from FT Technologies states that "Blockchain is to Bitcoin, what the internet is to email. A big electronic system, on top of which you can build applications. Currency is just one". At its core, blockchain is an open, distributed register that records transactions between two parties in a perpetual way without needing third-party authentication. This creates an extremely efficient process and one people predict will dramatically reduce the cost of transactions. When entrepreneurs understood the power of blockchain, there was a surge of investment and discovery to see how blockchain could impact supply chains, healthcare, insurance, transportation, voting, contract management and more. It is estimated thatn early 15% of financial institutions are currently using blockchain technology.

It was in 2013 when Vitalik Buterin wanted to expand beyond the limitations found in Bitcoin technology and cretated the second public blockchain, called Etherum. The major difference between the two is that Ethereum can use other assets such as loans or contracts, not just currency. Ethereum launched in 2015 and can be used to build "smart contracts"—those that can automatically process based on a set of norms established in the Ethereum blockchain. This technology has attracted the attention of companies such as Microsoft, BBVA and UBS, who are interested in the potential of the smart contract functionality to save time and money.

Today, Bitcoin is just one of the several hundred applications that use blockchain technology. It's been a remarkable decade of transformation for blockchain technology and it will be interesting to see where the next decade takes us.

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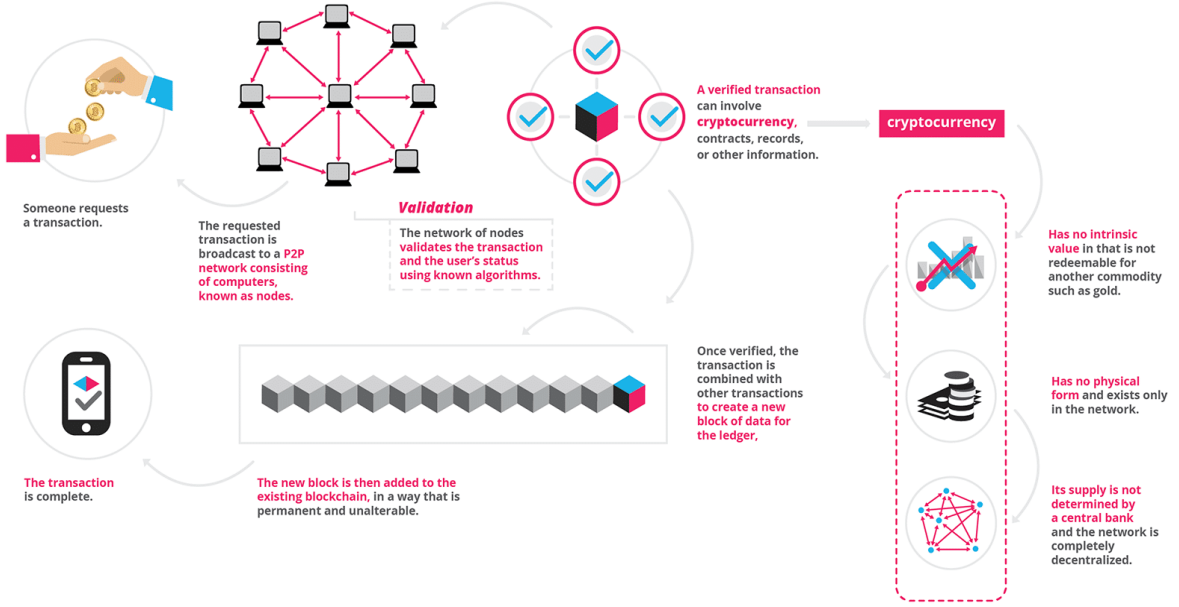
2. The use of blockchains

2.1. Validation

Presently, blockchain works on the "proof of work" concept, where a powerful computer calculation or "mining" is done in order to create a block (or a new set of trustless transactions). Currently, when you initiate a transaction, it is bundled into a block. Then the so-called "miners" confirm the transactions are authentic within that block by solving a proof-of-work problem—a very difficult mathematical problem that takes an extraordinary amount of computing power to solve. The first miner to solve the problem gets a recompense and then the verified transaction is stockpiled on the blockchain. Ethereum developers are interested in changing to a new consensus system called proof of stake.

2.2. Popular Use Cases of Blockchain

Figure 1 – Blockchain use (source: https://blockgeeks.com/guides/what-is-blockchain-technology/)



Notary

It is a fact that most records are stored on paper ledgers, but these can be tampered, lost, destroyed and so on. The data in blockchains cannot be tampered. Even the name suggests the two main components of the blockchain: a block and a chain. Data is stored in blocks and these blocks are all connected in a chain. The secure system is contained in the hash information from each block. In simple terms, hashing means taking an input string of any length and giving out an output of a fixed length. In the context of cryptocurrencies like Bitcoin, the transactions are taken as an input and run through a hashing algorithm (Bitcoin uses SHA-256) which gives an output of a fixed length. Every successive block will contain the previous block's hash. This is what binds them together.

Smart contracts

Usually, two parties can agree and sign a contract that legally binds them. For exemple, for renting or other services. What if one of the parties don't want to pay when the limit expires? Of course, there are legal ways to follow, but usually in a court the time lost is hard to compensate. So, the blockchain solution is to create a code that is deployed on both parties' computers. Also the banks of both parties should be part of this private blockchain. When the conditions are met, a trigger enforces the bank to make the payment:

Pseudo code of the smart contract between Person 1 and Person 2:

If today's date is 30th and rent is not paid then

Transfer $500 from Person 1's account to Person 2's account

Digital Voting

Blockchain helps overcome the biggest issue with digital voting: security. The technology can make the votes anonymous and provide better security. The latest drop in voting turnout may be changed using this system.

Distributed Storage

We are heading to an era when storage is more and more seen as a cloud option. We do not discuss here about the pros and cons regarding cloud versus local storage options, but more and more people rely on internet services for their files. It is also a big issue with the privacy and more people start to care and demand security and privacy for their private files. Using blockchains, the data is stored descentralized, with high encryption

Other uses, as Ameer Rosic describes in the article from BlockGeeks, are:

The sharing economy

With booming companies such as Uber and AirBnB, the sharing economy is already a proven success. Currently, however, users who want to save a

sharing service must rely on an intermediary such as Uber. By allowing peer payments, the block opens the door to interact directly between the parties - resulting in a truly decentralized economy.

An early example, OpenBasear uses the block to create a peer-to-peer eBay. One can download the app on the computing device and make transactions with OpenBazzar retailers without paying transaction fees. The "no rule" philosophy of the protocol means that personal status will be even more important for business interactions than is presently on eBay.

Crowdfunding

Crowdfunding initiatives, such as Kickstarter and Gofundme, are working in advance on the emerging peer-to-peer economy. The popularity of these sites suggests that people want to have a direct say in product development. Blockchains take this interest at the next level, creating potential venture capital funds with multiple sources.

In 2016, such an experiment, DAO based on Ethereum (Decentralized Autonomous Organization), generated a surprise of $ 200 million in just two months. The participants bought the "DAO chips", allowing them to vote on intelligent risk capital investments (the voting power was proportional to the number of DAOs they held). Subsequent hacking of project funds has shown that the project was launched without proper diligence, with disastrous consequences. Indirectly, the DAO experiment suggests that the bloc has the potential to introduce "a new paradigm of economic co-operation".

Governance

By making the outcomes fully transparent and available to the public, distributed database technology could bring full transparency to elections or any other way of polling. Intelligent contracts based on ethereum help automate the procedure.

The Boardroom application allows organizational decisions to be taken in block. In practice, this means that businesses' governance becomes fully transparent and verifiable when managing digital assets, equity or information.

Supply chain auditing

Consumers are increasingly keen to know that companies' ethical complaints about their products are real. Distributed records provide an easy way to certify that the history of the things we buy is genuine. Transparency comes with temporal marking of a date and location - for example on ethical diamonds - that correspond to a product number.

Provenance in the UK offers supply chain audit for a wide range of consumer goods. Using the Ethereum blockchain, the Provenance pilot project guarantees that fish sold in Japan's Sushi restaurants has been harvested sustainably by its Indonesian suppliers.

Prediction markets

The agglomerated screening of predictions about the probability of the event proves to be of a high degree of precision. The significance of the previous attitude cancels the unexamined disagreements that distort the judgment. Predicted markets that pay according to event results are already active. Blocks are a "crowd wisdom" technology that will undoubtedly find other applications in the years to come.

However, in Beta, the Augur Market Demand Demand offers bids to participate in the outcome of real-world events. Participants can earn money by buying in the correct prediction. Most of the shares purchased in the correct result, the bigger it will be. With a small commitment (less than one dollar), anyone can ask a question, create a market based on a predictable outcome, and collect half of all market-generated trading fees.

Protection of intellectual property

As is well acknowledged, digital information can be replicated infinitely - and widely distributed through the Internet. This has given global users a goldmine of free content. However, copyright holders have not been so lucky, losing control over intellectual property and financially suffering consequently. Smart contracts can protect copyright and automate the online sale of creative works, eliminating the risk of copying and redistributing files.

Mycelium uses blockchain to create a peer-to-peer music distribution system. Founded by British singer and songwriter Imogen Heap, Mycelium allows musicians to sell songs directly to the public, as well as to issue licensing samples to producers and to hold copyright for composers and musicians - all of which are automated by smart contracts. The use of blocks to issue payouts in fractional cryptocrats (micropayments) suggests that this case of use for the blockchain has great chances of success.

Internet of Things (IoT)

What is IoT? Network management of certain types of electronic devices - for example, monitoring the air temperature in a storage facility. Intelligent contracts make it possible to automate remote management. A mixture of software, sensors and networking simplifies the exchange of data between objects and mechanisms. The result increases system efficiency and improves cost monitoring.

The biggest players in the manufacturing, technical and telecommunication industries are fighting for IoT supremacy. Think of Samsung, IBM and AT & T. A natural extension of the existing infrastructure, controlled by current operators, IoT applications will run ranges from predictive mechanical maintenance to data analysis and large-scale automation systems management.

Neighbourhood Microgrids

Blockchain technology allows the acquisition and sale of renewable energy created by neighborhood microgrids. When solar panels produce excessive energy, smart contracts based on Ethereum redistribute it automatically. Similar types of intelligent contract automation will have many other applications as the IO becomes reality.

Located in Brooklyn, Consensys is one of the world's leading global companies that develops a wide

range of applications for Ethereum. A project that they partner with is the Transactional Network, working with the distributed energy equipment, LO3. A prototype of a project currently in use, and uses smart deals from Ethereum to automate the monitoring and redistribution of microgrid energy. This so-called "smart grid" is an early example of IoT functionality.

Identity management

There is a clear need for better identity management on the web. The ability to verify your identity is the connection between financial transactions that occur online. However, remedies for the security risks associated with web trade are imperfect at best. Shared spreadsheets provide improved methods to prove who you are, along with the ability to digitize personal documents. Having a secure identity will also be imperative for online interactions - for example, in the sharing economy. Good reputation, after all, is the most important condition for online transactions.

The development of digital identity standards proves to be an extremely complex process. Apart from the technical challenges, a universal online identity solution requires cooperation between private entities and government. Add to this the need to navigate in the legal systems of different countries and the problem becomes exponentially difficult. Internet e-commerce is currently based on the SSL (low green block) certificate for secure web transactions. Netki is a startup that aspires to create a SSL for blockchain. After announcing a $ 3.5 million seed round recently, Netki expects to launch a product in early 2017.

AML and KYC

Anti-money laundering (AML) and know your customer (KYC) have a strong potential to adapt to the block of flats. Currently, financial institutions need to carry out a multi-step process for each new client. KYC costs could be reduced by customer checking within an institution and, at the same time, increasing the effectiveness of monitoring and analysis.

Startup Polycoin has an AML / KYC solution that involves transaction analysis. These transactions identified as suspicious are passed on to compliance agents. Another startup command develops an application called Trust in Motion (TiM). Characterized as a "Instagram for KYC," TiM allows customers to take an instant image of key documents (passport, utility bill, etc.). After verification by the bank, these data are stored cryptographically on the block of blocks.

Data management

Today, in exchange for personal data, users can use free social platforms like Facebook. In the future, users will have the ability to manage and sell the data generated by their online activity. Because it can be easily distributed in small quantities, Bitcoin - or something like that - will most likely be the currency used for this type of transaction.

The MIT Enigma project understands that user privacy is a prerequisite for creating a personal data market. Enigma uses cryptographic techniques to allow splitting of individual data sets between nodes and at the same time to perform bulk calculations across the entire data group. Data fragmentation also makes the Enigma scalable (as opposed to blockchain solutions where data is repeated on each node). A Beta release is promised in the next six months.

Land title registration

As registers accessible to the public, blocks can make all sorts of more efficient registrations. Property titles are a case in point. They tend to be susceptible to fraud, as well as costly and forced labor efforts for administration.

Several countries are building land registry projects based on blocks. Honduras was the first government to announce such an initiative in 2015, although the status of this project is unclear. This year, the Republic of Georgia has reached an agreement with the Bitfury Group to develop a block system for property titles. According to him, Hernando de Soto, the high-ranking economist and property rights attorney, will advise on the project. Most recently, Sweden has announced that it is experiencing a blockchain application for property titles.

Stock trading

The potential to increase efficiency in the stock settlement process makes the use of trading blocks strongly used. When running peer-to-peer, commercial confirmations become almost instantaneous (as opposed to taking three days for clearance). Potentially, this means that intermediaries - such as clearing houses, auditors and custodians - are eliminated from the process.

Numerous stock and commodity exchanges are application prototypes for the services they offer, including ASX (Australian Securities Exchange), Deutsche Börse (Frankfurt Stock Exchange) and Japan Exchange Group (JPX). The highest profile because the first known in this area is Linda Nasdaq Linq, a platform for trading on the private market (usually between companies that started to engage with investors). A partnership with the blockchain technology group, Linq, announced the completion of its first volume of transactions in 2015. More recently, Nasdaq announced the development of a block block test project for the proxy vote on the Estonian stock market.

3. A simple blockchain in R

The algorithm is detailed in the CorrelAid blog and describes a simple R implementation of a blockchain, containing a initial block, creation of each blocks (including hash and proof of work) and the creation of the chain.

3.1. Creating the BLOCK

At minimum, a block must contain: data, timestamp, index and self-identifying hash:

block_example <- list(index = 1,

```
timestamp = "2018-01-05 17.00 MST",
    data = "Some data",
    previous_hash = 0,
    proof = 9,
    new_hash = NULL)
```

3.2. Hash

As stated before, a hash helps to ensure the integrity of a block by connecting it to the other blocks in the chain. A hash function takes something as an input and gives us a unique, encrypted output**.**

In the hash function, it is not included only the current information contained by the block, but also the hash of the previous block. This means, the algorithm calculates the valid hash only if it knows the hash of the previous block, which was created using the hash of the previous and so on. This ensures the sequntiality of the blockchain.

```
#Function that creates a hashed "block"
hash_block <- function(block)
{
block$new_hash <- digest(c(block$index,
    block$timestamp,
      block$data,
    block$previous_hash),          "sha256")
return(block)
}
```

3.3. Proof of work

There is a need to control the maximum numbers of blocks that can be created (for example, in cryptocurrency this is due to value loss if unlimited number of coins cand be crated). To control that, a so-called “proof of work” is defined. The work that is to be done by the computer, for example – solving a mathematical problem, which should be hard to solve but easy to verify, is to be rewarded. In Bitcoin mining (which is the name of the problem solving for this currency) the reward is in Bitcoins. When a new block must be created, a computational problem is sent out to the network. The miner which solves the PoW problem first creates the new block and is rewarded in bitcoins (this is the way new BitCoins are actually created). This "lottery" of finding the new correct proof ensures that the power of creating new blocks is decentralised. When a new block is mined it is sent out to everybody so that every node in the network has a copy of the latest blockchain. The idea that the longest blockchain in the network (the one which "the most work was put into") is the valid version of the blockchain is called "decentralised consensus[1]".

As suggested in a blog regarding block creation, one can define a PoW like find the next number that is divisible by 99 and divisable by the proof-number of the last block**:**

```
library("digest") #Loading the hash-algorithm
### Simple Proof of Work Alogrithm
proof_of_work <- function(last_proof)
{
proof <- last_proof + 1
# Increment the proof number until a number is found that is divisable by 99 and by the proof of the previous block
while (!(proof %% 99 == 0 & proof %% last_proof == 0 )){
   proof <- proof + 1
 }
return(proof)
}
```

3.4. Adding new blocks

First, one should define the start block, the first block in the chain:

```
# Define Genesis Block (index 1 and arbitrary previous hash)
block_genesis <-  list(index = 1,
    timestamp = Sys.time(),
    data = "Genesis Block",
    previous_hash = "0",
    proof = 1)
```

Now, adding blocks to the chain cand be done with a function like:

```
#A function that takes the previous block and optionally some data (in our case just a string indicating which block in the chain it is)
gen_new_block <- function(previous_block){
#Proof-of-Work
new_proof <- proof_of_work(previous_block$proof)
#Create new Block
new_block <- list(index = previous_block$index + 1,
    timestamp = Sys.time(),
    data = paste0("this is block ", previous_block$index +1),
    previous_hash = previous_block$new_hash,
    proof = new_proof)
#Hash the new Block
new_block_hashed <- hash_block(new_block)
return(new_block_hashed)
}
```

3.5. Building the Blockchain

To build the blockchain, the algorithm should start with the first block, previously defined:

```
# Create blockchain
blockchain <- list(block_genesis)
previous_block <- blockchain[[1]]
# How many blocks should we add to the chain after the genesis block
num_of_blocks_to_add <- 20
# Add blocks to the chain
for (i in 1: num_of_blocks_to_add){
print(system.time(block_to_add <- gen_new_block(previous_block))) # Evaluate time it takes for PoW
```

[1] https://correlaid.org/blog/posts/blockchain-explained

```
    blockchain[i+1] <- list(block_to_add)
    previous_block <- block_to_add
    print(paste0("Block ", block_to_add$index, " has been added"))
    print(paste0("Proof: ", block_to_add$proof))
    print(paste0("Hash: ", block_to_add$new_hash))
    }
```

4. Conclusions

Blockchains are a revolutionary solution for a such variety of industries. The data validation and the lack of so called middle man, minimizing the fees, increasing the speed of transactions and the security and anonymity provided by this technology are good arguments for ensuring the continuous development of the technology and its spreading in every day activities.

References

- Dusa A., Oancea B., Caragea N., Alexandru C., Jula N.M., Ciuhu(Dobre) A.M., 2015, *R cu aplicatii in statistica*, Editura Universitatii din Bucuresti
- https://www.forbes.com/sites/bernardmarr/2018/02/16/a-very-brief-history-of-blockchain-technology-everyone-should-read/2/#1411e3d773bc
- https://blockgeeks.com/guides/what-is-blockchain-technology/
- https://correlaid.org/blog/posts/blockchain-explained

TRENDS IN NON-FINANCIAL MOTIVATION POLICIES OF EMPLOYEES

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Abstract

The main purpose of the paper is to identify the main non-financial motivation strategies, to emphasize their advantages and disadvantages, as well as to involve the management in achieving the motivational objectives within the organizations. Studies in the field have shown that there are a number of factors of great importance in motivating the staff that managers need to consider in improving the company's performance. Motivating human resources is not a simple process, it is complex and continuous and managers need to find the optimal mix for motivating and performance-oriented employee. Appropriate motivation of employees is the main purpose on which good management of a firm is based. Practice shows that poor leadership quality is the main cause of employee dissatisfaction that is unsatisfied with their work. Motivating staff means creating opportunities for individual and team goals, responsibility, recognition, reward, etc.

Motivation implies the totality of the internal and external motives of the personality, which condition the transformation of its development potential into real and functional psychological structures and is in itself a complex and cumulative psychological system. Most reward processes are based on philosophies and reward strategies and contain policy and strategy arrangements and contain policy arrangements, principles, practices, structures and procedures that are designed and managed to deliver and maintain the types and adequate levels of benefits and other forms of reward.

Keywords: *motivation, performance, motivation strategies, employee, reward.*

1. Theoretical aspects of lending

The motivation policy, regardless of where a person is active, aims to stimulate the employee to achieve performance. Motivation is what really causes people to work, and this has two major types of action on resources: financial and non-financial.

Researchers or academic colleagues such as Porter & Lawler, Naylor, Pritchard & Ilgen, Katzell & Thompson have experienced motivational models, later building analytics that are applicable to companies.

The strategy of motivating the human resource is one of the most important components of the organization that generates much and the evolution or deterioration of the economic situation. Also, organizational culture undergoes major mutations based on how the motivational system is built inside an economic entity and not only.

Financial methods such as salary, commission, bonus, bonuses, dividends, etc., are all forms of cash reward or the results obtained by the employee.

Although they are the most frequent forms of motivation, financial methods reveal major shortcomings in terms of motivation: on the one hand, in the perception of the employee, the respective amounts are entitled to what makes their motivating role very small, money clearly does not generate employee loyalty to the organization, (when the money is the only thing that keeps the employee connected to the organization they work in, the employee will leave the team at the first opportunity for a better offer, in Romania about 80% of the employees spend all their income from one month to the next , and when this occurs, the employer tends to blame the employer for not rewarding the employee's time and abilities in the right way). From psychological and social studies, it turned out that most employees did not retain more than 30 days the value of premiums/bonuses or successful commissions.The effects of financial motivation are strong, but they are not everything, which causes people to really work, not the magnification, but the motivation. Researches in this field have demonstrated the lack of long-term efficiency of financial incentive systems.

Motivation implies the totality of the internal and external motives of the personality, which condition the transformation of its development potential into real and functional psychological structures and is in itself a complex and cumulative psychological system.

Motivation should not be considered and interpreted as an end in itself, but served to achieve high performance, performance being a superior level of accomplishment of purpose.

The first and best-known need-driven motivational theory has been developed by American psychologist Abraham Maslow and is based on the concept of a "hierarchy of needs", according to the theory that needs can not be felt simultaneously by the individual but successively.

Clayton Alderfer recognizes that needs are in close relationship with motivation. At the same time his research does not find a strict hierarchy of needs comparable to that of Maslow. Alderfer classifies the

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needs in three great classes: necessities of existence, sociability and development.

Alderfer's model represents an attempt to increase the applicability of the theory of needs to organizational conditions (the theory of needs postulates that human beings have characteristic needs and that people can be motivated by giving them what they need in exchange for the effort they make, are motivated to meet their most important needs).

American psychologist David Clarence McClelland, in his reference paper, Theory of Needs, explained that in the general picture of the human psyche the needs occupy a prime place, which is why he leaned on the theories that the person's needs influence his actions, including at work. Thus, the American psychologist, although identifying 20 needs, focused only on three in explaining connections to the workplace, and these are the need to achieve, the need for association, and last but not least the need for power.

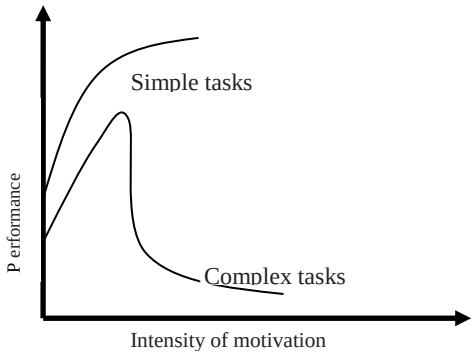
From these listed needs, the main thrust is the need for realization because it is closely linked to the individual and the other is linked to the individual's relationships with others. Also, people who have a strong need / personal desire to choose will choose the situations they can control and the results of their actions will depend on their abilities and training and less chance

2. Motivation-performance relationship

Psychological studies show that employee motivation within a company contributes to performance, but performance increases are not always directly proportional to the intensity of motivation.

The "Yerkes - Dodson" law demonstrates that increasing the intensity of motivation leads to improved performance only up to a critical area, after which, if the intensity of motivation continues to increase, performance is declining (chart 1).

Chart.no 1. Relationship between performance and intensity of motivation



Experimental research has shown that the critical area of motivation intensity varies depending on several factors: the simplicity/complexity of the task the individual has to accomplish, the degree of perceived difficulty of the task, the personality particularities of the individual, etc.

According to the graph, in the case of simple repetitive tasks, as the intensity of motivation increases, the level of performance also increases. In the case of complex tasks, increasing the intensity of motivation increases the performance but only to one point, after which a stagnation and even a decline begin. It is thought that too strong a motivation leads to the emergence of emotions, which in turn leads to a certain degree of disorganization, which prevents progress, even leading to regress.

The moment when the decline begins depends on the complexity of the task: a heavy task speeds up the occurrence of the inflection point and thus the occurrence of the decline, whereas in the case of simple, repetitive, routine tasks, this point appears very late or not at all.

Thus, the optimal motivational concept was introduced, namely the intensity of the motivation to achieve high performance. The motivational optimum is obtained by acting on two variables: on the one hand, the habit of individuals to perceive as accurately as possible the difficulty of the task (in which case the optimal motivation is obtained by an equivalence relation between the intensity of the motivation intensity and the degree of difficulty perceived) and, on the other hand, by manipulating the intensity of motivation to increase or decrease it, depending on the situation.

To achieve optimal motivation, a permanent combination of extrinsic positive motivation with intrinsic motivation should be considered, with the goal not only to increase performance but also to develop the human potential of personal life.

In this context, an important role belongs to the individual psychic particularities of the employees (emotivity, equilibrium, self-control, etc.), these being elements that can stimulate or, on the contrary, can brake the fulfillment of the tasks.

3. The importance of applying theories to organizations

Motivational theories highlight the fact that employees within any department within the company have different needs that need to be met and depending on their degree of achievement, so staff are more or less motivated to work for the achievement of goals, hence that important in the company is that the activities within the organization are as stimulating and why not as attractive for the employees.

In my opinion, at present, the most popular forms of motivation of employees in the Romanian companies are salary, work / work, position in the organization, career development perspectives, differentiated or delocalized work program, information possibilities on the company's objectives,

financial situation development perspectives etc., how to solve problems, crisis situations.

Salary as a factor in employee motivation - improper use of this form of incentive, but also the exclusive use of this form of motivation will also have negative effects. In particular, in order to have a motivating effect and to increase the performance of the organization, it must necessarily be linked to the performance of the employee.

Position in the organization as a means of motivation - is about an intrinsic motivation, since this motivation is closely related to the direct relationship between the occupant and the tasks he / she has to perform. When it comes to enriching a post, this can often become a factor that motivates and leads to positive results, but negative effects may also occur in this case when the target is occupied by the position does not have the necessary skills or not has the necessary professional training.

Work itself / work done - In order for the activity to be motivating, the individual objectives of the job description must be built by the SMART type. Thus, they must be specific - they are targeted at a measurable, measurable, measurable area - or at least have a progress indicator. accessible - specific to those who realize them, realistic - as close as possible to the truth by using the available resources. measurable - specify the time when objectives will be met. In this context, I appreciate that only using this motivation is useful for motivating those who perform simple tasks. For those performing complex high-skill activities, several factors need to be combined.

Differentiated or delocalized work program - can be done in several forms - a flexible program with start and end time activities that vary according to the needs of the person's employee), weekly weekly program (involves running all weekly activities in fewer days, observance of the number of normal weekly hours), division of the job (contributes to the motivation of the staff by the fact that an employee can perform the duties related to the job together with other persons).

Information: The more employees know about what is happening in the firm, and especially how much they know about their work, the more they trust their work, and this affects their morale in a positive way. It is also important to ensure that they receive accurate and up-to-date information. Lack of information would reduce morale, and consequently motivation;

4. The importance of motivation management

In our century, the biggest challenge for managers is to build human resources departments capable of increasing employee productivity, yet leaving the primary idea of economic perceptions to lower costs and maximize profits.

This task will dominate the managers' work agenda and will ultimately make a difference between the competitive capabilities of organizations and their survival in the global economic environment.

Motivating human resources is not a simple process, it is a continuous and complex one, and managers need to be able to find the optimal mix to motivate and result-oriented employees.

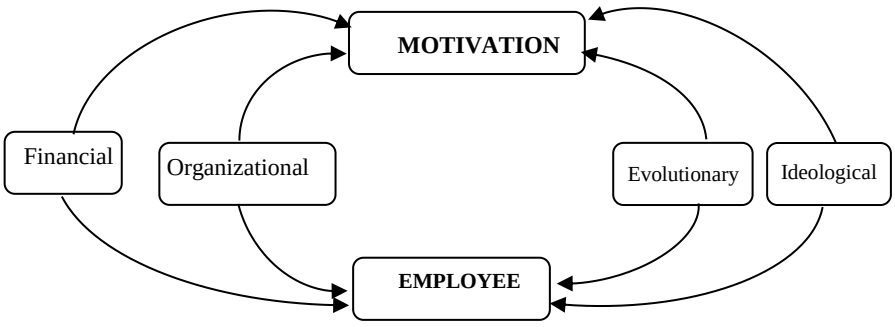
The motivation for work is, first of all, a personal matter, and it can be influenced by the policies and strategies of the organization. The manager believes that a company employee can motivate another, so he adopts the term "encouragement" instead of "motivation". Company managers are concerned with eliminating workplace dissatisfaction, improving working conditions, and providing as many facilities as possible to employees.

The manager understands the role of the human factor in achieving the desired economic performance and knows how to stimulate the entire collective of employees to effectively contribute to the achievement of the objectives without neglecting the staff's concerns for satisfying their own desires and needs.

The manager of the organization plays an important role in motivating employees; the ability to lead employees is one of the tasks the manager has and hence aims to permanently stimulate employees to do the best and to make the most of their capabilities to reach the organization's goals. An aspect of real importance is that in order to ask for and get the most out of employees, the manager is an example to them, in other words, the employees admire the person who leads them, and at the same time, they expect the hierarchical superior to or at the same time competent and responsive to their desires and suggestions.

The manager must also be involved in creating a team spirit in which each employee feels at ease, as a useful part of a whole. Collaboration between manager and employees increases staff motivation and therefore influences employee competence and performance.

Chart no.2. Motivational model



The successful manager is concerned with finding ways to motivate employees to get the job done. In this sense, they will have to be able to make their employees produce more, being interested in increasing the quality of their work and persuading them to spend less time recreating themselves and taking a long time thinking about the work and to their careers.

Once employees become motivated, they try to maintain that state; First, performance standards must be maintained at a high level (if you do not see when results start to be below the expected standards, people will think managers do not care about this). Secondly, another factor that is taken into consideration for the motivation of employees not to disappear is their morale, the mental state.

Maintaining performance: Following employees' motivation, it is useful to get the highest performance from them and maintain it at this high level. This is based on three elements: constant supervision (requires the manager to be constantly mindful of what is happening in the organization and the work of employees, to make sure what works well and make small adjustments where necessary - with as the mistakes are observed earlier, the more satisfied the world), periodic analysis of the situation (if the results of human labor are weak, it is not advisable for managers to react negatively to such situations, but to control, identify the causes that impede the achievement of the desired performance, it is important to identify the "culprit" and to agree with him an action plan to improve the situation), the review (the subjects to be discussed during the review are related to past performance, future plans, responsibilities). A periodic review of the results allows human resources to have an overview of their work, gives them a direction to follow, a feeling that they know where they are going).

5. Non financial motivation

In order to achieve optimal results, the manager is required to clarify from the outset the contractual relationships that are his projections regarding the financial or non-financial rewards and how they intend to use them. Many problems identified on the human resources component stem from the fact that managers do not know how to reward effectively the staff they coordinate.

The power of reward depends on the person who has the ability and the resources needed to reward employees.

Managers have a great reward potential, which is often exemplified by employees as follows: keeping or improving motivations, praise, recognition in front of others.

Rewards management is the process of developing and implementing strategies, policies and reward systems that enable the organization to meet its objectives by recruiting and selecting the necessary employees, as well as by properly motivating them.

In most human resource management theories, there are some aspects about the relationship between managers and employees: reward, recognition, appreciation, and last but not least benefits.

Relational needs. I am in correlation with the social needs component defined by Maslow, and the link with the work environment explains the need for individuals to come into contact, but also the social interaction that takes place in the workplace.

If it is based on the fact that maintaining good collegiality is an important aspect, it can be confirmed that the need for social interaction is an element that motivates employees in a company very much.

Development needs. It is the combination of Maslow's need for self-esteem and self-overtaking and refers to the need to be creative and to experience growth and development through the work done in the organization.

Most organizations recognize the need to use non-financial motivation methods. Non-financial methods are those forms of reward and incentive that do not involve direct payment of money to the employee. On the most important I will detail them in the following:

Expanding workplace activities involves the addition of additional tasks. In this situation, the employee desires to experience less repetition and monotony. When extending the workplace, the job itself remains essentially unchanged. With the expansion of the workplace, the employee rarely needs to acquire new skills to fulfill the additional burden. One possible negative effect is that the expansion of jobs can be viewed by employees as a requirement to do more work for the same payroll!

Rotation of jobs - involves moving employees through a range of jobs to increase interest and motivation. This method of rotation of jobs can have both advantages and disadvantages, on the one hand, it offers the advantage of solving the absence of staff, on the other hand it can generate a reduction in productivity because people are not familiar with the new task. Rotation of jobs often involves the need for further training.

Diversification of work - improving work tries to give employees greater responsibility by diversifying the work and complexity of tasks they have to do, while giving them the necessary authorities. This method creates the opportunity for employees to use their abilities to the fullest. Successful diversification of business requires almost always additional investment in employee training.

Teamwork and empowerment - involves ensuring greater control over professional life. Organizing the workforce in teams with a high degree of autonomy can achieve this. This means that employees plan their work, make their own decisions and solve their own problems. Teams are set targets to get and can receive rewards to do so. Teamwork is a popular way of organizing employees at work.

Compared to financial motivation, the non-financial one has a number of advantages: it has far more powerful effects, appealing to elements of emotional nature; costs less; has an effect over a longer period of time; is kept by the employee for a longer period of time; has positive effects on team cohesion; does not create resentment when the employer has to suspend it; creates loyalty to the company.

Non-financial motivation is the optimal solution for a number of situations naturally occurring in the company's activity. Below we can list a few:

Increase the company's productivity, as the financial situation does not allow for other employment or the additional payment of the existing employees;

Increasing the company's productivity in peak periods (especially in the service area);

Diminishing unjustified absences from the work program - with a clear impact on the company's productivity;

Developing the creativity, imagination and dedication of the staff in times of crisis of the organization;

Increasing loyalty to the organization and reducing departures - specific to sectors where finding qualified staff is difficult;

Improving the image of the company both internally and externally (supplier area);

Increasing the quality of products / services offered at no extra cost;

Increasing teamwork and improving the working atmosphere.

Non-financial motivation is a widespread practice in Western countries, especially in large companies. These strategies cover a wide range of stimulators, which can be divided into three distinct categories: employee / employee-related benefits, related to the company or related to the activity being carried out.

From my point of view the instruments of non-financial motivation are multiple and they can be constructed depending on the type of employee and type of organization. We enumerate the clear set of rules, respect for employees, but also respect for the bosses, relaxed work environment, atmosphere and right relationships between employees, the existence of personal development opportunities, but also career advancement prospects, team building activities to strengthen the spirit teamwork.

In the table below we have structured some non-financial motivation factors identified in different studies, broken down by category.

EMPLOYEE	**WORK**	**ORGANIZATION**
Possibilities to advance	Resources	Quality of service offered
Public recognition of merits	Features	Legality
Advantages in nature training	Tools	Economic Stability
Professional	Data	Defined objectives
Development	Ergonomics	Declared values
Information	Physical security	Mission
Affiliation	Systems of self-reliance	Competitive strategy
Professional realization	Autonomy	Fast decision making system
Identification with the organization	Responsibility	Consistency in decisions
State of mind	Flexibility	Clear communication
Trust in colleagues	Diversity	Transparency
Trust by colleagues	Efficiency	Accept the heroes
Personal goals consistent with the company's objectives	Utility	Leadership
Development	Level of stress	Ethics
Pride	Risk level	Social image
Security	Professional training	Human Resources Policy
Acceptance	Clarity of pregnancy	Employee status
Success		Supervision style
Recognition		Competitiveness
Satisfaction		Harmony
Work-life balance		Equity
Respect		

4. Conclusion

It is increasingly evident that the organization, the company, can cope with the changes required by competitiveness and progress only by focusing the managers' efforts on the motivation and satisfaction of the employees.

Practice has shown that there are a number of factors of great importance in staff motivation and which managers always account for. These factors are defined as positive and negative. From the first category, among the positive factors (which maneuver correctly lead to motivation) are: the possibility of professional realization; recognition of personal value; opportunities for training and professional growth;

incentive activities (free entry to courses, gymnasiums, participation in team-building, participation in volunteer activities); assigning responsibilities; interpersonal relationships and the most pleasant environment at work.

Among the most important factors that have negative effects on the motivation of the staff are: unpleasant ambience or excessive stress; very stable salary policy.

Appropriate motivation of employees is the main purpose on which good management of a firm is based. Practice shows that poor leadership quality is the main cause of employee dissatisfaction that is unsatisfied with their work. Motivating staff means creating opportunities for individual and team goals, responsibility, recognition, reward, etc.

Assuming responsibilities creates the possibility of achievements that offer the possibility of individual or group recognition, and recognition ensures.

References

- Burlea Șchiopoiu A., Corporate Moral Agency in Dictionary of Corporate Social Responsibility. CSR, Sustainability, Ethics and Governance, Idowu, S.O., Capaldi, N., Fifka, M., Zu, L., Schmidpeter, R. (Eds.), Springer, 2015
- Burlea Șchiopoiu A., L'entrepreneuriat social: un défi et un pilier pour la protection sociale, in Croissance, population et protection sociale. Faites et Théories face aux enjeux. Sous la direction de Alain Redslob, pp. 229-243. ISBN – 979-10-90429-68-0; ISSN – 1765-0305, Editions Panthéon-Assas. 2016
- Druță, F. – Economic Motivation, București, Economica Publishing House, 1999
- Prodan, A. – Succes of Management: motivation and behaviour, Polirom Publishing House, Iași, 1999
- Ticu, C. - Determinants of motivation at work – from theory to analysis of organizational reality, University Publishing House, A.I. Cuza, 2009
- Verboncu Ion – Organisational Management, Economica Publishing House, 2008
- Zlate, Mielu, Lecture of organizational-managerial psychology, vol. II, Polirom Publishing House, Iași, 2007

AN EMPIRICAL STUDY ON PUBLIC DEBIT IN ROMANIA

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Costin Alexandru PANAIT[**]

Abstract

This paper states that public debt can be defined as an amount that a country owes to creditors outside themselves, but also to individuals, businesses and even other governments. The term "public debt" is used interchangeably with the term sovereign debt. The study presents a brief analysis of the evolution of public debt in Romania for the past years. The issue of public debt sustainability is an important factor in the development of policies aimed at reducing the volatility of volatile capital markets, the economic policy of Romania should be focused on the gross GDP growth. Public debt is sustainable when state authorities have the ability to repay public debt service to creditors without having to make future adjustments to budget revenues and expenditures. The public debt has a negative effect on economic growth, heavily indebted countries being exposed to the risk of capital outflows or of the rapidly deteriorating position of public finances in the context of an economic and financial crisis. Emerging economies cannot sustain the same debt level as a share of GDP, that countries with advanced economies can manage, but a much lower one, mainly because of the limited access to capital markets of the countries from the former category.

Keywords: *public debt, budget deficit, public debt sustainability, economic growth, external debt.*

Introduction

The public debt is defined as how much a country owes to lenders outside of itself. These can include individuals, businesses, and even other governments. The term "public debt" is used interchangeably with the term sovereign debt.

Public debt usually only refers to national debt, but some countries also include the debt owed by states, provinces, and municipalities. Therefore, be careful when comparing public. Zaman G. argues that national and international financial institutions adopt a number of criteria by which countries can be categorized according to the size and dynamics of the existing debt.

The issue of public debt sustainability is an important factor in developing policies aimed at reducing the volatility of volatile capital markets. Public debt is sustainable when state authorities have the ability to repay the public debt service to creditors without having to make future adjustments to revenue and budget expenditures

1. Public Debt vs External Debt

Don't confuse public debt with external debt. That's the amount owed to foreign investors by both the government and the private sector. Public debt affects external debt, because if interest rates go up on the public debt, they will also rise for all private debt. That's one reason businesses pressure their governments to keep public debt within a reasonable range.

Economists consider that "the internal public debt represents the totality of the state's liabilities, coming from loans contracted directly or guaranteed by the state, from individuals or legal entities, in lei or foreign currency, on the domestic market, including the amounts temporarily received from the Treasury's sources" and "external public debt represents the total liabilities of the state, coming from loans on the foreign market, contracted directly or guaranteed by the state".

Moșteanu T, Postole M. A, Gherghina R., remarked that the link between the two types of debt can be influenced by political factors such as: large public investment projects involving the import of advanced technology. (Popa, 2010) appreciates that a country's external debt is made up of lending and borrowing operations received by a country or by private economic agents in that country in the international relations it carries out.

Pattillo argues that in the second half of the 1990s, decision-makers around the world have begun to admit that the high level of external debt contributes to curbing the development of a large number of low-income countries.

In the short run, public debt is a good way for countries to get extra funds to invest in their economic growth. Public debt is a safe way for foreigners to invest in a country's growth by buying government bonds. This is much safer than foreign direct investment. That's when foreigners purchase at least a 10 percent interest in the country's companies, businesses or real estate.

It's also less risky than investing in the country's public companies via its stock market. Public debt is attractive to risk-averse investors since it is backed by

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the government itself. When used correctly, public debt improves the standard of living in a country. That's because it allows the government to build new roads and bridges, improve education and job training, and provide pensions. This spurs citizens to spend more now, instead of saving for retirement, further boosting economic growth.

Governments tend to take on too much debt because the benefits make them popular with voters. Therefore, investors usually measure the level of risk by comparing debt to a country's total economic output, known as gross domestic product.

The debt-to-GDP ratio gives an indication of how likely the country can pay off its debt. Investors usually don't become concerned until the debt-to-GDP ratio reaches a critical level.

When it appears the debt is approaching a critical level, investors usually start demanding a higher interest rate. They want more return for the higher risk. If the country keeps spending, then its bonds may receive a lower S&P rating. This indicates how likely it is the country will default on its debt.

As interest rates rise, it becomes more expensive for a country to refinance its existing debt. In time, more income has to go toward debt repayment, and less toward government services. For more on how this occurred in Europe, see Sovereign Debt Crisis.

For the appreciation of a country's external debt, various indicators are used, reflecting the degree of indebtedness to the foreign currency and the currency effort it claims.

The indebtedness of a country vis-à-vis foreign countries is expressed by means of the indicators: absolute size of external debt, average external debt per capita, and ratio of external debt to gross domestic product.

The absolute size and average per capita external debt ratio is the amount owed to external creditors at any given moment, with no relation to the financial and currency potential of the debtor country and the timing of its reimbursement. The ratio between external debt and gross domestic product shows how much of the gross domestic product of the year considered would be needed to repay that debt. In Romania, the value of this indicator has evolved as follows:

The foreign exchange effort of a country's external debt is highlighted by the absolute magnitude of the external debt service, which is the annual payments made to the maturity of the contracted external borrowing plus the corresponding interest paid in convertible currency. In this respect, indicators are also used:

a) The external debt ratio, which expresses the share of external debt service (Sde) in the annual external income (VE) of the debtor country; R=(Sde/VE)x100;

This indicator shows the payment capacity of the debtor country and has several advantages as follows: highlights the role of exports in obtaining convertible currency; it is easy to compute and analyze; Highlights for a relatively short period (at most one year) the country's ability to honor the external debt service.

The evolution of this indicator in Romania is as follows:

b) Another indicator expresses the ratio between external debt service and debtors' income (Vd), ie government and public revenue, as well as government-guaranteed debtor income (Sde/Vd) x 100;
c) The ratio between the external debt service and the state budget revenue (VB), (Sde/VE) x 100.

This indicator shows the share of external public debt service in the budget revenues, so this indicator compares external debt with budget revenues during the period considered. It presents the disadvantage for countries with the non-convertible currency because external debt cannot be directly compared to internal income, but must be converted into a third-party currency, usually in the currency in which the external debt is expressed;

d) The ratio between the external debt service and the value of the official monetary gold reserves and the free currency of the debtor country. This indicator shows to what extent the external debt service can be covered by foreign exchange reserves and by other monetary values [Sde / (Rz Au+Valute)] x 100;
e) The ratio of external debt service to gross domestic product (Sde / PIB) x 100. It shows us the capacity of a state to bear its external debt;
f) Because the external debt affects the part of the gross domestic product for accumulation, then the ratio between the external debt service and the part of the gross domestic product for accumulation (Sde /A) x 100;
g) The remaining external debt (non-reimbursed amounts) can also be compared with the gross national product. This report shows the degree of indebtedness of the country. These comparisons are extremely useful to the decision-makers of debtor or creditor countries.

Romania has been classified by the World Bank in international statistics as a "less indebted" country, together with Poland, Croatia, the Slovak Republic, the Czech Republic, Estonia, etc. (while Hungary is classified as a "moderate indebtedness") One of the most important arguments was the worsening of sustainability indicators in correlation with other negative events, such as diminishing accumulation resources, decreasing domestic savings and investment rates, and increasing The fact that more than 90% of the country's gross debt is externally funded demonstrates the fragility of the national economy and the highest degree of dependence on external financing conditions for the collection of new resources.

Table no. 1. Indicators of appreciation of the external debt level

Country	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Euro area (19 countries)	64.9	68.6	78.4	83.8	86.1	89.4	91.3	91.8	89.9	88.9
Euro area (18 countries)	65.1	68.8	78.5	84.0	86.2	89.6	91.5	92.0	90.1	89.1
EU (28 countries)	57.5	60.7	72.7	78.3	81.0	83.7	85.6	86.5	84.5	83.2
EU (27 countries)	57.6	60.8	72.8	78.4	81.1	83.8	85.6	86.5	84.5	83.2
Belgium	87.0	92.5	99.5	99.7	102.6	104.3	105.5	106.8	106.0	105.7
Bulgaria	16.3	13.0	13.7	15.3	15.2	16.7	17.0	27.0	26.0	29.0
Czech Republic	27.5	28.3	33.6	37.4	39.8	44.5	44.9	42.2	40.0	36.8
Denmark	27.3	33.3	40.2	42.6	46.1	44.9	44.0	44.0	39.5	37.7
Germany	63.7	65.1	72.6	80.9	78.6	79.8	77.4	74.6	70.9	68.1
Estonia	3.7	4.5	7.0	6.6	6.1	9.7	10.2	10.7	10.0	9.4
Ireland	23.9	42.4	61.5	86.1	110.3	119.6	119.4	104.5	76.9	72.8
Greece	103.1	109.4	126.7	146.2	172.1	159.6	177.4	179.0	176.8	180.8
Spain	35.6	39.5	52.8	60.1	69.5	85.7	95.5	100.4	99.4	99.0
France	64.3	68.0	78.9	81.6	85.2	89.6	92.4	95.0	95.8	96.5
Croatia	37.7	39.6	49.0	58.2	65.0	70.6	81.7	85.8	85.4	82.9
Italy	99.8	102.4	112.5	115.4	116.5	123.4	129.0	131.8	131.5	132.0
Cyprus	53.5	45.1	53.8	56.3	65.7	79.7	102.6	107.5	107.5	107.1
Latvia	8.0	18.2	35.8	46.8	42.7	41.2	39.0	40.9	36.9	40.6
Lithuania	15.9	14.6	28.0	36.2	37.2	39.8	38.8	40.5	42.6	40.1
Luxembourg	7.7	14.9	15.7	19.8	18.7	22.0	23.7	22.7	22.0	20.8
Hungary	65.0	71.0	77.2	79.7	79.9	77.6	76.0	75.2	74.7	73.9
Malta	62.3	62.6	67.6	67.5	70.1	67.8	68.4	63.8	60.3	57.6
Netherlands	42.7	54.7	56.8	59.3	61.6	66.3	67.8	68.0	64.6	61.8
Austria	64.7	68.4	79.6	82.4	82.2	81.7	81.0	83.8	84.3	83.6
Poland	44.2	46.3	49.4	53.1	54.1	53.7	55.7	50.2	51.1	54.1
Portugal	68.4	71.7	83.6	96.2	111.4	126.2	129.0	130.6	128.8	130.1
Romania	**12.7**	**13.2**	**23.2**	**30.2**	**34.4**	**37.3**	**37.8**	**39.4**	**37.9**	**37.6**
Slovenia	22.8	21.8	34.6	38.4	46.6	53.8	70.4	80.3	82.6	78.5
Slovakia	30.1	28.5	36.3	41.2	43.7	52.2	54.7	53.5	52.3	51.8
Finland	34.0	32.7	41.7	47.1	48.5	53.9	56.5	60.2	63.6	63.1
Sweden	39.3	37.8	41.4	38.6	37.9	38.1	40.8	45.5	44.2	42.2
United Kingdom	41.9	49.9	64.1	75.6	81.3	84.5	85.6	87.4	88.2	88.3
Source: EUROSTAT										

2. Evolution of governmental public debt in EU

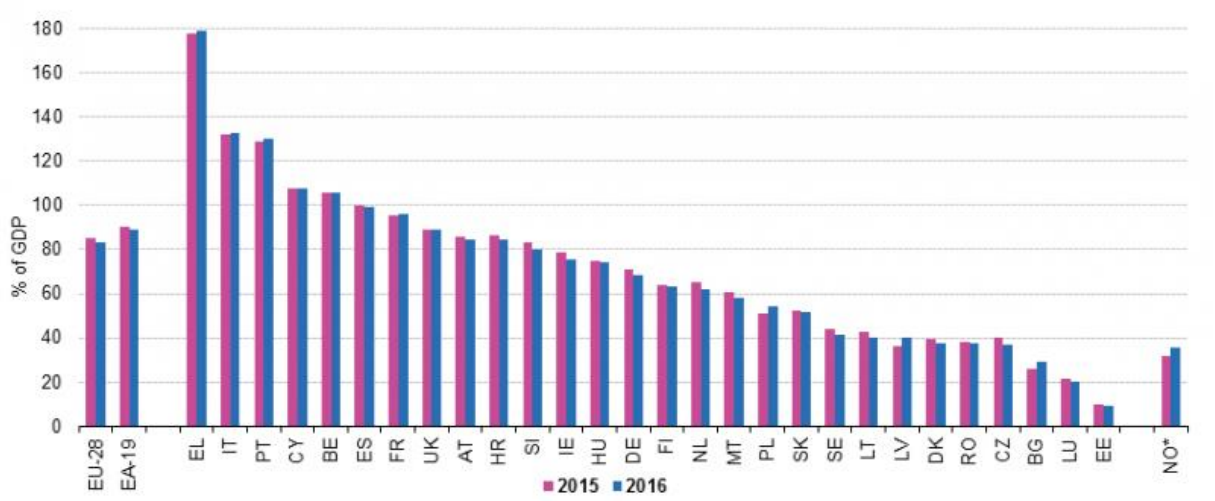
Evolution of governmental public debt in Romania, between 2005- 2016 As regards public debt in Romania, one must also take notice of the level of growth. In 2008 government public debt was 13.2 per cent of the GDP, and at the end of the year 2009 was 23.2 % of the GDP. On December 31, 2010, Romania recorded a government debt of 30.5 per cent of the GDP.

In 2011 public debt increased by 4.2 percentage, amounting to 34.7 percentage of the gross domestic product (GDP) as a result of the increase in economic growth of 2.5 per cent and the reduction in interest paid meant to attract loans, and a deflate greater than the forecast amount. At the end of the year 2012 government public debt was 51bn Euros, the payable debts being 14.4 bn. Euros, out of which 1.2 bn. Euros for the debt to the International Monetary Fund and the European Union. This was determined by the necessity to cover budget deficit and public debt buying into government. In 2012, according to Eurostat data, at the EU level, Romania was the fourth, only three member States recording a smaller debt: Estonia - 10.1 per cent of GDP, Bulgaria - 18.5 per cent of the GDP and Luxembourg - 20.8 per cent of the GDP.

In 2012, the government debt per every citizen was in 2012 of 2.500 euros, approximately double compared to 2008 when it represented only 1.400 euros. At the end of the first quarter of 2013, Romania's public debt increased by 0.9 percentage points compared to the same period of 2012, reaching the 38.6 per cent of the GDP and 0.8 percentages in the last quarter of the year 2012.

At the end of the first quarter of 2013 at the European Union level the situation is as follows: among the countries with the lowest public debt, there are: Estonia - 10% of GDP, Bulgaria - 18% of GDP, Luxembourg - 22.4 per cent of GDP, Latvia – 39.1% of GDP, Sweden - 40.4 per cent of GDP. While large public debt is recorded in: Greece – 160.3 per cent of the gross domestic product GDP, Italy – 130.3 per cent of the gross domestic product GDP, Portugal – 127.2.

Figure.no. 1.Maastricht debt as a percentage of GDP, 2015–2016



* Source for NO: quarterly general government gross debt
Source: Eurostat

In the long run, public debt that's too large can act like driving with the emergency brake on. Investors drive up interest rates in return for greater risk of default. That makes the components of economic expansion, such as housing, business growth, and auto loans, more expensive. To avoid this burden, governments must be careful to find that sweet spot of public debt. It must be large enough to drive economic growth but small enough to keep interest rates low.

Romania was among the EU countries with the lowest government debt in the GDP in the first quarter of the year. The rate slightly went down compared to the previous quarter, reaching 37.1%, according to EU's statistical office Eurostat.

The highest rate of government debt in the GDP in 2017, recorded at Greece the end of March, with 176.2%, followed by Italy, with 134.7% and Portugal, with 130.5%. At the opposite pole the lowest rates were seen in Estonia (9.2%), Luxembourg (23%) and Bulgaria (28.6%), followed by Denmark (36.7%) and Romania (37.1%).

Compared to the fourth quarter of 2016, the highest increase in the government debt ratio was reported in the Czech Republic, with 3.1 percentage points, followed by Luxembourg with 3 percentage points, and Croatia with 2.6 percentage points. Romania was among the countries that reported a slight decrease.

The baseline debt trajectory is higher relative to last year's DSA. 2 Despite a slightly lower-than-expected debt outturn in 2016 and a higher projection for GDP growth in 2017, gross public debt (including guarantees) is 0.2 percentage points higher in 2017 relative to the previous forecast (40.3 versus 40.5 percent to GDP) and 0.7 percentage points higher by the end of the projection period (44.2 versus 44.8 percent of GDP). This outcome is mainly driven by the higher expected budget deficits relative to last year's DSA. Under the baseline, which incorporates the most recent procyclical fiscal measures, the budget deficit is expected to exceed 3 percent every year until 2021, thus violating the 3 percent rule under the Stability and Growth Pact. The budget deficit does however gradually decline after 2018, reaching 2.9 percent of GDP by 2022 as absorption of EU funds improves and replaces capital spending financed directly out of the budget.

4. Conclusions

In the period taken into account, the level of national debt was found not to exceed the limit of 60% of GDP established by the Maastricht Treaty. Representing only 13.4 per cent of the GDP in 2008, at the end of the year 2016 the level of gross government debt is estimated at 38.4 per cent of the GDP, net government debt of 31.5 per cent of the GDP. At an estimated level of the estimated budget deficit of 2% of the GDP for t 2014, gross government debt level will reach 38.5 per cent of the GDP, while net government debt will be 32% of the gross domestic product GDP. For 2016, Fitch Ratings awarded BBB rating- for long term foreign currency debts and for long term national currency debts. At the same time, the agency makes a series of remarks regarding the macroeconomic situation of the country, such as reaching a structural deficit f 1% of GDP in 2017; curbing the gross public debt under 40% of GDP between 2016-2017; owning sufficient currency reserves and capital in the banking field; GDP growth in 2016 up to 2%, with a mild upward trend between 2015- 2016, which will cover the imbalance of the EU incomes.

The agency shall also makes a series of observations relating to macroeconomic situation of the country: a structural deficit of 1 percent of the GDP in

2016; maintaining gross government debt below 40% of the GDP in the period 2015-2016; possession of hard currency reserves and a capital in the banking sector sufficient; GDP growth in 2015 to 2 %, with a slight acceleration in the period 2015-2016, that he will be able to reduce the delay of the revenues from the EU.

There are also comments with respect to: low efficient activities within the state companies in the strategic areas such as transport and energy, as well as the lack of efficiency health and public administration sectors; increasing rate of non-performing credits at 20.9 %; possibility of a political instability degree as a result of Euro parliamentary and presidential elections in the year 2014. Moody's Rating Agency is the only one that has granted rating Baa3, keeping Romania in the category of countries with rating recommended for investors, while S&P granted Romania a BB+ both in lei and in hard currency.

For the period 2017-2018, we are expecting an increase in investments, decrease of budgetary expenditures, and a balance between the fiscal consolidation and the economic rebound, between economic and social.

To stimulate the economic growth in Romania, there were prepared an array of measures, such as: diminishing the overdue debts of the state budget, local budget and SOE's budgets; implementing the programmed "grants for youth" to decrease the unemployment rate; applying fiscal measure that should stimulate the activity of research, innovation and development; increasing the capacity of absorption of EU funds; supporting the economical investments.

Romania will have to take measures for sustainable development and reforming its economic and monetary policies, maintaining external balance, prioritizing export recovery and attracting foreign direct investment.

References

- Bental, B., Demougin, D., *Incentive contracts and total factor productivity*, International Economic Review, 47 (3), 2006
- BNR, 2015, Polls on lending, http://www.bnr.ro
- Loser, C., External *Debt Sustainability: Guidelines for Low and Middle Income Countries*, Research papers for the Intergovernmental Group of Twenty-Four on International Monetary Affairs, New York, 2009
- Moşteanu, T., Postole M. A., Gherghina R., *The analysis of external and internal public debt in Romania*, 11th International Conference Financial and Monetary Stability in Emerging Countries, 2010
- Nicula I., *Operations of credit institutions*, Ed. Pro Universitaria, Bucharest, 2007
- Pattillo, C., *External debt and grow*, Review of Economics and Institutions, 2011
- Popa, I., Romania's public debts and their consequences upon the economy, Munich Personal RePEc Archive, 2010
- Presbitero, A.F., Arnone, M. (2006), External Debt Sustenability and Domestic Debt in Heavily Indebted Poor Countries, Munich Personal RePEc Archive
- Văcărel I. Bistriceanu Gh, Anghelache G, Bodnar M, Bercea F, Moşteanu T, Georgescu F. (2007), *Public Finances*, Didactic and Pedagogical Publishing House
- Weber, L. (1997), *L'ETAT, acteur économique*, Economic Publishing House, Ediţia a III-a, Paris
- Zaman, G, Georgescu, G. (2010), Romania's External Debt Sustainability Under Crisis Circumstances, Romanian Journal of Economics
- Zaman, G. (2011), *Challenges, vulnerabilities and ways of approach in Romania's external debt sustainability*, Annals of the University of Oradea Economic Series, Oradea University Press

CUSTOMER EQUITY MANAGEMENT THROUGH CUSTOMER ENGAGEMENT: A CRITICAL REVIEW

Darina PAVLOVA*

Abstract

The current trends in business processes call for companies to operate in a highly competitive environment. Part of the changes observed is the increased focus on customer retention. The management of customer relations and the retention and expansion of the customer base are among the main tasks of any business. The concept of customer equity management provides opportunities for fulfilment of these tasks, but also monitors the financial well-being of the company. All this necessitates its implementation by businesses.The ability to preserve and manage the company's customer base is the application of the customer equity concept. This paper presents the opportunities for managing and increasing the value of customer equity through customer engagement. The research carried out tries to unify the conceptual framework of customer equity with the process of customer engagement resulting in the development of an integrated conceptual framework. Based on the proposed conceptual framework, the author draws the attention of managers not only to the analyses of the profitability from customers, but also to engagement of the entire customer base, regardless of its financial contribution to the well-being of the company. As a result, the intangible benefits from customers are regarded as an opportunity to increase the company's customer equity.

Keywords: *Customer Equity, Customer Engagement, CLV, Customer Equity Managemen, Brand.*

1. Introduction

The current trends in the development of the economy lead to substantial changes in the marketing approaches adopted by businesses. Recent decades have seen a shift from product to consumer-focused marketing. Already in 1996 the community was presented with the concept of customer equity, which has been established as the leading philosophy of marketers. At its core "customer equity" is seen as the total of the discounted lifetime values of the company's customers. This definition has different aspects, and depending on the scope of customers the authors may be placed inti two groups. The first one (Blattberg, Deighton (1996), Hanssens, Rust, Srivastava (2009)) define customer equity as the sum of discounted lifetime values of the existing customers of the company; the second group (Rust, Lemon (2004), Gupta, Zeithaml (2006), Leone (2006), Vogel, Evanschitzky, Ramaseshan (2008), Blattberg, Getz, Thomas (2001)) believe that customer equity should include the future customers of the company. As a concept, customer equity management studies and creates opportunities to retain the company's customers and increase the cash flows they generate in the long run. This, in turn, ensures the operation and prosperity of companies in the market. The fierce competition and the rapid adoption and imitation of products requires businesses to treat their customers in a special way so as to retain them, given that competitive advantages based on product features alone do not last long. In this regard, the management of customer relations and the retention and expansion of the customer base are among the main tasks of any business. The concept of customer equity management provides opportunities for fulfilment of these tasks, but also monitors the financial well-being of the company. All this necessitates its implementation by businesses.

On the other hand, the dynamics of changes in the market and in consumer needs and perceptions, accompanied by the rapid development of new technologies, have caused the emergence of the concept of customer engagement. Customer engagement is about creating a connection between the brand and the consumers. Customer engagement is the way the company creates relationships with its customer base, in order to encourage loyalty and brand awareness. This can be achieved through marketing campaigns, regular publications on the company's website, and promotion of the brand through social media and mobile and portable devices.

In this regard, of special importance is the integration of new consumer-centric marketing approaches, in particular customer engagement in the context of customer equity management. This is based on the inextricable link between customer engagement and the financial benefits it brings in the long-term, expressed by the value of customer equity.

This paper aims to present the fundamental importance of the concept of customer equity management for businesses, and to propose a conceptual model which integrates the new paradigm for customer engagement and could contribute to and further developed the theoretical achievements in the field of customer equity.

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2.Content

2.1. Customer Equity Management

Customer Equity Management as a concept requires a clarification of the term customer equity. Here above we presented two sets of views on this matter, from which we can summarize, that the main emphasis is on the value that customers generate in the course of their relationship with the company. The key difference in these views lies in the scope of customers. Customer equity is expressed either as a result of the relationships only with existing customers or as a result of relationships with both existing and future customers. In this regard, the author places the focus on existing customers and proposes a definition of customer equity, which draws from the views presented above and further develops and supplements them:

Customer equity is the value expression of current and future relationships with existing customers, which generate tangible and intangible benefits for the organization.

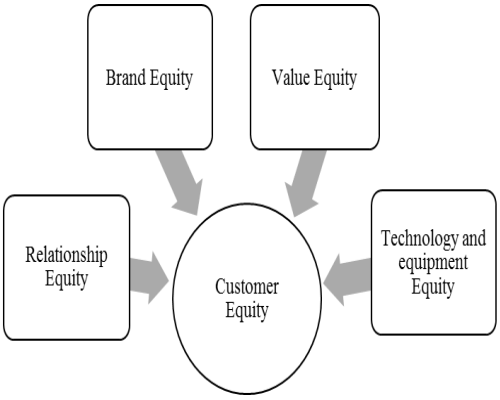
This definition is essential for the purposes of this paper, as the conceptual model developed for customer equity management aims to increase not only the tangible but also the intangible benefits for the company.

Central for the concept of customer equity is the assumption that customers are a major source of revenue for businesses. With this in mind, the focus is on the successful market performance of the company by maintaining effective relationships with its customer base in the long term. Guidance for establishing, maintaining and maximizing the benefits of these relationships is provided by the concept of customer equity. This concept may be presented as an innovative approach to retaining and acquiring customers, which leads to sustainable competitive advantages, enhanced market presence and increased market value.

The concept of customer equity is relatively new. It gained ground after 2000, when it was elaborated into a new management approach aimed at the successful long-term operation of the business (Blattberg, Getz and Thomas 2001, 111). The concept is based on the belief that the customer is a strategic value-generating resource, and that this value needs to be estimated, managed and maximized (Blattberg, Getz and Thomas 2001, 3-12). Customer equity management is a process that uses customer behaviour data and financial evaluation methods. It seeks to obtain the highest benefits from customers while their relationship with the company exists, and is based on the familiar concepts of customer lifetime value and customer life cycle, which it brings together in a new way. The application of this management approach requires integration of corporate strategies relating to products and consumers. This highlights one of the main contributions of the concept, namely the new insight into the efficient allocation of resources and efforts of businesses (Blattberg and Deighton (1996), Rust, Lemon and Zeithaml (2004), Reinartz (2005)).

In the literature there has been some controversy regarding the essential characteristics of the concept. According to Berger (2002), it lies in the basis of managing the value of relationships between customers and the company. Bayon,

Figure 1



Gutsche and Bauer (2002), in turn, regard the concept of customer equity as the optimal basis for consumer behaviour analyses. The two views combined regard customer equity as an expression of the expected future behaviour of the customers of the organization. This makes the application of the concept particularly important, as it may help build long-term relationships with customers and increase the value of the business, thus improving its market performance in the long run. These assertions are supported in publications by Pitt, Ewing, Berthon (2000), Flint, Woodruff, Gardial (2002), Slater (2009) and others, according to whom customer equity can be defined as a significant competitive advantage.

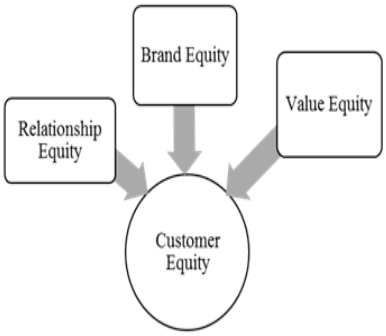
2.2. Cystomer equity management model

The essence and importance of customer equity for the company examined above raises the questions of its management and maximization. This paper is focused on an approach to customer equity management formulated by Lemon, Leone and Rust (2005). The authors put in the spotlight the customer life cycle and the possibilities to extend it. The approach presents customer equity management by analyzing consumer behaviour and defining the factors that drive customers to buy from a certain company both in the present moment and in the future. Lemon, Leone and Rust (2005) elaborated the concept of customer relationship management and defined the core values used to manage customer equity. This highlights the specific direction of this approach, namely the strong emphasis on consumers.

The value-based approach to customer equity management is based on an analysis of three stages of the customers' relationship with the company. The first stage is customer acquisition. This is the time when the customers form their opinions on the brand and the product before the purchase is made. In the second stage, after the purchase, the customers form an opinion on brand equity and value equity. As a result of these

evaluations, the customers continue to purchase from the relevant company. The third stage is the analysis of the value of the relationship established between the organization and the customers, which is turned into relationship equity by means of specific marketing tools. Thus, the authors define the influence of three determinants on the long-term value of the relationship with the customers. According to the equity approach, an organization can retain and expand its customer base by creating value equity, brand equity and relationship equity. Therefore, customer equity depends on the effect of these three values (Rust, Zeithaml and Lemon 2000, 9).

Figure 2



The equity approach presents the mechanism by which each of the determinants leads to an optimal relationship between the company and the customer. These three equities act both individually and in concert, and define the customer lifetime value (CLTV), and their effect on all customers determines the value of customer equity. This makes their management an indispensible necessity.

Value Equity is the consumer evaluation of the value of the product/service, based on perceptions of spending and receiving (Rust, Zeithaml and Lemon 2000, 56).

Brand Equity is the subjective and intangible evaluation of the product beyond its objectively perceived value (Rust, Zeithaml and Lemon 2000, 56).

Relationship Equity is the association of the customer with a brand, outside the customer's objective and subjective evaluation of that brand (Rust, Zeithaml and Lemon 2000, 57).

In previous research the author has identified and acknowledged the impact of an additional determinant that affects customer equity, namely technology and equipment equity. Technology and equipment equity should be understood as the consumer attitude towards the technology and equipment used in the company's activities (Ivanov and Pavlova 2017, 89-99). This fourth equity determinant is included due to the dynamics of the modern technological environment in a marketing context, and the companies' effort to engage and involve customers in the manufacturing process. In addition, in an effort to distinguish themselves from other market players, companies use technology as an approach to distinction. Efforts are made by manufacturers to make consumers aware about innovations used in their activities, and to make manufacturing processes visible in order to establish a relationship of trust with customers and instil in them positive attitudes towards the company's operations, products and brands. With regard to this fourth determinant it has been noted that consumers are increasingly aware of the production facilities and practices of organizations, and that online communication channels provide an opportunity to engage customers in these processes by converting them from observers to participants in the modification of existing products and the creation of new ones.

As a result, the model created by Lemon, Leone and Rust (2005) is further developed and enriched with a fourth factor, which contributes to customer equity management (Figure 2).

The impact of these four key determinants on customer equity requires reinforcement. One possibility to influence customers by creating all four equities is through the application of a new consumer marketing approach, namely customer engagement.

2.3. What is Customer Engagement

The new marketing reality requires managers to analyze their customers not only in the latter's role as buyers, but also in their role as business partners. The partnership between the customers and the company is expressed in their contribution to the development of businesses as observers, promoters, participants and co-creators who interact not only with the brand, but also with other consumers and the media. This new view on customers and their behaviour is a consequence of the overall digitization, which requires businesses to seek ways to retain and engage both their actual customers and those who are followers and "friends" of the brand (Moran, Muzellec and Nolan 2014, 200-204). This approach improves the company's market performance and helps both to preserve and to increase its customer base. In this respect, the idea of customer engagement is of particular interest.

In marketing terms, customer engagement is seen in two ways: with a focus on the psychological engagement of the customer with the company and with a focus on consumer behaviour.

Some authors regard customer engagement as a specific psychological state (Gambetti, Graffigna & Biraghi (2012); Patterson, Yu, and De Ruyter (2006); Brodie et al. (2011); Calder, Malthouse and Schaedel (2009) and Mollen and Wilson (2010)). Hollebeek (2011, 780) defines customer engagement as a certain psychological state, motivated by the attitude towards the brand. According to Bowden (2009, 63-74), customer engagement is a psychological process which creates customer loyalty. Higgins and Scholer (2009, 102) outline this engagement as a state of preoccupation, participation, inclusion and involvement in something.

Some aspects of customer engagement are discussed in terms of behavioural manifestations of the consumers. Van Doorn et al. (2010, 254) focuses on the actions of customers with respect to the brand, beyond the relationships pertaining to the transaction itself. Similarly, Verhoef et al. (2010, 247) define customer engagement as a behavioural manifestation towards the brand or the company outside the purchase. Kumar et al. (2010, 297-310), in turn, support the views of Van Doorn, but consider the act of purchase as part of the essence of customer engagement. The authors also highlight other forms of engagement taking place after the purchase, which create value for the company: influence of customers on other consumers by sharing positive or negative opinions, attracting new customers through references and feedback provided to the company. On the other hand, Bijmolt et al. (2010) lay the emphasis specifically on three key behavioural manifestations of customer engagement: word of mouth (WOM) marketing, co-creation of products, and behaviour manifested in the filing of complaints against the company (such behaviour may occur at different stages of the customer life cycle).

Opinions exist which combine the psychological and behavioural perspectives in defining customer engagement. Vivek et al. (2012) focus on the customers' behaviour towards the company, but also recognize the emotional and cognitive elements of the engagement. Hollebeek et al. (2014, 154) define customer engagement as a positive relationship with the brand, expressed in the behavioural, affective and emotional activities of the customers in their interaction with the company.

This paper shares the view that customer engagement is a psychological state shaped by the brand, with has a behavioural expression. The behavioural expression of this engagement are all actions related to word of mouth marketing, references, feedback, search and dissemination of information about the brand/company, generation of product ideas, etc. The act of purchase is placed under the concept of customer equity, in terms of the financial benefits the customers bring to the company, and is excluded from the definition of customer engagement. This understanding of customer engagement aligns with the intangible benefits that customers generate for the company. This gives grounds to look for opportunities to manage and maximize customer by engaging customers with the company.

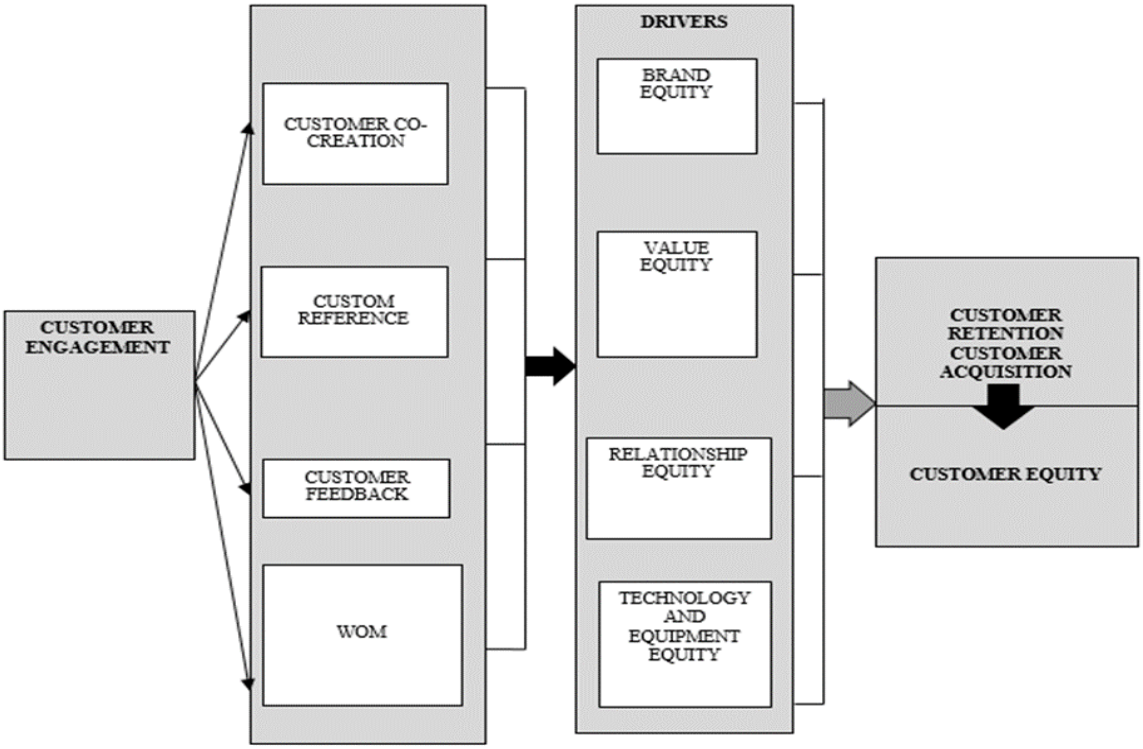
2.4. Maximising Customer Equity, an integrated framework

Customers generate profits for companies in two ways: directly – through their purchases, and indirectly through other actions such as references made before other potential customers, influencing current and potential customers on social networks, or providing feedback. Identifying the right customers who create value for the company and managing the relationships with them are key to improved financial results. A number of authors have explored in depth the various ways to maximize the value from customers, created by their regular purchases from the company. The concept of customer equity pays little attention to the indirect benefits from existing customers. In this regard, the author attempts to interlink the engagement of existing customers with the factors influencing customer equity as a mechanism for its maximization (Figure 3).

Customer engagement is expressed through four dimensions: participation of the customer in the process of creating new products, reference, sharing information about the brand and the company's activity (WOM), feedback on products and services of the company. It is important to clarify such actions are the result of established relationships between customers and the company.

In the context of customer equity management, customers who are engaged with the brand through the actions described above, outside the purchasing behaviour, are an important source of value for the company. Customers who participate as part of the creative team of the company in the creation of new products or improvement of existing ones contribute directly to the market success of the company. Those who carry out marketing by word of mouth, attract new customers for the company, as the personal reference is one of the most successful tools to induce interest in the brand. Customers who provide feedback to the company with reviews of the product, staff, service, supply or information are a valuable corrective contributing to the performance of the company. Customers who share positive information about the economic and non-economic activities of the company induce favourable consumer attitudes towards the brand. Everything presented thus far gives us reason to believe that this consumer behaviour affects other consumer and helps attract new customers for the business. The acquisition of new customers increases the value of customer equity.

Figure 3



On the other hand, each of these actions directly corresponds to the four factors that determine the value of customer equity. Customer involvement in product development strengthens the influence of the brand equity, value equity, relationship equity and technology and equipment equity, as it engages the customer in each of these aspects. The desire for references, feedback and sharing information about the company is also conducive to the formation of these values for customers. The creation of brand equity, value equity, relationship equity and technology and equipment equity, whose direct expression is customer equity, affects directly the retention of customers. It can be summarized that the engagement of customers strengthens their relationship with the company, which leads to long-term relationships. Maintaining the customer-company relationships in the long term has a positive impact on customer equity.

Based on the proposed conceptual framework, the author draws the attention of managers not only to the analyses of the profitability from customers, but also to engagement of the entire customer base, regardless of its financial contribution to the well-being of the company. As a result, the intangible benefits from customers are regarded as an opportunity to increase the company's customer equity.

4. Conclusions

In conclusion, we can say that the survival of any business depends on its ability to retain and increase its customer base. In this context, the ability to manage the company's customer equity is crucial. However, focusing only on the financial benefits from customers may limit the possibilities for customer equity maximization. In this regard, special attention has been given to the generation of benefits for the company by customers through their consumer behaviour, beyond the purchases they make, expressed through customer engagement. From the review made above it became clear that customer engagement is a concept whose definition cannot be accepted equivocally. In this paper it has been examined in terms of its aspects of emotional and behavioural engagement with the brand beyond the making of purchases. The dimensions of engagement presented here are interconnected both with the acquisition of new customers and the factors determining the value of customer equity. Product ideas generation, references, dissemination of information and feedback from customers are defined as activities that improve both the company's performance and the retention and increase of its customer base. In this respect, customer engagement is regarded as an opportunity to increase customer equity.

The author takes into account that future research in the following areas is needed:

- Testing the strength of the links between customer engagement dimensions and customer equity factors;
- Opportunities to engage the customers;
- Applying metrics for the level of the customer engagement.

References

- Berger, P., Bolton, R., Bowman, D., Briggs, E., Kumar, V., Parasuraman, A., Terry, C. 2002. „Marketing Actions and the Value of Customer Assets: A Framework for Customer Asset Management.“ *Journal of Service Research*, Vol. 5, № 1: 39 – 54
- Bijmolt, T. H. A., Leeflang, P. S. H., Block, F., Eisenbeiss, M., Hardie, B. G. S., Lemmens, A., & Saffert, P. 2010. „Analytics for customer engagement.“ *Journal of Service Research*, 13(3): 341–356
- Blattberg, R., Deighton, J. 1996. „Manage Marketing by the Customer Equity Test.“ *Harvard Business Review*, Vol. 74, no. 4: 136 – 144
- Blattberg, R., Getz, G., Thomas, J. 2001. *Customer Equity: Building and Managing Relationships as Valuable Assets*. Boston, Harvard Business School Publishing Corporation. p.111
- Bowden, J. L. H. 2009. „The process of customer engagement: A conceptual framework.“ *Journal of Marketing Theory and Practice*, 17(1): 63–74
- Brodie, R. J., & Hollebeek, L. D. 2011. „Response: Advancing and consolidating knowledge about customer engagement.“ *Journal of Service Research*, 14: 283–284
- Calder, B. J., Malthouse, E. C., & Schaedel, U. 2009. „An experimental study of the relationship between online engagement and advertising effectiveness.“ *Journal of Interactive Marketing*, 23 (4): 321–331
- Flint, D., Woodruff, R., Gardial, S. 2002. „Exploring the phenomenon of customers' desired value change in a business-to-business context.“ *Journal of Marketing*, Vol. 66: 102 – 117
- Gambetti, R. C., Graffigna, G., & Biraghi, S. 2012. „The grounded theory approach to consumer brand engagement: The practitioner's standpoint.“ *International Journal of Market Research*, 54 (5): 659
- Gupta, S., Zeithaml, V. 2006. „Customer metrics and their impact on financial performance.“ *Marketing Science*, Vol. 25, № 6: 718 – 739
- Hanssens, D., Rust, R., Srivastava, R. 2009. „Marketing Strategy and Wall Street: Nailing Down Marketing's Impact.“ *Journal of Marketing*, Vol. 73:115 – 118
- Higgins, E. T., & Scholer, A. 2009. „Engaging the consumer: The science and art of the value creation process.“ *Journal of Consumer Psychology*, 19(2): 100–114
- Hollebeek, L. D. 2011. „Demystifying customer brand engagement: Exploring the loyalty nexus.“ *Journal of Marketing Management*, 27(7–8): 785–807
- Hollebeek, L. D., Glynn, M. S., & Brodie, R. J. 2014. „Consumer brand engagement in social media: Conceptualization, scale development and validation.“ *Journal of Interactive Marketing*, 28(2): 149–165
- Ivanov, Y., D. Pavlova. 2017. „Impact of Technology and Equipment Equity on Price Levels of Products.“ *Marketing and Branding Research*, ISSN 2476-3160, Vol.4,Num.: 89-99
- Kumar, V., Aksoy, L., Donkers, B., Venkatesan, R., Wiesel, T., & Tillmanns, S. 2010. „Undervalued or overvalued customers: Capturing total customer engagement value.“ *Journal of Service Research*, 13: 297–310
- Leone, R., Rao, V., Keller, K., Luo, A., McAlister, L., Srivastava, R. 2006. „Linking brand equity to customer equity.“ *Journal of Service Research*, Vol. 9, № 2: 125 – 138
- Mollen, A., & Wilson, H. 2010. „Engagement, telepresence and interactivity in online consumer experience: Reconciling scholastic and managerial perspectives.“ *Journal of Business Research*, 63 (9–10): 919–925
- Moran, G., Muzellec, L., & Nolan, E. 2014. „Consumer moments of truth in the digital context: How "search" and "E-word of mouth" can fuel consumer decision-making.*“ Journal of Advertising Research*, 54(2): 200–204
- Patterson, P., Yu, T., & De Ruyter, K. 2006. „Understanding customer engagement in services.“ Paper presented at ANZMAC 2006 Conference, Brisbane. http://www.anzmac.org/conference_archive/2006/documents/Pattinson_Paul.pdf
- Pitt, F., Ewing, M., Berthon, P. 2000. „Turning competitive advantage into customer equity.“ *Business Horizons*, Vol. 43: 11 – 18
- Reinartz, W., Thomas, J., Kumar, V. 2005. „Balancing acquisition and retention resources to maximize customer profitability.“ *Journal of Marketing*, Vol. 69: 63 – 79
- Rust, R., Lemon, K. 2005. *Customer Equity Management.* N. J., Pearson Prentice Hall, Upper Saddle River
- Rust, R., Lemon, K., Zeithaml, V. 2004. „Return on marketing: using customer equity to focus marketing strategy.“ *Journal of Marketing*, Vol. 68: 109 – 127
- Rust, R.T., Zeithaml, V. A., Lemon, K. N. 2000. *Driving Customer Equity*. New York, The Free Press, 2000, p. 56
- Slater, S., Mohr, J., Sengupta, S. 2009. „Know your customers.“ *Marketing Management*, Vol. 36, (January/February): 36 – 44
- Thomas, B., Gutsche, J., Bauer., H. 2002. „Customer Equity Marketing: Touching the Intangible.“ *European Management Journal*, Vol. 20, № 3: 213 – 222
- Van Doorn, J., Lemon, K. N., Mittal, V., Nass, S., Pick, D., Pirner, P., & Verhoef, P. C. 2010. „Customer engagement behavior: Theoretical foundations and research directions.“ *Journal of Service Research*, 13(3), 253–266
- Verhoef, P. C., Reinartz, W. J., & Krafft, M. 2010. „Customer engagement as a new perspective in customer management.“ *Journal of Service Research*, 13(3): 247–252

- Vivek, S. D., Beatty, S. E., & Morgan, R. M. 2012. „Customer engagement: Exploring customer relationships beyond purchase.“ *The Journal of Marketing Theory and Practice*, 20(2): 122–146
- Vogel, V., Evanschitzky, H., Ramaseshan, R. 2008. „Customer equity drivers and future sales.“ *Journal of Marketing*, Vol. 72, № 6: 98 – 108

ELEMENTS CONCERNING THE INSTITUTIONAL FRAMEWORK OF PUBLIC-PRIVATE PARTNERSHIP

Florina POPA*

Abstract

Studying collaborative relationships between the public and private sectors concurs to the knowledge of contribution in promote economic development, regeneration of urban and rural areas, through the participation of a wide range of actors belonging to central/local governments, private actors.

The institutional system where the public-private partnerships evolve, offers to governments, the possibility to make their contribution in drawing up sustainable agreements through creating new institutional structures that provide a framework conducive to coherent policies formulation and experience development in project management. The institutional framework of the public-private partnership develops regulatory instruments through which it exercises its influence in the development of partnerships.

The state establishes units of Public-Private Partnership type, their role being to make their contribution in solving problems regarding PPP - designing partnership projects in a wide range of areas and implementing their goals. These units can contribute with information in formulating national policies and practices, thus, supporting government in developing partnerships.

The paper presents aspects of the institutional framework where Public-Private Partnerships form and evolves and elements whereby it takes part in their development – the institutional instruments and Public-Private Partnerships Units - the opinions of different authors concerning the influence which the institutional framework exerts on public-private partnerships.

Keywords: *Institutional framework, Public-Private Units, institutional instruments, Public-Private partnerships, Institutions.*

Jel Codes: *H41; H42; H44, E021.*

1. Introduction

The analysis of collaboration between the public and private sectors is important from the perspective of knowing the contribution made in promoting economic development, regeneration of urban and rural areas, in the context of the participation of a wide range of actors belonging to central/local governments, private actors.

Public-private partnerships are forms of co-operation between the public and, respectively, private sectors, in order to achieve infrastructures or services by that it assumes to optimize the experiences of the two entities. Their objectives belong to a wide range of economic and social activity, having political support and being the object of authorities' preoccupations at supranational, national, local level (McQuaid R.W. 2005, CEC-1996, Leach et al. 1994)[1].

PPP is based on a contract between the public and private sector through which the private sector contributes with financial resources and projects and the public sector is responsible for delivering services to the population, respecting the needs of individuals and contributing to standard of living rise. (UNECE, 2008).

2. Defining elements

Public-private partnerships evolve into an institutional system of which governments makes their contribution to accomplish sustainable agreements, by: creating certain institutional structures that provide a framework favourable to coherent policies drawing, transparency, fair distribution of risk, leading towards sustainable development and clarity of legislation regulation. (Delhi, V. S. K., Palukuri, S. & Mahalingam, A., 2010).

Scott (2008) defines the institutions as "symbolic frameworks that create shared meanings and controls that provide order to social action"[2]. Governments, through their authority, may impose different structures such as rules, regulations and procedures (Scott, 1987), which become means or instruments whereby they

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[1] Ronald W.McQuaid quotes pe CEC - 1996, Leach *et al.* 1994, in 1"The theory of partnership Why have partnerships?", în "Public Private Partnership Theory and practice in international perspective" Osborne P. Stephane ed., pag. 9;

[2] Julieta Matos-Castano, Geert Dewulf and Ashwin Mahalingam (2012), quote Scott, W. R. (2008) in "The Complex Interplay between the Institutional Context and PPP Project Outcomes" Working Paper Proceedings Engineering Project Organizations Conference Rheden, The Netherlands July 10-12, p.4;

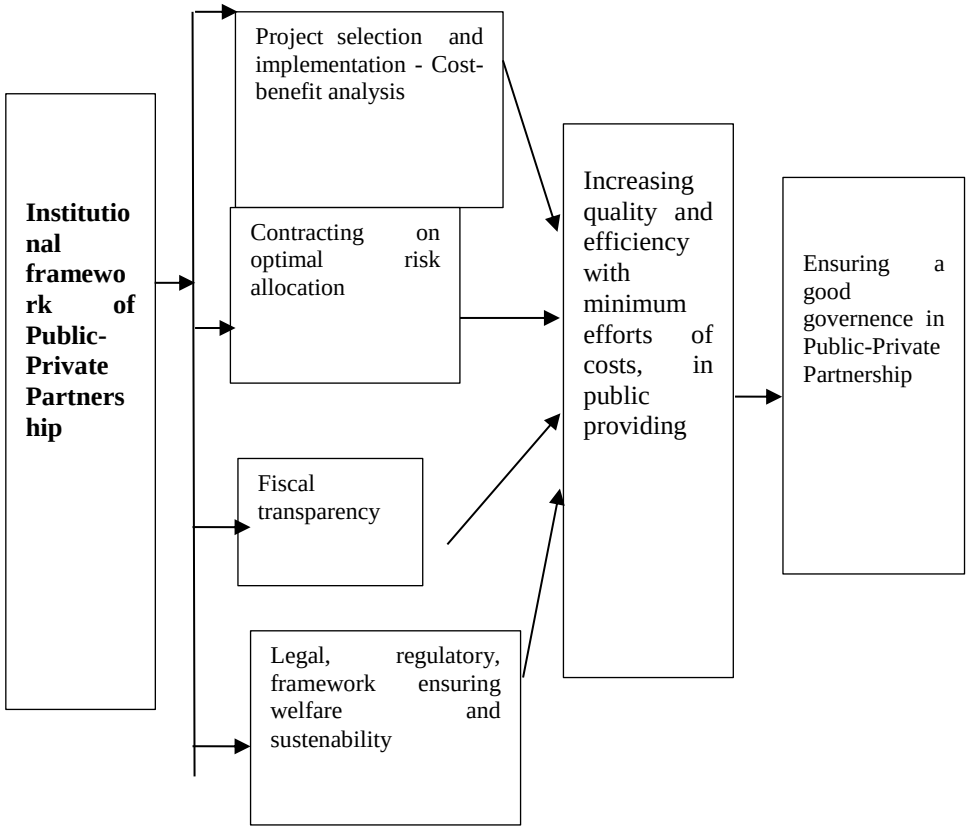
pursue to implement the objectives formulated (Scott, 1995; Henisz et al., 2012)[3].

In the *Guidebook on Promoting Good Governance in Public-Private Partnerships*, institutions are defined as "the bodies setting formal rules (property rights, rule of law etc.) while taking into account informal constraints (beliefs, traditions and social norms) that shape human interactions"[4] (UNECE, 2008).

The institutional framework of which public-private partnerships are developed is oriented towards the formation of new institutions and the development of experience in project management (UNECE, 2007). The institutions may be *formal* - legal and regulatory frameworks, coherent policies, institutions conducive to public-private partnerships (such as PPPs Units with coordinating role) and *informal* - forums where the public and private sectors meet to clarify the misunderstandings that may arise in the projects. A favorable institutional framework that emphasizes transparency and public interest, contributes to increase accountability and a better understanding of partnerships.

Schematically, the institutional framework of public-private partnership is expressed in Figure no. 1:

Figure no. 1 Elements of the institutional framework of Public-Private Partnership



Source: adaptation from Jomo KS, Anis Chowdhury, Krishnan Sharma, Daniel Platz (2016), „Public-Private Partnerships and the 2030 Agenda for Sustainable Development: Fit for purpose?",Department of Economic & Social Affairs DESA Working Paper No. 148 ST/ESA/2016/DWP/148 February 2016, http://www.un.org/esa/desa/papers/2016/wp148_2016.pdf

3. Institutional regulatory tools

Various authors demonstrate in their studies the influence that institutional framework exerts on public-private partnerships (Delhi et al., 2010), through regulatory instruments, called by Mahalingam et al. (2011) "*institutional capacities*": "legitimization, trust and capacity"[1]. A delimitation of the institutional environment is achieved by this arrangement and the institutional capacities favourable to PPP development are highlighted.

"**Legitimacy** is a generalized perception or assumption, that the actions of an entity are desirable, proper or appropriate, within some socially constructed system of norms, values, beliefs and

[3] Julieta Matos-Castano, Geert Dewulf and Ashwin Mahalingam (2012), quote Scott (1987), Scott (1995); Henisz et al., (2012), in "The Complex Interplay between the Institutional Context and PPP Project Outcomes", Working Paper Proceedings Engineering Project Organizations Conference Rheden, The Netherlands July 10-12, p.4;

[4] United Nations Economic Commission for Europe (2008), "Guidebook on Promoting Good Governance in Public-Private Partnerships", United Nations New York and Geneva, p.13;

[1] Julieta Matos-Castano, Geert Dewulf and Ashwin Mahalingam (2012), quote Mahalingam et al. (2011), Delhi et al. (2010), in "The Complex Interplay between the Institutional Context and PPP Project Outcomes" Working Paper Proceedings Engineering Project Organizations Conference Rheden, The Netherlands July 10-12, Proceedings Editors Amy Javernick-Will and Ashwin Mahalingam, p.4, p.5;

definitions"[2](Suchman, 1995). The willingness of public and private actors to engage in PPPs is encouraged by formal specific relationships. It is characteristic of PPPs because private sector actors are involved, in services delivering, which are provided by the public sector. (Jooste et al., 2011).

Mahalingam (2011)[3] shows the ways whereby governments can ensure the legitimacy nature:

- existence of clear reasons for drawing up Public-Private Partnership agreements;
- orienting the political will towards encouragement of the formation of PPPs;
- formulation of effective communication strategies, by governments, whereby to ensure all stakeholders information.

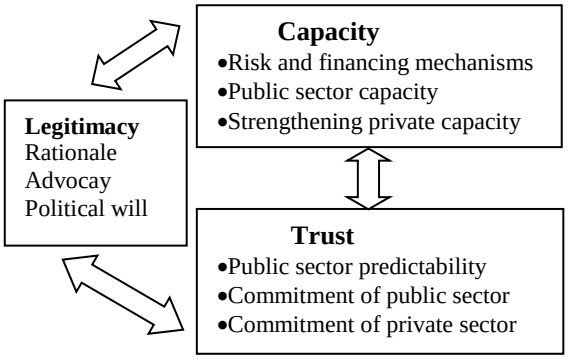
"**Trust** is a disposition and attitude relating to the willingness to rely on the actions of other actors under the condition of contractual and social obligations, with a prospective for collaboration"[4] (Smyth & Pryke, 2008). Sitkin (1995) and Zucker (1986)[5] note the mutual consolidation of trust and formal relationships that influences cooperation in a partnership.

"**Capacity** to undertake PPPs will strengthen the ability to structure and govern PPP projects, being essential for PPP development"[6] (Mahalingam, 2011). It calls on the public partner, the adoption of new roles, the acquisition of experience and qualification in many areas, leading the government policies directions, namely[7] (Mahalingam, A., 2011):

- *building the capacity of public sector* to know the internal structure of PPP; providing certain professional training programs such as workshops; knowledge of the project; providing a rough guide;
- *ensuring some risk-allocation and financing procedures*, for the efficient management of PPP projects;
- *increasing the potential of the private sector* by tenders development under competitive and cooperative conditions.

A schematic representation of *institutional capacities* is presented in figure no. 2.

Figure no. 2 Institutional abilities of the Private-Public Partnership



Source: Julieta Matos-Castano, Geert Dewulf, Ashwin Mahalingam (2012), quote Mahalingam et al. (2011) in „The Complex Interplay between the Institutional Context and PPP Project Outcomes" Working Paper Proceedings Engineering Project Organizations Conference Rheden, The Netherlands July 10-12, 2012, Proceedings Editors Amy Javernick-Will and Ashwin Mahalingam, p.6, http://doc.utwente.nl/81186/1/Matos_Dewulf_Mahalingam%5B1%5D.pdf

In order for a public-private partnership to be successful, it is important the existence of an appropriate and stable institutional framework that avoids arising unforeseen risks for private investors in partnership projects.

4. Public-Private Partnership Units

In order to solve PPP problems, project and implement their objectives, the state intervenes establishing *public-private partnership units*, the definitions given to this notion highlighting the role and contribution which they make in the achievement of these agreements:

- "Any organization designed to: promote or improve PPPs [...]; [and] has a lasting mandate to manage multiple PPP transactions, often in multiple sectors."[8]. (World Bank and PPIAF, 2007)
- "Any organization set up with full or partial aid of the government to ensure that necessary capacity to

[2] Julieta Matos-Castano, Geert Dewulf and Ashwin Mahalingam (2012), quote Suchman, M. C. (1995), in "The Complex Interplay between the Institutional Context and PPP Project Outcomes" Working Paper Proceedings Engineering Project Organizations Conference Rheden, The Netherlands July 10-12, Proceedings Editors Amy Javernick-Will and Ashwin Mahalingam, p.5;

[3] Julieta Matos-Castano, Geert Dewulf and Ashwin Mahalingam (2012), quote Mahalingam (2011), in "The Complex Interplay between the Institutional Context and PPP Project Outcomes" Working Paper Proceedings Engineering Project Organizations Conference Rheden, The Netherlands July 10-12, Proceedings Editors Amy Javernick-Will and Ashwin Mahalingam, p.5;

[4] Julieta Matos-Castano, Geert Dewulf and Ashwin Mahalingam (2012), quote Smyth & Pryke (2008) in "The Complex Interplay between the Institutional Context and PPP Project Outcomes" Working Paper Proceedings Engineering Project Organizations Conference Rheden, The Netherlands July 10-12, Proceedings Editors Amy Javernick-Will and Ashwin Mahalingam, p.5;

[5] Julieta Matos-Castano, Geert Dewulf and Ashwin Mahalingam (2012), quote Sitkin (1995) and Zucker (1986), in "The Complex Interplay between the Institutional Context and PPP Project Outcomes" Working Paper Proceedings Engineering Project Organizations Conference Rheden, The Netherlands July 10-12, p.5;

[6] Julieta Matos-Castano, Geert Dewulf and Ashwin Mahalingam (2012), quote Mahalingam, A. (2011), in "The Complex Interplay between the Institutional Context and PPP Project Outcomes" Working Paper Proceedings Engineering Project Organizations Conference Rheden, The Netherlands July 10-12, Proceedings Editors Amy Javernick-Will and Ashwin Mahalingam, p.5;

[7] Julieta Matos-Castano, Geert Dewulf and Ashwin Mahalingam (2012), quote Mahalingam, A. (2011), in "The Complex Interplay between the Institutional Context and PPP Project Outcomes" Working Paper Proceedings Engineering Project Organizations Conference Rheden, The Netherlands July 10-12, Proceedings Editors Amy Javernick-Will and Ashwin Mahalingam, p.5;

[8] Emilia Istrate and Robert Puentes (2011) quote World Bank and PPIAF (2007) in "Moving Forward on Public Private Partnerships: U.S. and International Experience with PPP Units" Project on State and Metropolitan Innovation, p. 6;

create, support and evaluate multiple public/private partnership agreements is made available and clustered together within government" [9]. (OECD, 2010)

- "A PPP unit is a public entity (government, public/private corporation, or nonprofit) that supports other government agencies to procure projects through a PPP process; it is not the procuring agency"[10]. (Istrate E. and Puentes R.)

PPPs units have a continuous character and support the government in procuring public-private partnership projects in a wide range of areas or specific areas. In relation to PPPs, which relate to the outsourcing of government provision of public goods and services, the PPP unit is "a way to delegate operational responsibilities regarding the provision of government services"[11].(Istrate E. and Puentes R.)

PPP units can support governments by setting up and supplementing information, policies and practices formation at national level, in the field of PPPs (for example, Partnerships British Columbia din Canada; UK Treasury's PPP Policy Team in the United Kingdom). These units can be established and coordinated with the actors involved in the PPP program at different governmental levels: federal, central, departmental, sectoral or ministerial. Much of the PPP units are set up in the Ministry of Finance or Treasury. (Randolph, S. 2010)[12]

Units constituted at federal-level coordinate the governmental levels (state, local) and those constitued at central level coordinate PPP units within ministries. Examples of such PPP Units are found in various countries of the world, at different levels, central or federal:

- Ireland`s Central Unit PPP coordinates the Interdepartmental Group on Public-Private Partnership formed of all PPP Units existing in different ministries and representatives of other agencies, with concernments in this direction (Istrate E. and Puentes R., 2011)
- PPP Units located in a resort ministry, often, in the department responsible for infrastructure policy, such as: Danish Enterprise and Construction Authority of the Ministry of Business and Economic Affairs (OECD, 2010).
- PPP Units represented by corporations, for example, The German national PPP Unit, Partnerships Germany (ÖPP Deutschland AG) - PPP Units in Germany constituted as mixed corporations (Istrate E. and Puentes R., 2011, Bernhard Müller)[13]. The form of PPP Units establishment in corporations is reasoned by the political independence, high flexibility to changes on the PPP market, enhancement of possibilities for experienced labour force attraction (Ed Farquharson in Farrugia, Reynolds and Orr, 2008)[14], regardless of form; the sources of funding derive from the public budget (government, agency, ministry).

Through their functions, PPP Units support the government in overcoming the difficulties it faces in accomplish some programs regarding PPP (World Bank and PPIAF, 2007), such as: weak incentives in procurement field, low coherence at governmental agencies level, lack of qualification and experience, insufficient information. To this end, PPP Units intervene through various actions, to remedy the governmental level-related problems regarding the PPP proposals, such as:

- *Overseeing the selection of PPP projects* PPP Units can follow project proposals regarding compliance with the evaluation criteria of the required documentation to prove the eligibility of the projects. (OECD, 2010).
- *Following the fulfillment of criteria set up in a project*. (World Bank and PPIAF, 2007).
- *Participation through assistance and guidance* in case of insufficient experience for PPP coordination. Due to the complexity of public-private partnership contracts, the role of the public sector is to monitor the private sector consultants to ensure the achievement of the general public interest. By holding the required qualifications, a Public-Private Partnership unit can provide support to the public sector, through the experience of specialists who have had concerns in the field, to streamline the processes of PPP procurement and make negotiations more effective. (Ahadzi M. and Bowles, G. 2004; World Bank and PPIAF, 2007; Monteiro, R., S. 2005; Emilia Istrate and Robert Puentes, 2011)
- *Contribution to the reduction* of transaction costs as well as the timing of making documentation for PPP procurement contracts, both for the private sector and the government. The variety of governmental laws and regulations, different from one state to another, leads to high costs of transaction in making PPP agreements. The PPP Units contribute, by developing standardized documentation, to guide public partners in managing PPP contracts and contract compliance with standardized principles and public interest.
- *Dissemination of information* regarding the

[9] Emilia Istrate and Robert Puentes (2011) quote Organization for Economic Co-operation and Development OECD (2010), in "Moving Forward on Public Private Partnerships: U.S. and International Experience with PPP Units" Project on State and Metropolitan Innovation, p.6;

[10] Emilia Istrate and Robert Puentes (2011) "Moving Forward on Public Private Partnerships: U.S. and International Experience with PPP Units" Project on State and Metropolitan Innovation, p. 6;

[11] Emilia Istrate and Robert Puentes (2011) "Moving Forward on Public Private Partnerships: U.S. and International Experience with PPP Units" Project on State and Metropolitan Innovation., Brookings-Rockefeller, p. 9;

[12] Emilia Istrate and Robert Puentes (2011) quote Randolph, S. (2010), in "Moving Forward on Public Private Partnerships: U.S. and International Experience with PPP Units" Project on State and Metropolitan Innovation, p. 15;

[13] Emilia Istrate and Robert Puentes (2011) quote Müller, Bernhard (2009), in "Moving Forward on Public Private Partnerships: U.S. and International Experience with PPP Units" Project on State and Metropolitan Innovation, p.9;

[14] Emilia Istrate and Robert Puentes (2011) quote Ed Farquharson in Farrugia, Reynolds and Orr (2008), in "Moving Forward on Public Private Partnerships: U.S. and International Experience with PPP Units" Project on State and Metropolitan Innovation, p. 9;

opportunities to get involve in Public-Private Partnerships with the government. In both the developed and developing countries, the PPP Units can serve as instruments to encourage the interest of *investors, private partners*, to engage in PPP, by providing information concerning the PPP policies, programs and future opportunities (for example, Flemish PPP Knowledge Center provides information about the PPP policies and possibilities of their development) (World Bank & PPIAF, 2007)[15]. An increase in the success of PPP Units may result in a grouping of the PPP Unit, based on the functions they perform in:[16] (Farrugia, Reynolds and Orr, 2008)

- Review Units – performs quality verification and expresses its views on potential PPP projects;
- Service Agencies have additional functions to the quality control one;
- Exelence Centers provide information concerning the research achieved on PPP and the experience of the best practice in the field.

The above reveals that the Public-Private Partnerships Units operate in various ways to overcome the problems that the state encounters in making Public-Private Partnership agreements. The complex nature of the PPP projects, the lack of experience required to manage PPPs, that may lead to difficulties in their correct assessment and to inappropriate risk sharing, are arguments for setting up PPP Units towards assist governments with the development of the capacity to address the PPP projects, complying with the public interest.

The role of the PPP Unit undergoes changes, diminishing along the way, due to the maturing of PPP programs during their evolution period and to the experiences gained by the governmental agencies.

5. Conclusions

Public-private partnerships have emerged as a result of the problems that the public sector faces, in terms of high costs, required both by delivering certain infrastructure services and by the maintenance of the existing ones such as damaged schools and hospitals, water treatment systems, modernization of public infrastructure. Through partnership, the public sector aims to increase efficiency, attract and use additional resources, towards carrying out various activities.

Infrastructure development plays an important role in economic growth and poverty reduction, a phenomenon that has generated a steady increase in demand for investment in this area. Public-private partnerships are one of the key elements for improving service delivery and diminishing existing gaps, the transfer of development, maintenance and operational risk to the private partner, representing in the long run, a real potential for achievement of certain superior quality results over the traditional ones.

Building internal policies needed for PPPs, leading projects towards cost streamlining, exchanging experience and good practice between states and within states among different administrative levels is a significant factor of development some viable, effective projects that meet citizens' needs.

References

- Ahadzi, Marcus; Bowles, Graeme (2004). "Public-Private Partnerships and Contract Negotiations: An Empirical Study", *Construction Management and Economics*, 22 (2004): pp. 967-978, https://doi.org/10.1080/0144619042000241471
- Belhocine, Noureddine, Facal, Joseph, Mazouz, Bachir. "Les partenariats public-privé: Une forme de coordination de l'intervention publique à maîtriser par les gestionnaires d'aujourd'hui", http://cerberus.enap.ca/Telescope/docs/Index/Vol_12_no_1/Telv12n1_belhocine_facal_mazouz.pdf
- Boase, Joan, P. (2000). "Beyond Government ? The Appeal of Public-Private Partnerships", *Canadian Public Administration*, Volume 43, Issue 1, March 2000, p. 75-92
- Delhi, Venkata, S. K.; Palukuri, Seshanka.; Mahalingam, Ashwin (2010). "Governance Issues in Public Private Partnerships in Infrastructure Projects in India". Working Paper Proceedings Engineering Project Organizations Conference, South Lake Tahoe, CA November 4-7, 2010 Proceedings Editors John E. Taylor, Paul Chinowsky, Paper presented at the Engineering Project Organizations Conference, South Lake Tahoe, CA, http://academiceventplanner.com/EPOC2010/Papers/EPOC_2010_DelhiPalukuriMahalingam.pdf
- Delhi, Venkata, S. K.; Mahalingam, Ashwin; Palukuri, Seshanka (2011, 2012). "Governance issues in BOT based PPP infrastructure projects in India", Built Environment Project and Asset Management, Vol. 2 Issue: 2, pp.234-249, Emerald Group Publishing Limited, 2012, https://doi.org/10.1108/20441241211280864;
- DiMaggio, Paul, J.; Powell, Walter, W. (1983). „The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields". *American Sociological Review*, Vol. 48, pp. 147–160;
- Farrugia, Christine; Reynolds Tim; Orr, Ryan J. (2008), "Public-Private Partnership Agencies: A Global Perspective", Working Paper 39, August 2008, Collaboratory for Research on Global Projects, Ed

[15] Emilia Istrate and Robert Puentes (2011) quote World Bank & PPIAF (2007) in "Moving Forward on Public Private Partnerships: U.S. and International Experience with PPP Units" Project on State and Metropolitan Innovation, p.9;

[16] Emilia Istrate and Robert Puentes (2011) quote Farrugia, Reynolds and Orr (2008), in "Moving Forward on Public Private Partnerships: U.S. and International Experience with PPP Units" Project on State and Metropolitan Innovation, p.9;

Farquharson in Farrugia, Reynolds, and Orr (2008), http://www.nawc.org/uploads/documents-and-publications/documents/document_02445830-0b21-4f61-8b65-bad5f5989467.pdf

- Ed Farquharson; Encinas, Javier (2010), "The U.K. Treasury Infrastructure Finance Unit: Supporting PPP Financing During the Global Liquidity Crisis", Public-Private Partnerships Solutions, World Bank Institute, March 2010, http://siteresources.worldbank.org/WBI/Resources/213798-1259011531325/6598384-1268250365374/PPP_Solutions_01.pdf
- Henisz, Witold, J.; Levitt, Raymond, E.; Scott, W. Richard. (2012). "Toward a unified theory of project governance: economic, sociological, and psychological supports for relational contracting", *Engineering Project Organization Journal*, Volume 2, Issue 1-2, 2012, pp. 37-55, https://doi.org/10.1080/21573727.2011.637552
- Istrate, Emilia and Puentes, Robert (2011) "Moving Forward on Public Private Partnerships: U.S. and International Experience with PPP Units" BROOKINGS-ROCKEFELLER Project on State and Metropolitan Innovation, December 2011, https://www.brookings.edu/wp-content/uploads/2016/06/1208_transportation_istrate_puentes.pdf
- Jomo KS, Anis Chowdhury, Krishnan Sharma, Daniel Platz (2016), „Public-Private Partnerships and the 2030 Agenda for Sustainable Development: Fit for purpose?", Department of Economic & Social Affairs DESA Working Paper No. 148 ST/ESA/2016/DWP/148 February 2016, http://www.un.org/esa/desa/papers/2016/wp148_2016.pdf
- Jooste, Stephan, F., Levitt, Raymond, E.; Scott, W. Richard (2009). "Capacity, Legitimacy, and Interest: Toward a Framework for PPP Program Success"
- Jooste, Stephan, F., Levitt, Raymond, E., Scott, Dick (2011). "Beyond "One Size Fits All: How Local Conditions Shape PPP-enabled Field Development" pp. 11-25
- Leach, Steve; Stewart, John; Walsh, Kieron (1994). "The Changing Organisation and Management of Local Government". Basingstoke, Macmillan
- Levai, Codrina, M., "Aspecte teoretico-practice privind parteneriatul public-privat în Uniunea Europeană", http://www.ugb.ro/Juridica/Issue1RO/11_Parteneriatul_public-privat_in_UEMihaela_LevaiRO.pdf
- Mahalingam, Ashwin, Kapur, Vikram (2009). "Institutional capacity and governmance for PPP projects in India", http://www.academiceventplanner.com/LEAD2009/papers/Mahalingham_Kapur.pdf
- Mahalingam, Ashwin (2011). "Creating an enabling environment for PPPs": Toolkit for Policymakers Engaged in Desigining and Managing PPP Interventions in the Infrastructure Sector: IFMR Research
- Marinescu, Cosmin (2004). "Instituţii şi prosperitate. De la etică la eficienţă". Editura Economică, Bucureşti
- Matos-Castano, Julieta; Dewulf, Geert; Mahalingam, Ashwin (2012), "The Complex Interplay between the Institutional Context and PPP Project Outcomes" Working Paper Proceedings Engineering Project Organizations Conference Rheden, The Netherlands July 10-12, Proceedings Editors Amy Javernick-Will and Ashwin Mahalingam, http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.455.1583&rep=rep1&type=pdf
- McQuaid, Ronald, W. (2005), **1** "The theory of partnership: Why have partnerships?", in Stephen Osborne P. ed,"Public Private Partnerships. Theory and practice in international perspective" Routledge Taylor & Francis Group e-Library 2005, pp. 9-35, https://books.google.ro/books/
- McQuaid, Ronald, W.; Scherrer, Walter, "Changing reasons for public private partnerships (PPPs)", econstor, Working Paper, *Working Papers in Economics and Finance*, University of Salzburg, No. 2009-02, https://ideas.repec.org/p/ris/sbgwpe/2009_002.html
- Meyer, John, W.; Rowan, Brian (1977). „Institutionalized Organizations: Formal Structure as Myth and Ceremony". *American Journal of Sociology*, Vol. 83, No. 2, (Sep. 1977), pp. 340-363
- Müller, Bernhard (2009). "PPP Units: Overview for Germany," Paris: Second Annual Meeting on Public-Private Partnerships, OECD Conference Centre, 2009
- Osborne, P., Stephen (2005)."Public Private Partnership Theory and practice in international perspective", Edited by Stephen P. Osborne, Routledge Taylor & Francis Group e-Library 2005, https://books.google.ro/books/
- Scott, W. Richard (1987). "The adolescence of institutional theory". *Administrative Science Quarterly*, Volume 32, No. 4, Dec. 1987, pp. 493-511
- Scott, W. Richard (1995). "Institutions and organizations". CA: Sage: Thousand Oaks
- Scott, W. Richard (2008). "Institutions and Organizations: Ideas and Interests*"*. Thousand Oaks, California, 3rd ed. Sage Publications, Los Angeles, CA
- Sean, Randolph (2010). "Framework Conditions for Foreign and Domestic Private Investment in California's Infrastructure: Seizing the P3 Opportunity a white paper by the Bay Area Council Economic Institute with support from Institute Board member and Table Rock Capital partner Peter Luchetti, prepared for the California Business, Transportation and Housing Agency, Economic Institute, September 2010
- Sitkin, Sim, B. (1995). "On the Positive Effect of Legalization on Trust". *Research on Negotiation in Organisations*, Volume/Issue 5, pp.185–217
- Smyth, D. Hedley (Editor); Pryke, S. (Editor) (2008). "Collaborative Relationships in Construction: Developing Frameworks and Networks": Wiley-Blackwell
- Sousa, Monteiro, Rui, (2005), "Public-Private Partnerships: Some Lessons from Portuguese Experience", European Investment Bank Conference on Economics & Finance, EIB Papers 9/2005

- Suchman, Marck, C. (1995). "Managing Legitimacy: Strategic and Institutional Approaches". *The Academy of Management Review*, Volume 20, No.3, pp. 571-610
- Zucker, Lynne, G. (1986). "Production of Trust: Institutional Sources of Economic Structure, 1840-1920". *Research in Organizational Behavior*, 8, 53–111
- Wettenhall, Roger (2003), "The Rhetoric and Reality of Public-Private Partnerships", *Public Organization Review: A Global Journal Volume* 3, Issue 1, pp. 77–107, March 2003, Kluwer Academic Publishers. Manufactured in The Netherlands, http://download.springer.com/static/pdf/95/
- Van Herpen G.W.E.B. (2002). „Public Private Partnerships The Advantages and Disadvantages Examined", European Conference Transport 2002, www.abstracts.aetransport.org/paper/download/id/1466
- CEC (1996). "Structural Funds and Cohesion Funds 1994-99: Regulations and Commentary". January 1996, Brussels, CEC, European Commission, European Union
- Organization for Economic Co-operation and Development OECD (2010), "Dedicated Public Private Partnership Units. A Survey of Institutional and Governance Structures", 3 March 2010, https://books.google.ro/, http://www.oecd-ilibrary.org/governance/dedicated-public-private-partnership-units_9789264064843-en, http://dx.doi.org/10.1787/9789264064843-en
- Organization for Economic Co-operation and Development OECD (2008). "Public-Private Partnerships. In Pursuit of Risk Sharing and Value for Money", 21 May 2008, https://books.google.ro/; http://www.oecd-ilibrary.org/ governance/public-private-partnerships_9789264046733-en; http://dx.doi.org/10.1787/9789264046733-en
- United Nations Economic Commission for Europe - UNECE. (2007). "A Guide on Promoting Good Governance in Public Private Partnerships", United Nations Economic Commision for Europe.
- United Nations Economic Commission for Europe – UNECE (2008), "Guidebook on Promoting Good Governance in Public-Private Partnerships", United Nations New York and Geneva, http://www.unece.org/fileadmin/DAM/ceci/publications/ppp.pdf;
- World Bank and the Public-Private Infrastructure Advisory Facility (PPIAF) (2007) "Public-Private Partnership Units - Lessons for their Design and Use in Infrastructure", October 2007, http://documents.worldbank.org/curated/en/220171468332941865/Public-private-partnership-units-lessons-for-their-design-and-use-in-infrastructure
- World Bank Group and the Public-Private Infrastructure Advisory Facility (PPIAF) (2016) "The State of PPPs. Infrastructure Public-Private Partnerships in Emerging Markets & Developing Economies 1991-2015", June 2016
- World Bank Group, Public-Private-Partnership in Infrastructure Resource Center (PPIRC), "Government Objectives: Benefits and Risks of PPPs", https://ppp.worldbank.org/public-private-partnership/overview/ppp-objectives
- Toolkit for Public-Private Partnerships in Roads & Highways, PPIAF, "Institutional framework", World Bank Group [US], https://ppiaf.org/sites/ppiaf.org/files/documents/toolkits/highwaystoolkit/6/pdf-version/4-21.pdf
- Partnerships British Columbia, 2003. „An Introduction to Public Private Partnerships". Update June 2003. Partnerships British Columbia, https://s3.amazonaws.com/academia.edu.documents/33551782/ An_ Introduction_to_P3_-June03.pdf?AWSAccessKeyId=AKIAIWOWYYGZ2Y53UL3A&Expires= 1518903329& Signature=0AUu8LYXuX0Kcti4ZfBVCbPzsok%3D&response-content-disposition= inline % 3B%20filename%3DAn_Introduction_to_Public_Private_Partne.pdf
- *Establishing a PPP Framework* 1.7.6 "The Roles and Benefits of PPP Units", https://ppp-certification.com/ppp-certification-guide/176-roles-and-benefits-ppp-units;https://ppp-certification.com/ppp-certification-guide/establishing-ppp-framework

PUBLIC DEBT - THEORETICAL CONSIDERATIONS

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Abstract

The article presents a point of view regarding the public debt management, in theoretical terms, characterized by a critical analysis both economically, financially and socially. Public debt has been, is and will be a topic of real interest for every society and for many of them it may be considered a way to modernize the mentality even of the population.

Public debt management is a process that is closely linked and dependent on monetary and budgetary policy and involves the involvement of all those who have a say or can influence the transformation of these issues.

Public debt management requires a permanent improvement through from the perspective of reforms which take place in the state administration process.

Keywords: *public debt, public expenditure, taxes and duties, indirect taxes, direct taxes.*

1. Introduction

The concept of *public debt*, this macroeconomic financial instrument present since ancient times in all the more or less developed socio-political systems, has led and still leads to strong disputes and even doctrinal controversies regarding the definition but, most of all, its sizing in a unitary manner.

In our opinion, there are two or even three reasons for these disputes in which all the great economists of the world have been and continue to be engaged.

The first category motivates the position of denial – up to exclusion – of the need for loan, on the grounds that it is not moral to transfer to future generations the today's effects of faulty financial management due to an unjustified lack of predictability in the programming of funding sources for future projects that generate budgetary remaining expenditures, at some point, without these resources. Promoters of this theory still exist today, but the idea has emerged since the 17th century.

In his Fifth book of "The WEALTH of NATIONS", published on March 9th 1776, Adam SMITH vehemently pleads against the very idea of public debt, stating that "...financing of public expenditure from taxes and fees or from selling government guarantees could become an activity generating public debt, which", says the author... "diminishes the effects of productive workforce in favour of nonproctive workforce".

In his work "On the Principles of Political Economy and Taxation", another important economist, David RICARDO, with more moderate opinions regarding the need for public debt, states: "The choice between financing through indirect taxes or debt - that is, future taxes - would be irrelevant to the real evolution of the economy, what matters being the actual levies made by public sector on the company's available resources."

The reluctance to use the loan as a financial instrument, but without excluding it, was also manifested by some contemporary economists.

Without denying the idea of external loan as a leverage of financial management, Henry KAUFMAN noted, however, that "...**nobody was able to explain either to taxpayers or to their elected representatives why the loan today will be tomorrow's expenditure, that will diminish the funds for other programs**".

In the same register, Paul A. SAMUELSON, winner of Nobel Prize for Economics in 1970, was asking himself, in his reference paper "Economics",: "...is it normal that the entire population bears the interests due to some persons, private creditors, through taxation?"

However, the one who violently attacked the idea of indebtedness of states, especially underdeveloped ones, was Karl MARX.

Although he did not directly address public debt as macroeconomic activity, Karl Marx was mentioning in "Das Kapital", his reference work: "...after they robbed the "BLACK" continent in order to support capitalism in England, its countries will be in such a shortage of resources that they will soon be forced to borrow and they will do it, usually also from the robbers".

The second category of economic analysts consists of those who not only accept the idea of public debt as an instrument of macroeconomic management, but also recommend it as a lever for the development of a state, conditioned by the use of resources attracted in this manner only into programs which bring added value.

Thus, claim the supporters of this theory, the level of transfer of additional budgetary obligations

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generated by the loan is much diminished due to the subsequent economic effects of the investments financed by it.

Significant in this regard is the equivalence assumption, promoted by David RICARDO, who accepts macrofinancing from both internal sources through indirect and external taxes, by loans, provided that the level of public sector leverage on the real financial resources of the company is balanced.

The dilemma tax or loan generated a third category of analysts, the moderates, who are supporters of a balanced system combining the two, based in particular on Ricardian theories. Today, the situation has not evolved much and how could we better explain the acidity of the remark of the British economist John Maynard KEYNES who, in connection with this or perhaps not only, states ... "all action people who think to be immunized against intellectual influences are in fact enthralled by some ideas of a few defunct economists".

These doctrinal differences have generated a vacuum of information in the area or, more correctly, they have not yet allowed to set a common definition for public debt, nor a common way to express its real dimension. And this is due to the fact that international norms of accounting representation in this area have not yet been established and institutionalized at international level.

2. Content

In his work, "Dette publique et deficits", the French teacher Jaques Le CACHEUX mentionned in this regard that..."at the moment, at international level, there are no unified public accounting rules that can be followed by all countries".

Paradoxically, this state of uncertainty still persists, considering that the need for loans has also seen – on the background of a certain economic stagnation – an unprecedented increase in the post-recession history, having as main effect the increase of budget deficits, a situation that imposed the adoption of decisions limiting both their size and the level of public debt.

For the purpose of the above and without limiting the scope of examples, we can consider as significant the provisions of the Treaty of the European Union, signed in Maastricht on 7 February 1992, which set out a series of very rigorous criteria for the sizing of the maximum levels of the main macroeconomic indicators, including those for the budget deficit and public debt.

At the same time, the international financial institutions were those who, in a certain way, had to define the main financial instruments in a way as accurate as possible but also acceptable for the borrowing countries, starting with the need to assess future creditors using unitary criteria.

One of the major financial institutions, namely the International Monetary Fund, in one of the protocols annexed to the Treaty of the European Union signed in Maastricht, defines the budget deficit as follows:..."the difference between the total government expenditure, including interest on public debt, but excluding its reimbursement and the total revenue, including tax, non-tax and asset transfers, but excluding loans".

3. Conclusions

The public debt is defined very briefly, being, in our opinion, "...the need for loan, at a certain moment, of a government", an understandable situation considering the creditor quality. I avoided the term "loan shark", although I confess that I would be terribly tempted to use it, considering that a treaty like the one signed in Maastricht introduces a definition for an important financial instrument without taking into account the fact that each Member State of the European Union has some specificity, a certain degree of development and thus a greater or lesser need for external loan.

Is it possible that, at this level, the famous remark from the not less famous work "The General Theory of Employment, Interest and Money", where John Maynard KEYNES was saying that ..."the set of consequences on public debt will not be the same if the economy (of a country n.a.) is experiencing a state of expansion or recession" was unknown?

Is it possible that, at this level, is was not known the fact that, unlike other unions, the European Union is a structure that unites primarily nations and not countries, and that each of its states has the capacity to preserve its identity and independence, including in its own economic space? Hard to believe, but also harder to accept, given that the analysis of some of the generous goals of the United Nations, especially those aimed at social progress and the improvement of the people's standard of living, reveal a perpetual endemic regression.

Considering this, we believe that, first of all, efforts should be intensified in the doctrinal space, in order to adopt rules for the implementation of macroeconomic policies that take into account the economic, social and even political realities of every country of the world!

References

- Petre Popeanga, Financial Control of the Public Debt Account, „Romania of Tomorrow" Foundation Publishing House, 1998
- Petre Popeanga, Carmen Bragadireanu, International financial and banking systems; "Universitary BOOK" Publishing House,`Bucharest 2006
- Autumn 2017 Economic Forecast, EC Report, www.ec.europa.eu/info/business-economy-euro/economic-performance-and-forecasts/economic-forecasts/

THE COUNTRY RISK REFLECTED IN THE CDS QUOTATIONS

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Abstract

We know the fact that, with the rapid growth of the economic, political and financial instability, country risk analysis has gained an increasingly important role in the practice of international financial institutions. There have been developed a number of country risk assessment models used by companies that are looking to penetrate new foreign markets or who want to protect and minimize their investment losses, including macro-financial models, econometric models, models developed by the Standard & Poor's and Moody's rating agencies etc. However, one of the indicators that measure the perception of a country among investors is the CDS (Credit Default Swap) price. By using this tool, an investor will be compensated if the debtor goes bankrupt and as such the lower the CDS price is, the lower the perception of that debtor's bankruptcy risk is. The purpose of this article is to present the impact of the increase or decrease of CDS quotations on a country's loan costs.

Keywords:*country risk, country rating, derivative instruments, risc de tara, Credit Default Swaps (CDS).*

1. Introduction

In order to understand how country risk is reflected in the evolution of CDS prices and, implicitly, on a country's loan costs, we will need to explain the two concepts, namely country risk and Credit Default Swaps (CDS) - a financial derivative instrument used to cover the default risk.

Country risk is defined as "the risk of exposure to a potential loss of an actual asset / business as a result of the occurrence of economic, political or social events that are, from a certain level up, at least partially, under government control in the host country and not under the control of the owner of the asset / manager of the company"[1]. If the government cannot control an unfavourable event, but only its impact, then the possibility of the event occurring is a country risk. The country risk concept was originally applied only to government loans and was then extended to government-guaranteed private loans, private non-government guaranteed loans, foreign direct investment, and even foreign portfolio investment.

In order to penetrate an international market, any company needs to know the economic, financial and social-political situation in the host country that will allow it to determine the level of the country risk. In emerging markets, however, there may be major economic or political changes, causing short-term changes in the level of the risk associated with the market or country in question. As such, the country risk assessment will be conducted whenever an event leading to rating degradation occurs in order to adopt those strategies to reduce potential or actual losses.

A worsening of the economic or political situation in the host country does not always lead to a degradation of the country rating. A country is downgraded to an inferior risk class only if the disruptions recorded in the economic or political environment act long-term and the economy of the host country is not able to cope with them.

Uncertainties about global economic growth, the state of the international financial system, and the deepening of geopolitical tensions have led to a deterioration in investors' confidence in emerging economies, which can be reflected in the rapid foreign capital outflows of these economies and the increase in the cost of financing them.

As far as political risks are concerned, they will continue to be a major concern in 2018. Among the areas with advanced economies, Europe is the one facing the greatest political uncertainty. During 2017, the European Coface political risk indicator[2] increased by an average of 13 points for Germany, France, Italy, Spain and the United Kingdom. If major political turmoil continues, at a scale similar to that of the British referendum, European growth could slow down by an average of 0.5 points.

Political risks in developing countries are higher than ever, driven by so-called "social" dissatisfaction and increased security risks. CIS (because of Russia, with a score of 63% out of 100% in 2016) and the regions in North Africa / Middle East (Turkey and Saudi Arabia both having a 62% score) show the greatest risks among the major emerging economies. The increase in the political and social frustrations in South Africa is partly responsible for downgrading its assessment to Class C, in a very poor growth context.

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[1] Economic Dictionary, 2nd ed., Economica Publishing House, Bucharest, 2001, p. 387

[2] www.coface.ro (press release 0/202/2017)

Security risks, including terrorist attacks, conflicts and loss of human lives are a new factor in determining the political risk indicator in emerging countries. As expected, they reach the highest ratings in Russia and Turkey.[3].

Concerning Eastern Europe, Poland is threatened by unprecedented political and possibly economic sanctions on the part of the European Union for erosion of the rule of law, while the billionaire leader of the Czech Republic has failed to form a majority government. In the case of Romania, the ruling party has removed its third prime minister in about a year. One of the risks to Romania's governance indicators is the uncertainty caused by the justice reform, which has attracted public protests and criticism from EU Member States. From this point of view, Romania risks losing some of the allocated European funds and being politically marginalized from the European institutions.

Coface has conducted a country risk assessment for some countries, concluding:[4]:

- **Spain** climbed to level **A3**, while **Iceland** and **Cyprus** (where capital control risks are down) are now being assessed at **A2** and **B** respectively.
- Countries in Central Europe continue to improve their ranking among the 160 countries rated by Coface. **Estonia (A2), Serbia (B)** and **Bosnia-Herzegovina (C)** have all experienced improvements in terms of business, and economic growth in these countries is reaching comfortable levels. Bulgaria (A4) has confirmed its recovery, due to moderate growth and further consolidation of the banking sector. Romania is at the A4 level, but according to Coface, some of the weaknesses are slow bureaucratic and legal processes, corruption, low public revenues and tax evasion. The macroeconomic developments in Romania, the improvement of country ratings by the three US rating agencies: Standard & Poor's, Moody's and Fitch Ratings at investment grade (low investment risk), but also the regional risk perception by investors led to the reduction of the CDS quotations of our country to 100 basis points.
- Greece was assessed at B level, its weak points being: high levels of public debt, tax evasion, poor banking portfolios, social tensions fuelled by fiscal austerity, mass unemployment and weak public institutions.

The most accurate assessment and positioning of country risk is very important for a company's decision-making system. Knowing the level of risk of a country and the premises underlying its change in time provide economic operators with greater certainty and the possibility of adopting adequate measures to reduce the risk exposure of their international operations[5].

The country risk concept is differentiated as investment or lending risk depending on the system of indicators and the time period. As regards credit risk, according to the ISDA conventions, it takes the following forms: bankruptcy or insolvency, bankruptcy of a company with which the reference entity is in close relationship, non-payment of the interest / coupon at maturity, debt restructuring, debt extinguishing, accelerated repayment of the obligation, downgrading of the rating class, acquisition / merger.

Credit risk transfer instruments include credit derivatives that can be defined as a "class of financial instruments the value of which derives from the market value due to the credit risk of a private or government entity, other than the counterparties involved in the derivatives transaction related to the credit risk"[6]. This definition highlights the role of credit derivative instruments in trading the credit risk of a particular entity by two parties that may not have any commercial or financial relationship with that entity the credit risk of which is being traded.

The term "credit derivatives" was first used in 1992 by the International Swaps and Derivatives Association (ISDA), an institution that developed and published in 1994 the standard form (template) of the Master Agreement, as well as the main regulations regarding these contracts, valid worldwide[7].

One of the credit risk derivatives traded on OTC (over-the-counter) markets is also the Credit Default Swap (CDS) contract.

Unlike insurance contracts concluded for 1 year (or year fractions), credit derivatives offer protection over longer periods.

The first CDS contract was introduced by JP Morgan in 1997 as a way for the banks to protect themselves against their exposure to large corporate loans they made to their clients.

These contracts are the most used in credit risk management, and are bilateral contracts where regular fixed payments (or only one premium in the credit default option case) are made to the seller for protection in exchange for the payment the seller will make in the event of a credit event specified in the contract. Usually the premium is quoted in base points multiplied by the nominal value. The support asset (reference asset) of the contract may be a single financial instrument (e.g. a bond) or a toolbox.

The credit default swap can be used to transfer credit risk exposure to another party. For example, banks may use this contract to trade the credit spread for bonds issued by private entities or governments without having these instruments.

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[3] www.coface.ro (press release 0/202/2017)

[4] www.coface.ro

[5] http://www.finint.ase.ro/Cursuri%20masterat/Master%20ASE_Management%20si%20marketing%20international/Studiile%20de%20caz/Analiza%20gradului%20de%20expunere%20la%20risc.pdf

[6] Das S. "Credit Derivatives and Credit Linked Notes", 2nd edition, John Wiley & Sons, Singapore, 2000, page 7

[7] Tomozei V., Enicov I., OborocIu. "Risks and Financial Coverage Instruments", Evrica Publishing House, Chișinău, 2002

The maturity of the contract must not be the same as that of the reference asset and in most cases it is not. In case of default, the contract is considered completed and the protection seller will calculate and pay the buyer the default payment.

The flows that take place during the performance of the contract are:

- Regular payments (premium leg) of the protection buyer: base points of the nominal value;
- Payment received by the protection buyer in the case of the occurrence of a credit event (protection leg): the nominal value of the bond × [100 - the price of the bond after the occurrence of the event specified in the contract].

As a result, the payoff of this tool is binary.

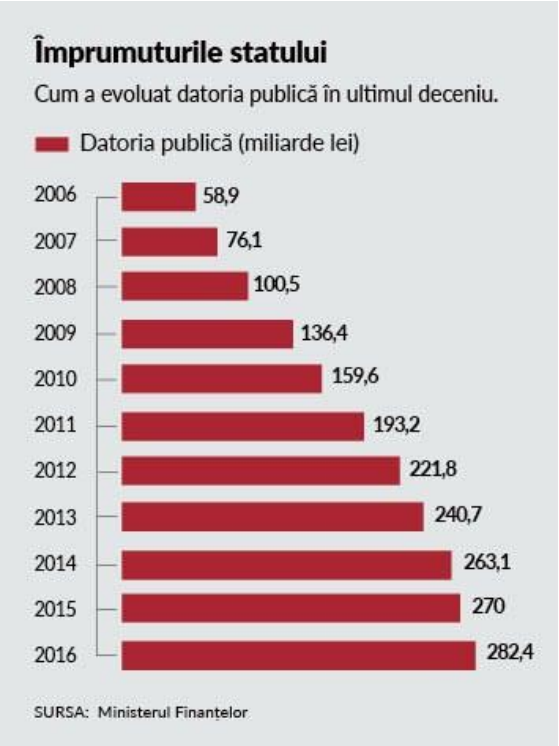
The CDS price on the derivatives market is called spread. Credit default spreads or default risk insurance pricing reflects the perception of the risk associated by the investors with an entity's issued credit, and when it is bought by international investors, it also reflects the perception of the country risk. CDS represents the cost of reinsuring a country's debt against loan restructuring or the cessation of payments. The level of CDS influences the cost of external financing, and if it becomes lower, the state can borrow funds at lower costs, while local banks can attract cheaper credit lines from parent banks.

It should be remembered that, although CDS is used by investors to cover against credit risks, speculators use them for risks to which they are not directly exposed. The global financial crisis raised the first questions about the speculative use of CDS. An EU regulation to decrease speculation on debt derivatives, which came into force on November 1, 2012, could affect the borrowing ability of countries with small government debt markets such as Poland, Hungary, Lithuania and the Czech Republic. Hedge funds are extremely present in CDS transactions in these emerging markets, through the so-called "directional transactions". If funds believe that the economic situation will deteriorate, they buy CDS, and they expect an improvement, they sell. These transactions are made without the investor needing to hold bonds for which to sell or buy the CDS.

2. CDS with exposure to Romania

A representative indicator for the country risk analysis is the public debt, which is the direct effect of the cumulative budget deficits from previous periods, which must be financed by loans. In an analysis of the German investment bank Berenberg, Romania was likened to the "Eastern European tiger", as the country's development after the crisis that started in 2008 was remarkable, by reducing the budget deficit from 5.6% of the GDP in 2008, to 2.6% in 2015, 2.41% in 2016 (RON 282.4 billion according to Chart 1), 2.887% in 2017 and with an average annual growth rate of 3.6% from 2000 to this day, while the EU average is 1.2%. In 2017, Romania recorded an economic growth of 6.7%. However, capital inflows are vital to adequately stimulate the transition from an economic growth driven by the increase in aggregate demand to an economic growth driven by the long-term growth of aggregate supply, by significantly improving the performance of production factors.

Chart 1 - Romania's public debt in 2006-2016



Although 2017 ended, in the case of Romania, with a budget deficit of RON 24.3 billion, or 2.88% of the GDP, under the annual target of 2.96% of the GDP set by the ruling coalition, this was achieved by:

- the significant reduction of investments that were down by 10% in 2017 compared to the previous year;
- the reintroduction, in September 2017, of the excise over-duty of 7 eurocents / litre which generated revenue for the budget;
- blocking the payments of authorizing officers (meaning their exclusion) after December 27, 2017;
- dividends paid to the state budget by state-owned companies that could have been used for investments.

Fitch Ratings financial assessment agency also states that "The budgetary target was reached by realizing only half of the planned capital expenditures. Tax cuts have reduced the ratio between revenue and the GDP to one of the lowest levels in the region, while the gradual increase in the minimum wage, public sector wages and pensions has increased basic spending". Investments, including capital expenditures, as well as expenditures related to development programs financed from domestic and external sources,

decreased by about RON 3 billion, respectively 3.2% of the GDP versus 3.9% of the GDP in 2016.

The December 2017 financial stability report of the National Bank of Romania shows that "the continuation of an expansionary fiscal-budgetary policy is likely to put pressure on the cost of financing the budget deficit and implicitly on the medium-term public debt sustainability. The contribution of the public deficit to financing needs rose to 3% of the GDP in 2017, from 2.4% in 2016 and 1.4% in 2015, amid the deepening of the budget deficit starting in 2016. Continuing this development could put pressure on the level of public indebtedness in the future". According to the European Commission, the structural budget deficit reached 3.3% of the GDP in 2017, rising by 3 percentage points in two years. In 2018, the budget will continue to deteriorate, with Romania risking to return to the EU's excessive deficit procedure, from which it had exited in 2013, according to Fitch estimates, but remains below the 40.9% average of the BSE rating.

Public debt can fuel economic growth only if the total amount of debt-generated income is higher than the total debt balance. If the public debt grows as a result of the financing of the current budgetary expenditures, there will be negative medium and long term effects in the economy. This increased public debt will soon turn into a higher financing cost for our country. The country risk will be felt in the prices of treasury bonds and CDS. An economy that is in great need of financing will face restricted access to primary markets and high interest rates.

Romania's public debt increased in Q3 2017, compared to Q3 2016 by RON 25.4 billion (5.5 billion euros) but decreased as a share of the GDP compared to the reference period, by 0.6% according to Eurostat, the statistical office of the European Union. The ratio between the public debt and the GDP increased to 38% at the end of 2017, from 37.6% in 2016, indeed under the target of 60% of the GDP agreed at the European level by the Maastricht Treaty. Mainly, extending the maturity of the public debt led to a decrease in the refinancing risk. Public debt is mostly contracted in the medium or long term (94% of the total, being equally attracted from the domestic and foreign markets). Although public debt is at a sustainable level of 38% of the GDP, things may worsen in the years to come, given that the state will accrue significant debt as a result of higher public pensions and wages. In any case, a large deficit is not recommended in a period of economic growth, as in a possible recession period, it will increase greatly, which will lead to an exponential increase in public debt. Prior to the crisis, public debt was below 15% of the GDP, but in the years to come, government revenue dropped significantly as the economy was in recession. As such, deficits have reached record levels of over 7% of the GDP (RON 36.4 billion added to public debt in one year - 2009).

At the EU level, there is also a decline in public debt versus the GDP, both in the euro area (from 89.7% to 88.1%) and in the EU28 (from 82.9% to 82.5%) compared to the third quarter of 2016. At the end of the third quarter of 2017, debt securities accounted for 80.3% of the euro area and 81.4% of government debt of EU28. Credits accounted for 16.5% and 14.5% respectively, and the currency and deposits accounted for 3.1% in the euro area and 4.2% of the government debt of EU28.

In recent years, there has been a gradual improvement in risk perception, with the costs at which Romania contracted loans on the international capital markets decreasing. The cost of insurance against the default risk reflected in credit default swaps quotations has reached 100 basis points, and Romania continues to be seen by foreign markets as a low-risk placement compared to other European countries. The CDS reflects the evolution of investor perception and the degree of mistrust in a particular issuer, becoming one of the most visible indicators of a country's ability to finance its capital markets in the years of crisis. CDS is traded on the financial markets, so its price may have significant fluctuations, depending on the status of the debtor concerned and the international financial environment. It has become the focus of public attention during the peak of the financial crisis in 2008-2009. When the CDS price drops, not only the state can borrow at lower costs, but local banks can also attract cheaper credit lines from parent banks.

The link with bank loans is due to the fact that interest rates at which local banks contract external loans are determined by both the reference interest rates in euro, Swiss dollars or francs (LIBOR and EURIBOR) and by the perception of external financial markets of Romania’s country risk, expressed through the CDS quotation the subject of which are the bonds issued by the Government.

As a result, banks increased customer interest rates due to the worsening of the perception of the country risk, thus no longer having access to cheap financing from parent banks. From our point of view, there is no direct relationship between the CDS quotation and bank financing cost, but only a theoretical one.

As a result of the latest financial crisis, the specialized literature the price formation mechanism on public debt instruments markets gained greater attention, which showed that the investors' perceptions of a country's economic status may significantly affect sovereign financing costs. For policy makers, it is important to assess how the prices of government bonds and CDS contracts are being formed, as it allows a good understanding of how the evolution of fundamental factors and investors' perceptions is translated into quotations on the financial markets.

"Traditionally, the assessment of public debt instruments is based on the interest rate and liquidity risk, but the sovereign debt crisis has brought the default risk back into focus, as evidenced by the sustained growth of the trading activity on the market of the CDS associated with securities issued by euro area Member States. Under these circumstances, it is

not surprising that many quantitative analyses come to the conclusion that the pricing of these instruments is closely linked to developments in the CDS markets. However, other authors demonstrate that the causal relationship takes place in the opposite direction"[8].

According to the financial stability report drafted by the NBR, "during the year 2016 there is a relatively stable dynamics of the CDS quotations in the emerging countries in the CEE region, including Romania, as compared with the development of indices for countries such as Spain or Italy. The impact of the vote on Britain's exit from the European Union has been amplified in the case of CDS quotations for Portugal, Italy, Ireland, Greece and Spain, largely determined by the negative perception of high levels of public debt, given the potential implications on the architecture of the European Union. Thus, on the day of the Brexit referendum, the risk associated with the sovereign exposures of Spain and Italy increased by 29% (29.3 base points) and 25% (35 base points), while the CDS quotations of Hungary and Poland registered increases of 14% (21.2 base points) and 10% (8.3 base points) respectively. Market quotations for the sovereign risk associated with Romania marked a temporary increase of 20% (25.4 base points), returning in the beginning of July 2016 to the average trend recorded this year.

The cost of sovereign debt financing issued by the Romanian state recorded a synchronous evolution with the observed trends in other countries in the region. In this sense, the gap between the yields of the Romanian and German government securities recorded a slight increase between April and June, after which, following the decision of the British citizens to leave the European Union, it decreased significantly. The similar evolution of the region's differences, observed both in terms of level and magnitude of the fluctuations, reveals that the determinants were of a global nature and therefore the effects were similarly felt".

As regards the January-September 2017 period, according to the December 2017 Stability Report of the NBR, "CDS quotations related to sovereign debt instruments issued by the Romanian state remained relatively stable, with the exception of a slight decrease in the first two months of the year. In August and September, there was a slight volatility, caused by the temporary tensions in the domestic political environment, as well as by the US Federal Reserve's announcements on the increase in the monetary policy rate"[9].

Conclusions

Although the sovereign CDS' market can anticipate the changes of a country's rating, this information is not always conclusive, because on the one hand the spread of CDS with exposure to a country was floating, the rating of the country stood still, and on the other hand CDS can be used for speculative purposes, as was the case of Lehman Brothers.

Lehman Brothers bankruptcy, caused by overexposure to securitized instruments with sub-prime base assets, has created tremendous pressure on AIG (a company that sells CDS for insuring against bankruptcy of banks, funds or companies) both through the clearing channel of CDS' protection on Lehman Brothers and through the destabilization of the securitized real estate market. It was estimated that, in 2008, the total of Lehman Brothers' credit risk swaps amounted to USD 400 billion, while the total of the bonds covered was USD 150 billion, the difference being purely speculative.

In addition, CDS derivatives being traded on the OTC market (the unregulated market OTC – Over the Counter) add even more uncertainty to the system. However, CDS reflect the evolution of investor perceptions and the degree of mistrust in a certain issuer, becoming in the crisis years one of more visible indicators of a country's ability to finance its capital markets.

Deutsche Bank has ranked among the most 49 risky countries in terms of the likelihood of their governments defaulting. According to this ranking, Romania rank 20th with a margin of 130 basis points between selling and buying prices of CDS in the global market. The bigger the difference is between the buying and selling quotations of the CDS, the government securities of that country are considered more risky. It should be remembered that the most difficult year for Romania, in terms of risk of default, was 2009, when our country registered a margin of 626 points.

In the case of Romania, the cost of the default risk insurance reflected in the five-year CDS quotations dropped to 94.88 points in September 2017, our country being perceived as risky as Hungary (94.64 basis points), but more risky than Poland (54.88 basis points) or the Czech Republic (37 basis points). The best borrowers are Norway and Sweden with 14 points.

The general benefits of derivatives are that by securing risk in international or domestic transactions, financial institutions have the opportunity to invest more easily in different assets or markets and thereby benefit from increased leverage. In this way, derivatives contribute to increasing the liquidity and efficiency of markets.

[8] www.bnr.ro Financial Stability Report", December 2016, page 89

[9] www.bnr.ro Financial Stability Report", December 2017, page 118

References

- Dictionar de economie, editia a 2-a, Editura Economica, Bucuresti, 2001, pag.387
- www.coface.ro (comunicat de presa 0/202/2017)
- www.coface.ro (comunicat de presa 0/202/2017)
- www.coface.ro
- http://www.finint.ase.ro/Cursuri%20masterat/Master%20ASE_Management%20si%20marketing%20international/Studiile%20de%20caz/Analiza%20gradului%20de%20expunere%20la%20risc.pdf
- Das S. "Credit Derivatives and Credit Linked Notes", Editia a 2-a, John Wiley & Sons, Singapore, 2000, pag.7
- Tomozei V., Enicov I., Oboroc Iu. "Riscuri si instrumente financiare de acoperire", Editura Evrica, Chisinau, 2002
- www.bnr.ro "Raportul de stabilitate financiara", decembrie 2016, pag.89
- www.bnr.ro "Raportul de stabilitate financiara", decembrie 2017, pag.118
- https://www.sfin.ro/recomandari/intre-economia-reala-si-speculatie/
- http://www.economica.net/care-este-riscul-de-default-al-romaniei-si-cu-cine-se-compara-intr-un-top-global_103621.html#ixzz5CBfBdGZ0

TEN YEARS AFTER THE GLOBAL CRISES - EXPORTS RECOVERY AT REGIONAL LEVEL IN ROMANIA

Artur-Emilian SIMION*

Abstract

After ten years of the global financial crises, which peak in Romania was 2009, the negative impact on exports and imports of Romania are still in place for some Romanian counties. The scale of the impact highlights the strong connections between the national economy and the economy of the other EU countries, which have suffered during the crisis because of falling demand for imports from Romania.

The good export recovery is not a favorable thing for those counties who focused theirs exports on primary products, products based on natural resources and low-technology products. These exports lead to the decrease in foreign exchange earnings and implicitly the potential of endogenous growth at the county level, mainly due to deteriorating terms of trade.

The paper is focused on Romanian exports recovery analysis, taking into account the impact of world financial crisis, which started in Romania in 2009. A special attention is paid to the recovery of exports at the regional level and to the importance of the structural changes of Romanian export, occurred in 2017 compared to 2008. Also, in this article are analyzed the concentration of exports at county level, the main partners on export, the share of the first 10 partners and evolution of export per capita at the counties level. The trade balance is used to classify the counties in: net exporters (export>import) and net importers (import>export).

Keywords: *county exports, imports and trade balance, exports recovery, export per capita, export partners and top 10 exporting compnies.*

JEL classification: *F10, F31*

1. Introduction

The crisis started in 2009 showed that external openness of an economy, which is based on reciprocal earnings from international trade, should have a high level resilience of national economy, necessary and sufficient for resistance against possible strong external shocks. At country level, Romania's exports showed a good resilience, thus, in 2010 (one year after the crisis) exports increased by 10.8% compared to 2008; after ten years, in 2017 the export growth rate was 85.7% compared to 2008.

Analyses of this paper are focused on the period 2008 - 2017 (2008 being the first year before the crisis of 2009 and 2017 is the last year for which data is available at this level of detail) and will be detailed at county level. In order to create a clear picture of international trade in goods of Romania, at the county level, over a ten years period (2008-2017), this article will present and analyzed the following statistical data: growth rates of exports, imports and trade balance FOB / CIF in the period 2009-2017 compared to 2008 at the county level, the main export destinations and structural changes occurring in 2017 compared to 2008, the share of the top 10 exporting companies at county level and the trade balance in 2017 at the county level (counties classification in net importer or net exporter). All these indicators will provide a synthetic image of the profile and orientation of Romania's counties international trade.

2. Brief literature review

Sustainable regional development is closely linked to regional demand (exports) to achieve a high level of competitiveness and specialization. Export is considered a major contributing factor to regional growth but also a source of developing economic and social inequalities in territorial profile.

In Romania there are several reference papers on this topic, but the level of detail of the data at the county level is limited in comparison with the present paper. Among these papers we can mention "Endogenous regional economic development: the case of Romania" - Zaman, Gh. and "Structural developments of Romanian export" - Zaman, Gh., Vasile, V.

Another important article on this topic, published on „Romanian Journal on Economics" in 2015 is „Regional aspects of economic resilience in Romania, during the post-accession period" (Zaman Gheorghe, Georgescu George), which is focused on the issue of regional resilience to the economic crisis impact in the case of Romania, taking the county as territorial unit of observation. Also, the article "A new classification of Romanian counties based on a composite index of economic development" (Zaman Gheorghe, Goschin Zizi) provides a good starting point for this article.

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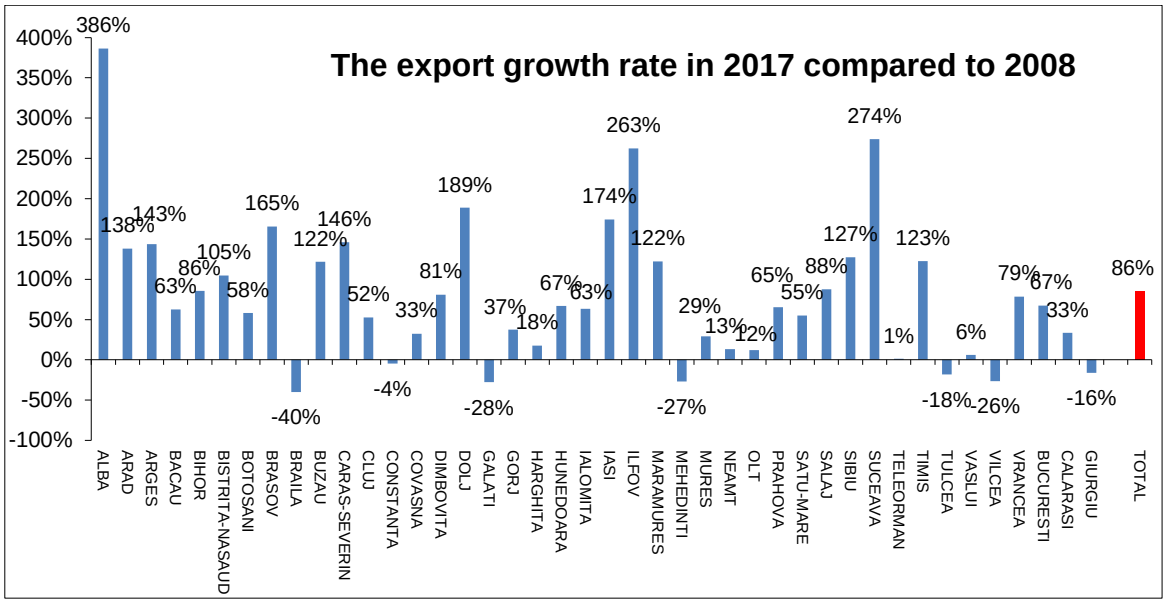
3. The evolution of international trade of Romania in the period 2008-2017

3.1. The export growth rate in the period 2009-2017 compared to 2008

The export growth rate in the period 2009-2017 compared to 2008, at the county level, had different values from one county to another. Thus, the counties of Arges, Buzau, Calarasi, Gorj, Ilfov, Suceava and Tulcea have shown a strong resilience on export, export growth continued in the period after the crisis. An atypical county is Cluj, which after the crisis recorded high growth rate on exports (+ 121.7% in 2011 compared to 2008), in 2012 registering a high decrease of export (- 16.7% compared to 2008), mainly because of cessation activity of a major producer and exporter of mobile phones. Another atypical county is Giurgiu, which after the crisis recorded positive rates of exports (+33.2% in 2011 compared to 2008), in 2013 registering a high decrease on exports.

Figure 1- The export growth rate in 2017 compared to 2008



Source: own calculation based on data of Romanian National Institute of Statistics

Counties such as Alba, Arad, Bihor, Bistrita-Nasaud, Botosani, Brasov, Caras-Severin, Dambovita, Ialomita, Iasi, Maramures, Salaj, Satu-Mare, Sibiu, Teleorman and Timis had a relatively good resilience export; thus in 2010 the export exceeded the 2008 level for these counties. Instead, for the counties Bacau, Braila, Bucharest, Constanta, Covasna, Harghita, Hunedoara, Mures, Neamt, Prahova and Vrancea the export exceeded the 2008 level only in 2011. The Dolj county returned to pre-crisis export value only in 2012, with the launch exports of a large car manufacturer.

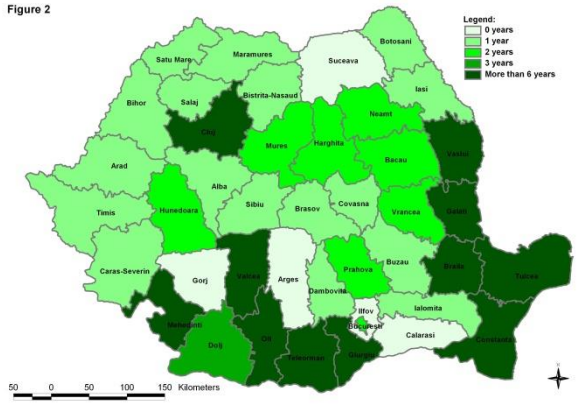
Table 1 – Export resilience (Recovery time in years)

Recovery time	No. of counties	Weights in 2008	Weights in 2017	Counties
0 years	5	10,6	14,9	AG, CL, GJ, IF and SV
One year	17	35,2	43,5	AB, AR, BH, BN, BT, BV, BZ, CS, CV, DB, IL, IS, MM, SM, SJ, SB and TM
Two years	8	30	26	BC, HR, HD, MS, NT, PH, VN and B
Three years	1	1,3	2	DJ
More than six years	8	18,4	8,8	BR, CT, GL, MH, OT, TL, VL and GR
Inconstant resilience	3	3,8	2,9	CJ, TR and VS

Source: own calculation based on data of Romanian National Institute of Statistics; see annex for counties' codes.

There are still 7 counties for which exports from 2017 are below those recorded in 2008: Braila (2017 compared to 2008 -40.1%), Constanta (2017 compared to 2008 -4.4%), Galati (2017 compared to 2008 -27.8%), Giurgiu (2017 compared to 2008 -16.1%), Mehedinti (2017 compared to 2008 -26.7%), Tulcea (-18.0% in 2017 compared to 2008) and Valcea (-26.5% in 2017 compared to 2008).

Figure 2 – The export resilience at the county level



Source: own calculation based on data of Romanian National Institute of Statistics

Also, there are 3 counties with inconstant resilience: Cluj, Teleorman and Vaslui. The export of these counties exceeded the values registered in 2008, but in the period 2008-2017 they have recorded both increases and decreases from one year to another.

The share of export for top 10 counties in total exports increased in 2017 compared to 2008 from 64.6% in 2008 to 66.6% in 2017. The highest increases in weights (in percentage points pp) had recorded the following counties: Alba +2.4 pp (climbed from position 19 to position 7 in the top) and Arges +2.3 pp (it has kept his 3rd position in the top export). The biggest rise in the top recorded Suceava, which has climbed 11 places from position 37 to position 26 in the top and Alba which has climbed 12 places from position 19 to position 7 in the top. The biggest drop in top was recorded for county Valcea, which lost 10 places, from position 17 in 2008 to position 27 in 2017 (-1.1 pp). The largest decreases of the weights (in percentage points pp) were recorded by the following counties: Constanta -3.0 pp (form position 4 in 2008 to position 10 in 2017), Galati -2.5 pp (form position 6 in 2008 to position 16 in 2017) and Bucharest that registered a large decrease of the weight in total export (-1.9 pp) and, though, it kept its leading position on export.

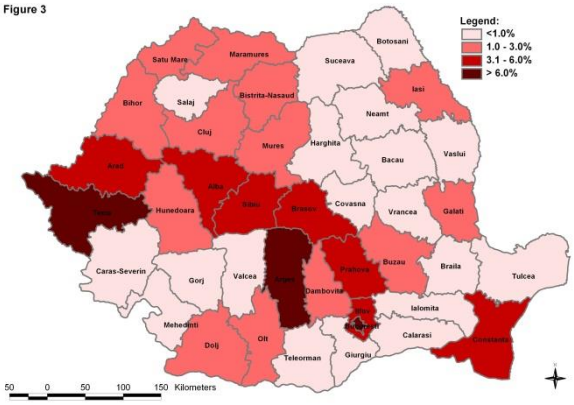
Table 2- Top 10 counties on export in 2008 and 2017

2008			2017		
No.	**County**	**Weight**	**No.**	**County**	**Weight**
1	Bucuresti	18.9	**1**	Bucuresti	17.1
2	Timis	8.4	**2**	Timis	10.0
3	Arges	7.3	**3**	Arges	9.6
4	Constanta	6.2	**4**	Arad	5.5
5	Arad	4.3	**5**	Brasov	5.2
6	Galati	4.1	**6**	Sibiu	4.7
7	Prahova	4.1	**7**	Alba	3.9
8	Sibiu	3.9	**8**	Ilfov	3.8
9	Olt	3.8	**9**	Prahova	3.6
10	Brasov	3.6	**10**	Constanta	3.2

Source: own calculation based on data of Romanian National Institute of Statistics

Counties like Galati and Olt came out of top 10 in 2017 compared to 2008, giving way to the top 10, in 2017, to Ilfov and Alba counties.

Figure 3– The export weights of the counties in 2017



Source: own calculation based on data of Romanian National Institute of Statistics

The share of top 10 exporting companies at county level in 2017 exceeded, in most cases, 50% of total exports at the county level, which indicates a strong dependency of exports at the county level by a few big exporting companies, the major part of them being foreign direct investment affiliates and subsidiaries of multinational enterprises.

Table 3 – The share of top 10 exporting companies at county level in 2017

The share of top 10 exporting companies at county level between:	**No. of counties**	**Counties**
30 – 40 %	1	B
40 – 50 %	5	HR, BH, CJ, MS and IF
50 – 60 %	5	BC, SM, AR, TM and BV
60 – 70 %	7	SB, VN, NT, BZ, MM, BR and PH
70 – 80 %	10	GJ, HD, CV, IS, SV, BN, TL, BT, VS and GR
80 – 90 %	11	VL, AB, IL, SJ, CL, AG, DB, CS, TR, CT and DJ
> 90 %	3	GL, OT and MH

Source: own calculation based on data of Romanian National Institute of Statistics; see annex for counties' codes.

For counties like Galati, Olt and Mehedinti, the share of top 10 exporting companies in 2017 exceeds 90%.

3.2. The export partners

While in 2008 the main export destination was Italy for 21 counties, in 2017 only 15 counties still

had Italy on a first position on export. Instead, Germany exceeded Italy in 2017 compared to 2008 and has become the main destination for 18 counties on exports in 2017, compared to only 12 counties in 2008. This shows an increase of exports dependence, on county level, of demand in the German market. Other partner countries on a first position on county export in 2017 are: Norway (2 counties), France (one county), United Kingdom (one county), Marshall Islands (one county), Netherlands (one county), Poland (one county) and Turkey (one county).

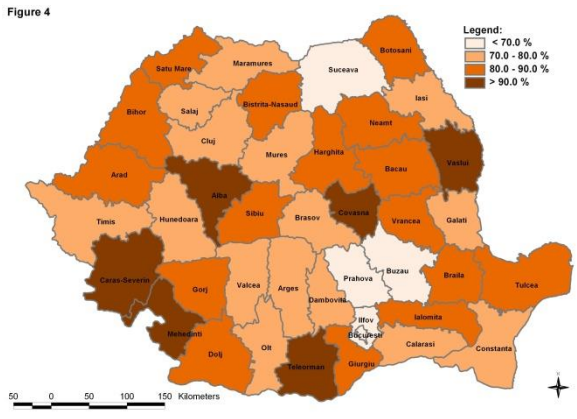
Table 4 – The weights of a top 10 partner countries on export in 2017, at the county level

The weights of a top 10 partner countries on export in 2017, at the county level, between:	**Number of counties**	**Counties**
60 – 70 %	5	SV, B, PH, BZ and IF
70 – 80 %	15	DB, MS, CT, VL, AG, CL, OT, SJ, CJ, IS, BV, TM, HD, GL and MM
80 – 90 %	16	NT, VN, HG, GR, AR, IL, BC, BH, SM, BT, DJ, BR, TL, BN, GJ and SB
> 90 %	6	VS, CV, TR, AB, CS and MH

Source: own calculation based on data of Romanian National Institute of Statistics; see annex for counties' codes.

In 2017 Italy and Germany were in the top 10 export destination for 42 counties, France for 39 counties and UK for 37 counties.

Figure 4 – The share of top 10 partner countries on counties exports in 2017



Source: own calculation based on data of Romanian National Institute of Statistics

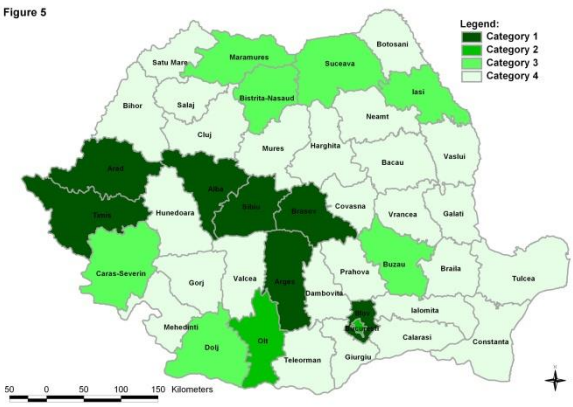
The top 10 destinations for counties' exports are mainly countries from European Union (87.4% in 2017). There are counties in 2017 that have no extra EU country in the top 10 export partners: Arad, Bihor, Cluj, Harghita, Maramures, Satu Mare, Timis and Bucuresti. These counties are, with one exception (Bucuresti), in the center and east part of Romania and the exports orientation is explained by the proximity of European Union countries, which offer more opportunities and choices for Romanian exports.

3.3. Exports per capita

Depending on the export per capita in 2017 and export dynamics in 2017 compared to 2008, counties are divided into 4 categories (Figure 5):

- Category 1: counties with export per capita higher than the national average and export dynamics in 2017 compared to 2008 higher than the national growth rate;
- Category 2: counties with export per capita higher than the national average and export dynamics in 2017 compared to 2008 less than the national growth rate;
- Category 3: counties with export per capita less than the national average and export dynamics in 2017 compared to 2008 higher than the national growth rate;
- Category 4: counties with export per capita less than the national average and export dynamics in 2017 compared to 2008 less than the national growth rate.

Figure 5 – Counties by categories, previous defined

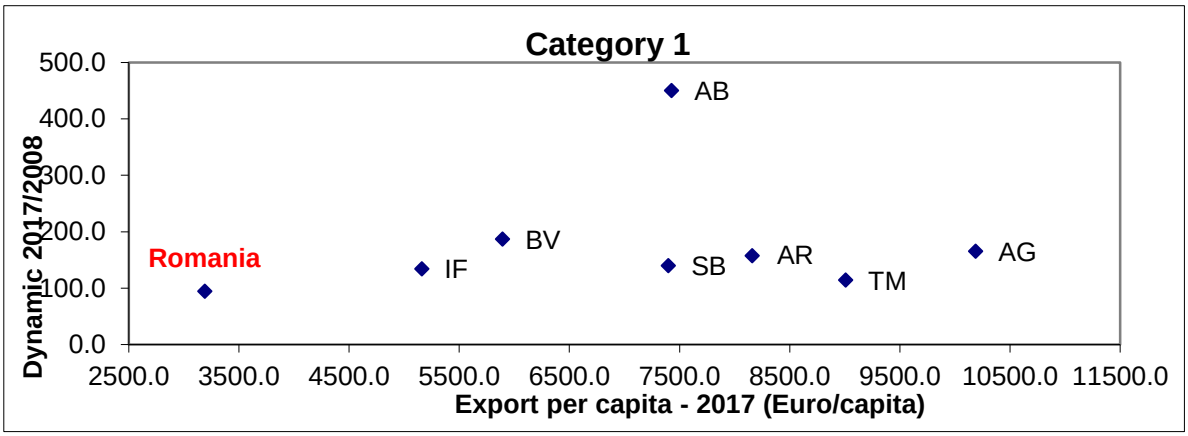


Source: own calculation based on data of Romanian National Institute of Statistics

Based on these criteria resulted in the following:

- in the first category there are 7 counties, with a total export share increasing from 30.9% in 2008 to 42.8% in 2017; dynamics of export per capita in 2017 compared to 2008 are: Alba 450.5%, Arges 165.7%, Arad 157.8%, Brasov 187.5%, Ilfov 134.6%, Sibiu 140.5% amd Timis 114.7% (Figure 6). This category corresponds to developing counties.

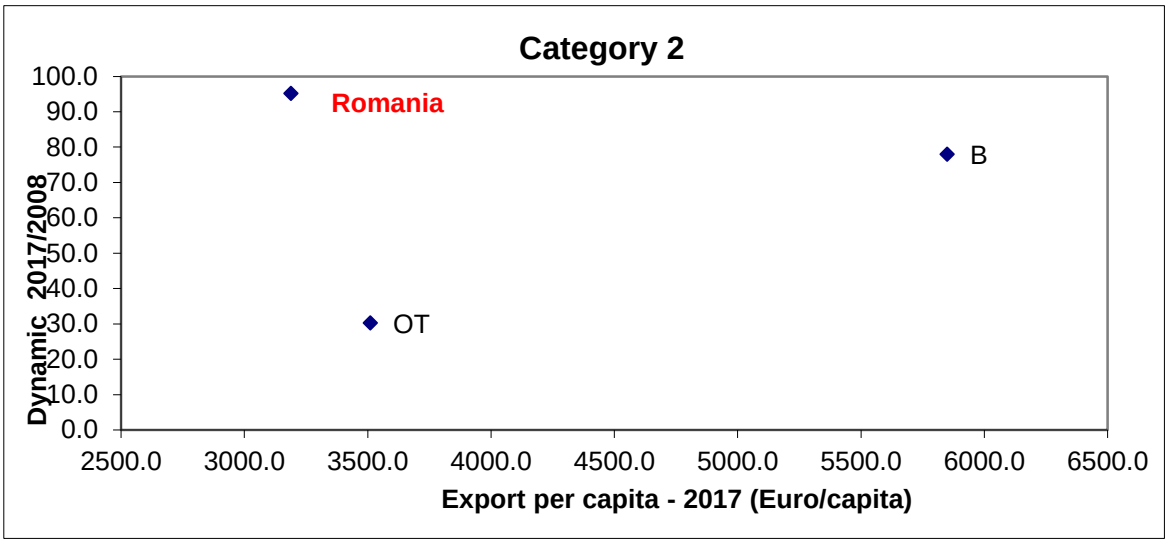
Figure 6 – category 1



Source: own calculation based on data of Romanian National Institute of Statistics; see annex for counties' codes.

– in the second category there are only 2 counties, with a total export share dropping from 22.7% in 2008 to 19.3% in 2017; dynamics of export per capita in 2017 compared to 2008 are Bucharest +78.0% and Olt +30.2% (Figure 7). This is an atypical category, which contain 2 counties with an export per capita above the national average in 2017, but with a lower growth rate.

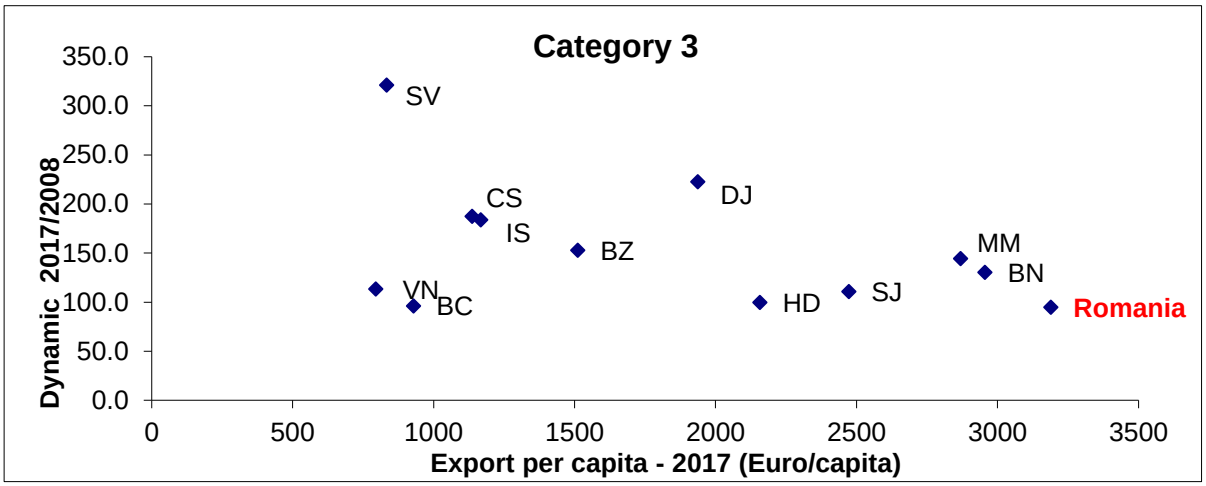
Figure 7 – category 2



Source: own calculation based on data of Romanian National Institute of Statistics; see annex for counties' codes.

– in the third category there are 11 counties, with a share of total exports slightly up from 10.7% in 2008 to 12.8% in 2017; dynamics of export per capita in 2017 compared to 2008 are: Bacau 96.4%, Bistrita-Nasaud 130.6%, Buzau 153.1%, Caras-Severin 187.5%, Dolj 222.8%, Hunedoara 99.8%, Iasi 184.1%, Maramures 144.7%, Salaj 111.0%, Suceava 321.2% and Vrancea 113.5% (Figure 8). The third category contains counties with export per capita less than the national average and export dynamics in 2017 compared to 2008 higher than the national growth rate.

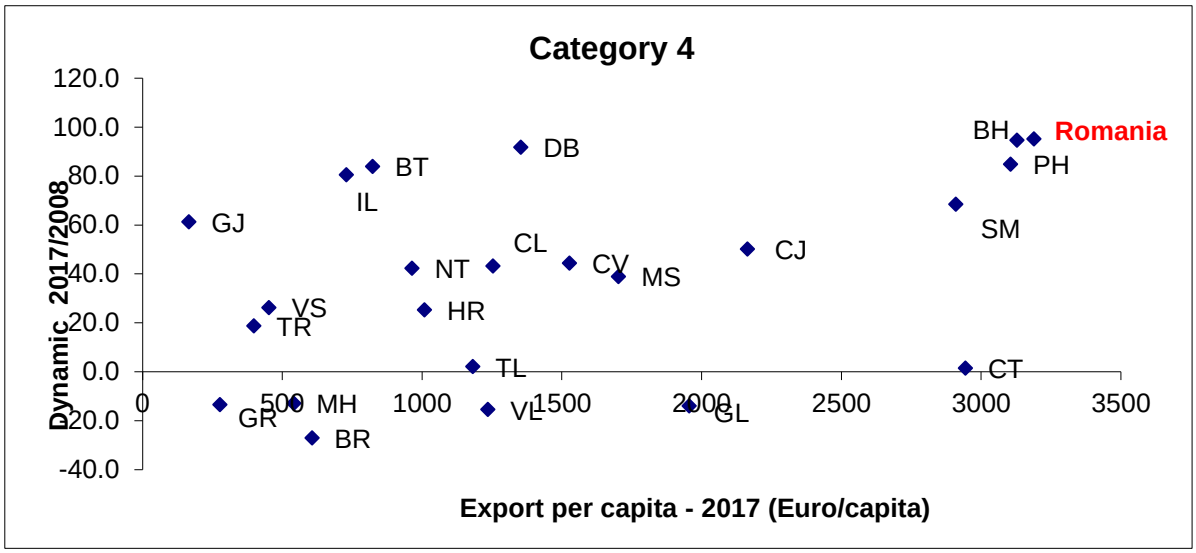
Figure 8 – category 3



Source: own calculation based on data of Romanian National Institute of Statistics; see annex for counties' codes.

– in the fourth category there are 22 counties, with a share of total exports drastically decreasing from 35.0% in 2008 to 23.2% in 2017; however dynamics of export per capita in 2017 compared to 2008 are increasing in counties such as Bihor 94.5%, Botosani 83.8%, Calarasi 43.2%, Cluj 50.1%, Constanta 1.4%, Covasna 44.3%, Dambovita 91.7%, Gorj 61.3%, Harghita 25.3%, Ialomita 80.4%, Mures 38.9%, Neamt 42.3%, Prahova 84.8%, Satu Mare 68.4%, Teleorman 18.7%, Tulcea 2.1% and Vaslui 26.2%. The rest of the counties recorded large decreases in 2017 compared to 2008: Braila -27.1%, Galati -13.9%, Giurgiu -13.5%, Mehedinti -12.9% and Valcea -15.4% (Figure 9).

Figure 9 – category 4



Source: own calculation based on data of Romanian National Institute of Statistics; see annex for counties' codes.

These counties had an export per capita less than the national average and export dynamics in 2017 compared to 2008 less than the national growth rate; the common features of these counties are the low level of economic development.

3.4. Import and trade balance

Although exports had a high resilience to the crisis, it had a limited impact on GDP because, in the quantification of contribution to GDP, the net exports are taking into account (difference between exports and imports), but also because they involve usually an increase in imports (reflected in the import content of exports), which limit the contribution of international trade to economic growth.

The share of the top 10 counties in total Romanian imports slightly decreases in 2017 compared to 2008 from 75.7% in 2008 to 74.5% in 2017. The biggest drop of the share (in percentage points pp) was recorded in Bucharest (-8.0 pp). However, it kept the leading position among the top counties on import with around 30% of total imports of Romania in 2017. Significant increases of share, in 2017 compared to 2008, recorded the following counties:

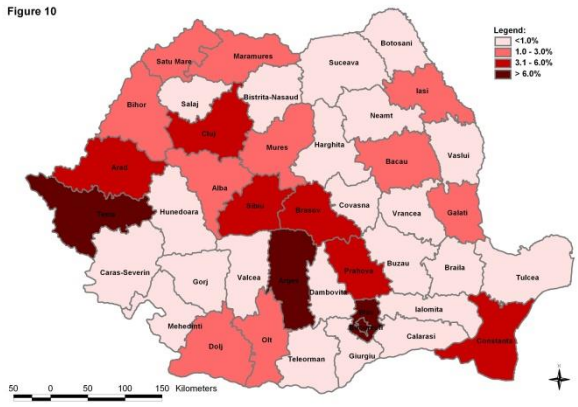
– Arges +2.4 pp (dynamic 2017/2008 was +117.83%); it climbed three positions in the top, from position 7 to position 4;

– Arad +1.6 pp (dynamic 2017/2008 was +113.0%); it climbed four positions in the top, from position 10 to position 6;

– Timis +1.5 pp (dynamic 2017/2008 was +69.2%); it climbed one position in the top, from position 4 to position 3;

– Ilfov +2.4 pp (dynamic 2017/2008 was +82.1%); it kept his second position in the top.

Figure 10 - Shares of counties on Romanian import in 2017



Source: own calculation based on data of Romanian National Institute of Statistics

Besides Bucharest, significant decreases in the share of the total import in 2017 compared to 2008 recorded the following counties:

– Galati with -1.3 pp (dynamic 2017/2008 was -25.9%); it fell six positions in the top, from position 8 to position 14;

– Constanta with -2.0 pp (dynamic 2017/2008 was -15.6%) fell five positions in the top, from position 3 to position 8.

Table 5 -Top 10 counties in total imports of Romania

2008			2017		
No.	**County**	**Weight**	**No.**	**County**	**Weight**
1	Bucuresti	37.9	**1**	Bucuresti	29.9
2	Ilfov	6.4	**2**	Ilfov	8.8
3	Constanta	5.6	**3**	Timis	7.0
4	Timis	5.5	**4**	Arges	6.1
5	Prahova	4.4	**5**	Prahova	4.4
6	Cluj	3.9	**6**	Arad	4.1
7	Arges	3.7	**7**	Brasov	4.0
8	Galati	2.9	**8**	Constanta	3.6
9	Brasov	2.9	**9**	Cluj	3.4
10	Arad	2.5	**10**	Sibiu	3.1

Source: own calculation based on data of Romanian National Institute of Statistics

In the 2008-2017 period there was a huge drop in the external trade deficit of Romania (dynamic 2017 / 2008 was -44.9%), from -23.5 billion Euro in 2008 to -13.0 billion Euro in 2017.

At county level, the largest contribution to reducing the Romanian external trade deficit had Bucharest (31.8% of reduction), with a decrease in the external trade deficit from -15.3 billion Euro in 2008 to -11.9 billion 2017 (dynamic 2017/2008 was -21.9%). Another important contribution to decrease the Romanian external trade deficit had county Timis, which passed from trade deficit to surplus (from -0.3 billion in 2008 to positive trade balance of +1.3 billion in 2017).

Some counties had positive external trade balance in 2008 and this increased in 2017, as follows: Arges county from +0.35 billion Euro in 2008 to +1,39 billion Euro in 2017 (dynamic 2017/2008 was +301.0%) and Alba county from 0.12 billion Euro in 2008 to +1.05 billion Euro in 2017 (dynamic 2017/2008 was +753.8%).

Table 6 - Classification of counties based on external trade balance in 2017

No.	**Net exporter (export> import)**	**External trade balance (millions Euro)**	**No.**	**Net importer (import> export)**	**External trade balance (million Euro)**
1	Arges	1386.9	**1**	Vrancea	-15.6
2	Alba	1045.2	**2**	Satu-Mare	-20.2
3	Timis	965.9	**3**	Braila	-25.7
4	Olt	630.8	**4**	Tulcea	-29.5
5	Sibiu	614.8	**5**	Ialomita	-39.5
6	Maramures	351.0	**6**	Teleorman	-52.9
7	Arad	335.2	**7**	Bihor	-59.4
8	Brasov	233.8	**8**	Giurgiu	-90.0
9	Salaj	216.9	**9**	Suceava	-105.9
10	Hunedoara	205.6	**10**	Harghita	-116.1
11	Buzau	192.1	**11**	Galati	-230.9
12	Bistrita-Nasaud	171.1	**12**	Bacau	-231.8
13	Vilcea	111.2	**13**	Mures	-364.8
14	Caras-Severin	88.5	**14**	Constanta	-691.0
15	Calarasi	79.5	**15**	Cluj	-1016.6
16	Vaslui	33.3	**16**	Prahova	-1060.5
17	Botosani	33.1	**17**	Ilfov	-4313.3
18	Dimbovita	32.8	**18**	Bucuresti	-11942.6
19	Iasi	30.2			
20	Mehedinti	30.0			
21	Neamt	23.1			
22	Covasna	11.1			
23	Gorj	6.8			
24	Dolj	5.1			

Source: own calculation based on data of Romanian National Institute of Statistics

From classification of counties based on the trade balance in 2017 resulted 24 net exporting counties (with a positive external trade balance of +6.83 billion Euro in 2017 compared to only +0.07 billion in 2008) and 18 net importing counties (with a trade deficit of -20.4 billion Euro in 2017 compared to -23.36 billion Euro in 2008).

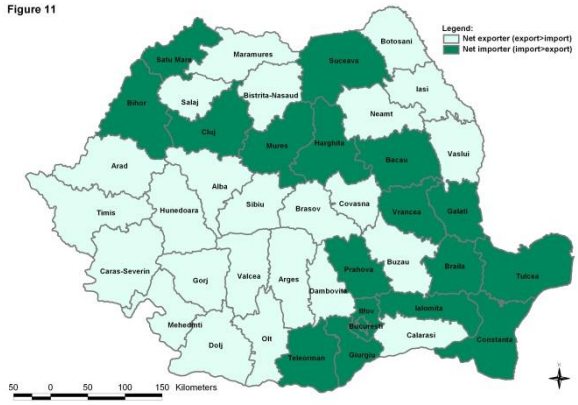
4. Conclusions

Although Romania's total exports has shown a pretty good resilience, there are still counties who have not exceeded exports from 2008 nor in 2017. The share of the top 10 exporting companies and top 10 countries of destination for counties export over 50% in 2017, for almost all counties, reveals a strong dependence of counties exports by a few big exporting companies (in

majority with foreign capital) and several destination countries (mostly from European Union). However, the increase in external demand for products of a county, according to the basic Keynesian theory, contributes to its economic growth.

The positive external trade balance at the county level may have a positive impact on the economic development of the county if the exports refer to high technology products. If this positive trade balance is based on exports of raw materials and semi-products, under conditions of low imports, it will have a negative impact on sustainable economic growth of the county in question (immisering exports). The most counties that have kept the positive external trade balance in the 2008 – 2017 periods are in this situation.

Figure 11 – External trade balance in 2017



Source: own calculation based on data of Romanian National Institute of Statistics

The counties with negative external trade balance must act to reduce the external trade deficit in the medium and long term. However, a negative trade balance deficit may have a positive impact on sustainable economic development if it is based on the high-tech products imports, local assimilated through technology transfer.

Also, the analyses from this paper revealed that, after ten years of the global financial crises, which peak in Romania was 2009, the negative impact on exports and imports of Romania are still in place for some Romanian counties. The trade concentration on a few countries, mainly from European Union, points out the strong connections between the national economy and the economy of the other EU countries, which have suffered during the crisis because of falling demand for imports from Romania.

References

- Antonescu Daniela, 2003, Regional development in Romania - Concept, mechanisms, institutions, Ed. Oscar Print, Bucharest
- Antonescu Daniela, 2001, Regional development. Trends. Mechanisms. Institutions. Ed. Top Form, Bucharest
- Constantin D. L., 2010, Regional Economy: Theories, models, policies. Ed. ASE
- Samuelson, P. , Nordhaus, 2000, Political economy, Ed. Teora, Bucharest
- Zaman, Gh., Geamănu, M., 2006, Economic efficiency, Ed. Fundatiei România de Mâine, Bucharest
- Zaman, Gh., Geamănu, M., 2014, Economic efficiency in the context of sustainable development, Ed. Fundatiei România de Mâine, Bucharest
- Zaman, Gh., Vasile, V. , 2003, Structural developments of Romanian export, Ed. Expert
- Zaman, Gh.,et al, 2015, Endogenous regional economic development: The case of Romania, Ed. Expert

Annex – export, import and trade balance, by county, in 2008 and 2017

- Millions Euro -

Counties' names	Counties' codes	Export		Import		Trade balance	
		2008	2017	2008	2017	2008	2017
Alba	AB	505.5	2457.9	383.1	1412.7	122.4	1045.2
Arad	AR	1447.1	3442.4	1458.8	3107.2	-11.7	335.2
Arges	AG	2470.6	6015.5	2124.8	4628.6	345.8	1386.9
Bacau	BC	340.5	553.4	371.5	785.3	-31.0	-231.8
Bihor	BH	955.0	1771.8	1392.8	1831.2	-437.9	-59.4

Counties' names	Counties' codes	Export		Import		Trade balance	
		2008	2017	2008	2017	2008	2017
Bistrita-Nasaud	BN	406.0	831.7	370.6	660.6	35.4	171.1
Botosani	BT	203.2	321.2	172.0	288.1	31.2	33.1
Brasov	BV	1222.4	3244.4	1640.9	3010.5	-418.5	233.8
Braila	BR	302.3	181.2	239.3	207.0	63.0	-25.7
Buzau	BZ	290.3	643.4	381.3	451.2	-91.0	192.1
Caras-Severin	CS	128.9	317.1	129.5	228.6	-0.6	88.5
Cluj	CJ	997.5	1521.2	2220.7	2537.8	-1223.1	-1016.6
Constanta	CT	2088.4	1996.7	3184.6	2687.7	-1096.2	-691.0
Covasna	CV	236.2	313.0	338.3	302.0	-102.1	11.1
Dambovita	DB	374.9	677.9	430.0	645.1	-55.0	32.8
Dolj	DJ	426.3	1230.9	543.0	1225.7	-116.7	5.1
Galati	GL	1392.9	1005.6	1667.8	1236.5	-274.9	-230.9
Gorj	GJ	39.0	53.6	64.2	46.8	-25.2	6.8
Harghita	HR	262.1	308.2	423.8	424.2	-161.7	-116.1
Hunedoara	HD	507.5	848.0	471.3	642.4	36.2	205.6
Ialomita	IL	116.9	190.9	144.3	230.4	-27.5	-39.5
Iasi	IS	336.3	921.8	614.5	891.6	-278.1	30.2
Ilfov	IF	655.2	2375.7	3672.5	6689.0	-3017.2	-4313.3
Maramures	MM	600.9	1335.4	561.8	984.4	39.1	351.0
Mehedinti	MH	184.3	135.0	125.3	105.0	59.0	30.0
Mures	MS	712.3	920.4	1142.2	1285.3	-429.9	-364.8
Neamt	NT	383.9	435.3	410.9	412.2	-27.0	23.1
Olt	OT	1275.8	1431.8	556.7	800.9	719.1	630.8
Prahova	PH	1377.0	2275.1	2505.4	3335.6	-1128.4	-1060.5
Satu Mare	SM	632.2	979.0	786.0	999.1	-153.7	-20.2
Salaj	SJ	284.6	533.9	368.3	316.9	-83.7	216.9
Sibiu	SB	1301.7	2957.2	1416.6	2342.4	-114.9	614.8
Suceava	SV	140.0	523.6	256.1	629.5	-116.1	-105.9
Teleorman	TR	137.5	139.2	92.9	192.1	44.6	-52.9
Timis	TM	2824.5	6288.6	3144.9	5322.7	-320.4	965.9
Tulcea	TL	289.0	237.1	211.5	266.6	77.5	-29.5
Vaslui	VS	163.1	173.4	124.1	140.1	39.0	33.3
Valcea	VL	599.0	440.3	352.8	329.1	246.2	111.2
Vrancea	VN	146.0	260.7	157.5	276.3	-11.5	-15.6
Bucuresti	B	6389.6	10686.3	21688.6	22629.0	-15299.0	-11942.6
Calarasi	CL	274.9	367.0	232.8	287.5	42.2	79.5
Giurgiu	GR	90.3	75.7	223.1	165.7	-132.8	-90.0
Not allocated Trade		212.7	1223.4	443.2	607.5	-230.5	615.9
Total		**33724.6**	**62641.9**	**57240.3**	**75598.4**	**-23515.7**	**-12956.5**

Source: own calculation based on data of Romanian National Institute of Statistics

YIELD AND RISK - THE BASIC COORDINATES OF SOCIO-ECONOMIC DEVELOPMENT PROGRAMS

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Mihaela SUDACEVSCHI[**]

Abstract

Public policies are implemented through larger and smaller public programs and projects that have to comply with very strict governance conditions. Evaluating the net benefits generated by public programs or projects allows for the identification of the cost-effective ones in order to select them. For this purpose, a lot of indicators, mainly the Net Present Value (NPV), both in financial and socio-economic terms, as well as the recovery period, are being constructed, the probabilistic modeling of which provides the information needed to determine the public spending performance, public expendityres financing the national economy development.

Development and implementation of the public programs are faced with risks, their prediction being a complex approach. For the identification of risks, a wide range of values of indicators involved in risky actions is assigned so that probability appraisal of the occurrence of those risks can be made, including their impact upon environment and / or community. The mix of the probability of producing the risk and its impact leads to the identification of most of its manifestations, so that we can retain to evaluate the program only the significant risks.

The paper also presents the most important criteria for the selection of the development programs / projects, focusing on addressing economic and social benefits, expressed in monetary terms. The cost-benefit analysis that must accompany any public project proposal will identify both its utility for the intended community and externalities, positive and / or negative, that will be a factor of impact upon the NPV.

Keywords: *yield, risks, socio-economic development, appraisal, Net Present Value (NPV).*

1. Introduction

The analysis of the impact of the projects implemented in the economic and social environment for which they are conceived reveals important differences (gaps) between the information contained in the project and those obtained after its implementation. The risks generated by these gaps can produce significant negative effects and should therefore be estimated as accurately as possible, to prevent its being necessary to propose treatment methods for disposal or only reduction.

The gaps that may appear in socio-economic assessment have different causes, but most of them are produced by underestimating the costs and overestimating the benefits to be considered in the cost-benefit analysis underlying any feasibility study. To assess the level of risk in a project, statistical laws of functional distribution of sources of error are used: normal law, beta law, Gamma law, which are applies to available information, which also implies a risk.

There are several methods of risk management, most of which are of a quantitative nature, generally of a high degree of complexity, such as scenario analysis; sensitivity tests - Current Socio-Economic Net Value, etc. Qualitative analysis is a simpler, descriptive method and is therefore used for small-scale projects.

2. Methods of evaluation of macroeconomic development programs and projects

The assessment of macroeconomic and sectoral development programs can be achieved (* * * , 2011) by using several methods, such as:

- cost-benefit analysis, which calculates the net benefit (the sum of the results minus the sum of costs, expressed in updated monetary values), which provides information on the performance of a program. This analysis involves the observation of the impact of the actions proposed in the program concerning the most important aspects of economic and social activity. Currently considered a basic element for designing and evaluating any public program or project, this method involves the use of techniques for updating and estimating economic and social risks involving sophisticated statistical-mathematical models, as:
- multicriterial analysis, which seeks to satisfy multiple options simultaneously, each of these options being aimed at achieving a specific objective. The approach of this method requires the estimation of each set of option - impact - objective, the determination, generally by probability calculations, of the coefficients for each criterion, etc. ;

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− the cost-effectiveness analysis is intended to be a simpler version of the cost-benefit analysis because it attempts to propose to achieve the objectives specified in the program or project with lower costs. However, using this method raises a number of issues if the results are to be the basis for making public policy decisions. Thus, some social aspects can be ignored; also, if the impact of proposed actions on the economic and social environment is not analyzed, negative externalities can occur which can not be ignored by the responsible public authorities. In addition, if certain costs are not taken into account, it may be possible to see an important difference between the estimated output of the program or project and the actual one that will compromise that policy;

− the development of macroeconomic, statistical and mathematical models that use databases containing medium and long-term variations of macroeconomic indicators describing developments at national and supra-national level - for example across the Union European or Eurozone. For the information produced by these models can also be used at lower levels: local, regional, microeconomic, they can be introduced as exogenous sizes in the models specially designed for those levels.

In the wide range of methods and techniques used to evaluate public programs (Le Maître – Sétra, 2014), two are most commonly used: macroeconomic scenario-based methods built on probabilistic estimates and methods based on the introduction of a lump-sum premium that expresses the risk in the discount rate of all financial and social sizes, denominated in monetary terms.

The selection of programs according to the criteria previously formulated by public authorities takes into account the foreseeable sensitivity in the different macroeconomic scenarios, which will be estimated for the main components of the net present value (NPV).

In the macroeconomic scenarios, the initial stage is represented by the probabilistic distributions of the indicators describing the added value gain achieved through the implementation of the proposed program.

3. Definition of the risks

A public program or project presents and substantiates the proposal to carry out an activity that will improve the characteristics of the economic, social, natural, technical environment, etc. In order to achieve the established objective, the program or project will allocate resources, use appropriate mechanisms and achieve results that should lead to the goal expressed in public policy. During the implementation period of the program / project, the risks may appear to disrupt the operation according to the program or project provisions and the ex-ante analysis of these risks is intended to diminish and even eliminate the effects of these risks, hence the importance of knowing them.

In the category of economic risks, two different categories are distinguished: systemic and non-systemic risks. The former are macroeconomic risks that affect the newly created national level (which can be expressed by the macroeconomic indicator Gross Domestic Product (GDP) or similar indicators, National Income (VN), Gross Global Product (PGB) or Net (PGN)

− non-systemic risks are those risks perceived as belonging to the assessment inability of those conducting the assessment operation. They may be confronted with insufficient information on macroeconomic and social indicators, the use of non-performing or inadequate software for high issues, the lack of reliable information on the evolution of the macroeconomic indicators, etc. ;

− systemic risks are generated by its functioning, as described by macroeconomic indicators, such as GDP and other assimilated ones. If they vary, it is expected that the level of development and, implicitly, the quality of life of the community will vary accordingly. In this respect, both public institutions and other organizations involved in macroeconomic forecasting activities elaborate several scenarios on the development of the economy as well as its main sectors.

All evaluations are based on the components of the internationally recognized macroeconomic indicator: GDP per capita at purchasing power parity (PPP). Considering the components of GDP formation, ie Gross Value Added (excluding asset depreciation) and net indirect taxes (involving fiscal policy coupled with commercial policy), it will be possible to follow the behavior of the community towards the potential of national gains, balancing the risks detected to achieve these earnings.

For this purpose, two statistically determined quantities are computed and compared based on the multiannual macroeconomic information: the hope of the key indicator (in this case, the NPV) :

E (NPV – NPV equivalent = the risk premium that the collectivity would agree to bear in order to avoid the risk, where E (NPV) = NPV hope,

and the NPV equivalent = current, net present value of a risk-free program / project in the sense that the NPV is not dependent on macroeconomic developments, ie GDP variation, which shows the equivalence with the preference of the community not to face risks.

3. Methods of risk assessment

- Scenario-Based Methods

Within each scenario, input and output financial flows are calculated to determine the net value of the value added, then the updated utility expectancy is calculated using the risk-free rate to calculate the NPV equivalent.

- Beta-based methods

Beta methods consist of computing the updated value of the macroeconomic indicators and their

components retained in the program by completing the discount rate with a program / project specific risk premium, followed by the ways of applying the algorithm used for the scenario method.

The variation of the utility of the community in a certain economic and social environment, determined at the date of evaluation, follows two situations:

- without implementation of the project, so that only the foreseeable evolution of the current environment will be predicted. This situation is the reference situation, to which the analysis of the differences and, implicitly, of the benefits and risks generated by the proposed development project will be reported;
- the situation in which the project is being put into operation: the updated value of the equivalent NPV project is added to the existing wealth;

The updated sum of the annual community collectivity sampling values, calculated for the assessment period, will follow the same algorithm:

- without implementing the project, considering only the current year's (Ct) fuel wealth;
- the situation in which the project is put into operation, when the random gains obtained in the current year through project implementation are added to the random gain of the reference situation.

When the community has a risk aversion, the equivalent NPV is less than the hope NPV, in the sense that it would prefer to obtain a certain gain (NPV equivalent), rather than the uncertain gains that the risk situation would bring. The difference between the NPV's certainty and the expectation of NPV is what the community is willing to pay to avoid the risk, and this quantity is defined as a risk premium.

This risk premium is the product of the community's aversion to risk and is calculated by the actual value of the correlation between the annual benefits of the project and the wealth obtained by the community through its implementation in that year, a correlation that is quantified by the covariance of these two statistical variables.

As a project is most often aimed at replacing or completing an already existing service offer, the socio-economic assessment will attempt to estimate the cost-effectiveness of a project by comparing two situations obtained in a future context: one where the project is not realized (reference option), the other is the project. In the next sequence, the change process will focus on the clear definition of the overall macroeconomic context or the "baseline scenario", and the option to improve it by implementing the selected program / projects.

It should be noted that the baseline situation can not be confused with the present situation, this being the most probable situation that would occur in the future period in the absence of the project.

At the same time, the option to implement the program / project will predict in detail the most likely situation that would occur in the presence of the project.

4. Socio-economic assessment compared to financial evaluation (*Waaub Jean-Philippe,* 2012)

While the financial assessment only examines the financial effects of the project operator, the socio-economic assessment (* * * , 2015) compares, for every each major category of actors, the impact of the chosen version of the project version for which it was chosenthe impact of the project version for which it was chosen with the reference project.

In addition to commercial goods and services - which can be valued through market prices - included in the financial evaluation, respectively the commercial expenses and revenues related to the project, the socio-economic evaluation also looks at the value of the non-market goods and services produced by the project. Known as externalities, these positions are initially quantitatively assessed, as is customary in social, environmental and economic disciplines.

Also, with regard to costs, it is the question of determining the full cost, which entails evaluating both total costs, including investment costs, operating, maintenance and renewal costs, as well as the monetary estimation of negative externalities regarding the social and economic effects of human resources policy review, etc.

In terms of benefits, it is imperative to predict revenues and the monetary outlook of positive externalities what can happen with the time saved by economic agents, the gains in the safety of people's lives, or reducing the number of injured people, improving the environment and quality of life, social and economic ones by increasing the abilities of the population, decreasing morbidity, etc.

The socio-economic evaluation aims to synthesize, as far as possible, all the financial and non-financial effects of the project under evaluation.

Net present value (NPV) is defined as the sum of the updated benefits minus the sum of the updated costs. This aggregation involves the translation, wherever possible, of the impact of non-commercially-expressed monetary amounts, which should be as standardized as possible in order to achieve the fair comparability of programs / projects involving such sizes. This standardization involves the establishment of calculation conventions and the choice of reference values, also called tutelary values, the valuation conventions being based on the type of impact considered.

The most important factors for establishing the socio-economic profitability of a program / project - quality of life, competitiveness, biodiversity, etc. - will be able to be analyzed due to the monetary units being expressed in terms of NPV-SEs.

This indicator, the Socio-Economic Net Present Value (NPV-SE) of a project, is defined as the difference between the current amount of the benefits obtained through the project implementation and the current amount of estimated costs for realizing those revenues.

In the process of selecting the programs / projects proposed for achieving an objective of socio-economic development of the collectivity, several statistically developed indicators are used which present the essential aspects required for the acceptance of a public-funded approach. These indicators will highlight:

- the program / project profitability or benefit for the company: the net present value in financial or socio-economic terms;
- the liquidity, respectively the speed of recovery of the invested funds, expressed in the recovery period, also under conditions of updating;
- the risks faced by initiators of the program / project, which are very diverse, both financially and in terms of the usefulness of the community.

In terms of cost-effectiveness, public projects have a distinct feature compared to private ones: their profitability will not only take account of the possibility of realizing a monetary profit but social benefits for the community due to the project during its entire duration. These benefits can be expressed by raising living standards, education, etc., but they are difficult to express monetary, but NPV-SE needs to evaluate them as accurately as possible to present the benefits of implementing a public project.

In this respect, for the public programs / projects, which propose the realization, including the financing of public services, to provide the decision makers with reliable selection criteria, two indicators are calculated which express the net present value (NPV), meaning financial NPV (NPV-F) and socio-economic NPV (NPV SC):

- NPV-F is defined, from the financial investor point of view, by aggregating the updated cash flows with the discount rate set for the enterprise implementing the project. This discount rate is generally considered equal to the weighted average cost of capital - which is calculated as the average weighting of the debt and the share of equity in project financing, in current monetary units, ie the year considered.
- NPV-SE represents the collectivity's profitability requirements and, in this case, takes into account, in addition to the financial flows expressed in units of currency in the constant prices of the reference year, non-commercial costs and benefits, also expressed in monetary units , updated at the rate set by the public authorities.

NPV, and even NPV-SE, are used as criteria for selecting programs / projects, considering their absolute value without uncertainties, as the risk premium perceived by the community and the socio-economic beta[1] is included in the discount rate, which refers to the variation in macroeconomic development, expressed in GDP per capita.

However, many other risk factors, both exogenous and endogenous, are emerging in the project, such as the timing of the planned activities, the variation in the prices of the resources employed, the different evolution of the labor market, the mortgage market, etc., without takes into account the predictive errors of macroeconomic indicators that may arise from these factors.

In the best case scenario, by conducting a risk analysis or sensitivity analysis for several possible variations of macroeconomic aggregates and factor prices, the discount rate can be estimated and thus determine the value of the NPV-SE, considered a cost-effectiveness criterion for selecting programs / projects.

The profitability of a program / project can also be analyzed using its management rate, ie NPV reported to the invested monetary unit, showing under the same financial update terms the classification of projects in terms of budgetary implications.

Conclusions

Although the two profitability indicators: NPV-F and NPV-SE can be calculated for each program / project, they are rarely used at the same time. If, due to the scrupulous decision of the decision-makers, its are analyzed in the same work, several situations should be pursued: both positive, both negative, positive and negative, but in all situations, the interpretation of profitability, and therefore acceptance of the project, being different, thus:

- if both NPV-F and NPV-SE are negative, ie financially, but also as an impact on the social life of the community, its implementation does not improve, on the contrary, it causes unnecessary expenditure, and the project must be rejected;
- if both NPV-F and PSE are both positive, it is assumed that the program / project brings improvements to economic and social life, without compromising the financial balance of the community;
- more controversial situations arise when the two indicators are different:
- if NPV-SE is positive and NPV-F negative, it means that the project can bring benefits to the community, but the costs involved can not be supported solely by public funds. However, it is necessary to reconsider all the costs and sources of funding available to mobilize, including, in the case of the EU Member States, Community subsidies;
- if both indicators are negative, it is recommended to reject the program / project, at least in the form presented, although the analyzes made on the foreseeable developments of the communities and the economic environment may be the subject of some relevant proposals.

The general formula of the NPV of an investment involves using at the denominator of the discount rate,

[1] The "beta" coefficient represents the risk of the sector and the company considered; mathematically, it is measured by the dispersion of the profitability of the company around the average profitability, Source : Cléon 2018, http://rfcomptable.grouperf.com/dictionnaire/comptable_financier/navigation.php?lettre=a

whose essential function is to make comparable economic flows occurring at different times.

Due to the importance of the discount rate for determining the profitability, liquidity and risk of a program / project, whether public or private, its sizing requires some clarification:

- the public discount rate is unique and applies uniformly to all public investment projects taken into account and to all sectors of activity. Deviations from this principle would lead to the systematic acceptance of significant inconsistencies in the allocation of public resources;
- the discount rate is a rate calculated without the risk premium. The risk review should not be incorporated by an implicit increase in the discount rate. The risk must be treated for each project together with the quantitative and pricing estimates that are appropriate to it.
- the discount rate is a real rate, in the sense that the values used for its calculation will be expressed in constant prices, generally based on the reference year;
- the update rate, estimated for the entire life of the program / project, decreases over time for long-term assessments;
- this rate should therefore be subject to periodic revisions to avoid a different estimation of developments in macroeconomic indicators: GDP variation, long-term interest rate trends, demographic variables, labor productivity, demographics, etc.).

References

- Le Maître – Sétra, Hélène (2014), –cstm-deost Prise en compte du risque macro-économique dans le calcul socio-économique faisabilité d'une méthode par scénarios sur des projets routiers, http://www.sétra.developpement-durable.gouv.fr
- Waaub Jean-Philippe (2012) Outils et méthodes d'évaluation des impacts, typologie et revue critique. www.sifee.org/static/.../WAAUB/WAAUB_DIAPO_1.pdf
- (2011), Guide relatif à l'analyse socio-économique – Autorisation, © Agence européenne des produits chimiques, 2011, https://comments.echa.europa.eu/Comments/FeedbackGuidance.aspx
- (2015), L'évaluation socio-économique des grands projets d'investissements publics. Ce que l'évaluation socio-économique apporte de plus qu'une évaluation financière.pdf, Rapport au Commissaire général à l'Investissement Rapport au Commissaire général à l'Investissement, www.gouv.fr https://www.lesechos.fr/16/03/2016/lesechos.fr/021770903297_impot---les-mille-et-une-recettes-de-l-optimisation-fiscale.htm#AsehzBWW61PZdKth.99
- Cléon (2018), http://rfcomptable.grouperf.com/dictionnaire/comptable_financier/navigation.php?lettre=a

ON THE POSITIVE CORRELATION BETWEEN EDUCATION AND GDP IN ROMANIA

Sandra TEODORESCU[*]

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, GDP.*

JEL Classification: *C15, I25, P46*

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 programmes 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, simple and log-log regression,* as well as *multiple regression.*

Using available data, we obtain the general linear model presented below:

$$y_j = b_0 + bx_j + \varepsilon_i, j = \overline{1,T} \quad (2)$$

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

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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

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:

$$y_{ij} = b_0 + bx_{ij} + \varepsilon_{ij}, \quad i = \overline{1,N}, \qquad j = \overline{1,T} \quad (3)$$

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 logs for variables, i.e. semi-log or log-log regression model

$$y_j = b_0 + blnx_j + \varepsilon_j, j = \overline{1,T} \quad (4)$$

and, respectively

$$lny_j = b_0 + blnx_j + \varepsilon_j, j = \overline{1,T} \quad (5)$$

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 obtain the following linear multiple regression model:

$$y = b_0 + b_1x_1 + b_2x_2 \ldots + b_px_p + \varepsilon \quad (6)$$

where p represents the number of predictors used to explain or predict the other variable y.

3. Description of the Contextual and Specific Indicators Used

The specific, educational indicators we analyzed are the predictors, i.e.[2]:

6. *School life expectancy* (SLE) 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.
7. *Total public expenditure on education* (TPEE) 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.
8. *At least upper secondary educational attainment, age group 20-24 years* (USEA)- *%* (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.
9. *Tertiary educational attainment, age group 30-34 years*, (TEA) % - 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.
10. *Employment rates of recent graduates* (ERRG)- % 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.
11. *Employment by educational attainment level* (EEAL), *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.

[2] Source: EUROSTAT

12. *Population by educational attainment level* (PEAL), *sex and age* -% highlights the share of the population having completed at least upper secondary education, age class 15-64 years.
13. *Enrolment rate* (ER) *%* 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 general level of participation in and capacity of education.
14. 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 ($r_{PIB;Chelt\_ed} = 0.62$), 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 ($r_{PIB;Grd\_angajare} = -0.42$).

Table 1. Correlations. The highlighted correlations are strong for p < .05000 N=8

	GDP	SLE	TPEE	USEA (%)	TEA(%)	EEAL	ERRG	PEAL(%)	ER (%)
GDP	1.00	**0.81**	0.62	0.78	**0.86**	-0.42	**0.87**	**0.83**	**0.88**
SLE	**0.81**	1.00	**0.91**	**0.95**	**0.97**	**-0.82**	**0.90**	**0.96**	**0.96**
TPEE	0.62	**0.91**	1.00	**0.96**	**0.85**	**-0.82**	**0.76**	**0.87**	**0.80**
USEA (%)	0.78	**0.95**	**0.96**	1.00	**0.93**	-0.75	**0.88**	**0.93**	**0.88**
TEA (%)	**0.86**	**0.97**	**0.85**	0.93	1.00	**-0.80**	**0.97**	**0.99**	**0.99**
EEAL	-0.42	**-0.82**	**-0.82**	-0.75	**-0.80**	1.00	-0.71	**-0.82**	-0.78
ERRG	**0.87**	**0.90**	0.76	**0.88**	**0.97**	-0.71	1.00	**0.98**	**0.96**
PEAL (%)	**0.83**	**0.96**	**0.87**	**0.93**	**0.99**	**-0.82**	**0.98**	1.00	**0.98**
ER (%)	**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 (see Appendix).

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 presented in Table 1 (Appendix), the following linear regression equation illustrating the relationship between the dependent variable *GDP* and the independent variable *School life expectancy* was developed:

$$PIB = 102259 * Speranta\_sc - 1427211 \quad (7)$$

(83816) (1368881)

$$R^2 = 0{,}14$$

after normalization (standardized independent variable value – 0 and dispersion value – 1) we obtain:

$$PIB = 0{,}376719 * Speranta\_sc \quad (8)$$

The coefficient of determination denoted $R^2(\%) = 14\%$, indicates that *School life expectancy* influence on *GDP* values is of 14%.

At the same time, we obtain the following log-log equation:

$$lnPIB = 4{,}71454 * lnSperanta\_sc - 1{,}18165 \quad (9)$$

(2.512) (7.00)

$$R^2 = 0{,}28$$

[3] Source: INS, TEMPO Online
[4] Source: EUROSTAT - for variables 1)-7) and GDP

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).

$$PIB = 7{,}86 * Chelt\_ed + 75075{,}27 \quad (10)$$

(2.93) (20884.59)

$$R^2 = 0{,}5$$

and, respectively,

$$lnPIB = 0{,}484558 * lnChelt\_ed + 7{,}493406 \quad (11)$$

(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.

3.2.3. 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.

$$PIB = 91901 * Cel\_putin\_liceu - 6987316 \quad (12)$$

(84242) (6623873)

$$R^2 = 0{,}11678823$$

and, respectively,

$$lnPIB = 21{,}5066 * lnCel\_putin\_liceu - 81{,}9073 \quad (13)$$

(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%.

$$PIB = 19449 * Cel\_putin\_fac - 123466 \quad (14)$$

(23733.8) (454719.5)

$$R^2 = 0{,}069$$

and, respectively,

$$lnPIB = 1{,}187959 * lnCel\_putin\_fac + 8{,}526990 \quad (15)$$

(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

[1] Cost of Non-Investment in Education in Romania, UNICEF and MEN study

[2] The percentage of economically active population

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.

$$PIB = 532 * Grd\_ocupare - 519003 \quad (16)$$

(906) (1321651)

$$R^2 = 0{,}41$$

and, respectively,

$$lnPIB = 2{,}44745 * lnGrd\_ocupare - 5{,}78455 \quad (17)$$

(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.

$$PIB = 53674 * Populatia - 405081 \quad (18)$$

(68743) (852371.8)

$$R^2 = 0{,}07$$

and, respectively,

$$lnPIB = 1{,}804858 * lnPopulatia + 7{,}518492 \quad (19)$$

(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, 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.

$$PIB = 18480 * Grd\_sc - 996358 \quad (20)$$

(27487) (1839069)

$$R^2 = 0{,}47$$

and, respectively, the log-log equation:

$$lnPIB = 4{,}54648 * lnGrd\_sc - 7{,}13556 \quad (21)$$

(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.

[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

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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References

- Beitone A., Cazorla A., Ddollo C., Drai A. (2007), *Dictionnaire des sciences économiques, 2ième édition*, Armand Colin, Paris.
- Draper N.R., Smith H. (1981), *Applied Regression Analysis*, J.Wiley, N.Y.
- Iosifescu M., Moineagu C., Trebici V., Ursianu E. (1985), *Mică enciclopedie de statistică*, Editura Științifică și Enciclopedică, București
- Molnar M. (2004), *Statistică pentru economiști*, Editura Expert, București
- Teodorescu S. (2006), *Matematici economice*, Editura Bren, București
- Vasile V, Balan M., *L'educație, facteur de l'utilization efficace des ressources humaines. Le development durable dans des conditions de crise*, Revista Romana de Statistica, nr 3/2011
- *** Sistemul national de indicatori pentru educație. Ghid methodologic. Bucuresti 2014
- *** Studiu *Costurile investitiei insuficiente în educație în România*, (2014) realizat de UNICEF în colaborare cu MEN
- *** Comisia Europeană, *Europa 2020 – O strategie europeană pentru o creștere inteligentă, ecologică și favorabilă incluziunii*, 2010
- *** European Comission, *Recommendation for a COUNCIL RECOMMENDATION on România's 2013 national reform programme and delivering a Council opinion on România's convergence programme for 2012-2016* {SWD(2013) 373 final}, pp. 4
- *** OECD, Educație at a Glance 2011: OECD Indicators, OECD Publishing, Indicatorul A9, pp. 166, 2011
- *** EUROSTAT database
- *** INS, TEMPO Online database
- *** Statistica soft

ORGANIZATIONAL PERFORMANCE AND LEARNING FROM THE PERSPECTIVE OF AN OPEN SYSTEM

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Abstract

A learning organization must be constituted in a dynamic environment of constant changes, prepared to engage and interact in systemic and systematic way with the context in which it operates. The present work intends to analyze the importance of organizational learning and their contribution to the performance of an organization from the perspective of the Organization as an open changing system, as well as emphasize its direct link with organizational theory.

Keywords: *Organizational learning, Performance, organizational performance, systems approach.*

JEL: *M1, M11, M14, D24.*

Resumen

Una organización que aprende debe estar constituida en un ámbito dinámico de constantes cambios, preparada para relacionarse e interactuar de manera sistémica y sistemática con el contexto en el cual funciona. Con el presente trabajo se analiza la importancia del aprendizaje organizacional y su contribución en el desempeño de una organización desde la perspectiva de concebir a la organización como un sistema abierto en constante cambio, así como enfatizar su vinculación directa con la teoría Organizacional.

Palabras clave: *Aprendizaje organizacional, desempeño, enfoque a sistemas.*

1. Introduction

Nowadays, companies are developing in a more competitive national and international economy, with increasing demands of productivity, where the laws of the market force them to deepen and to change strategies and policies, to plan, to create and to innovate, to have capacity of adaptation, speed responsiveness and sensitivity to anticipate future needs and be able to survive and develop in a complex and increasingly competitive environment. The level of performance to remain in the desired position, is based on the capacity that companies have to interact and respond to the environment from the macro and micro perspective, therefore it is in function of the context.

In the world scenario, processes of change are increasingly dynamic, where structures, forms, instruments and means are being renewed. It is imperative that companies and institutions are constantly updating models, systems, processes, procedures, technologies and personnel according to their own internal characteristics and the requirements of the environment in which they perform themselves to learn to renew themselves through the learning capacity that they are going to develop every day.

Considering the above, in the present article the concept of organizational learning is approached first, under the conceptualization of several authors, with the purpose of obtaining a better understanding of the concept and in order to explain the operation and main dimensions. Lastly, the article proceeds to empirical testing, discussing the results and ending with the conclusions and with the presentation of some limitations and implications of the study.

2. Approach and delimitation of the problem

This academic work emphasizes the identification that organizations have the need to face a changing world, and for this, managers must have an open, participatory, proactive mentality, with a focus on the development of human resources as a fundamental part of the same. As the changes happen in a vertiginous way in which performance and

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organizational learning become fundamental pillars to overcome adversities and have the character of overcoming the economic and social effects that cross organizations.

3. Objective of research

To analyze the importance of organizational learning and its contribution to the performance of an organization (Performance), in order to determine its degree of importance.

4. Research questions

Will organizations through the application of learning achieve a renewal and revitalization that will allow them to survive in a globalized environment?

What is the importance of learning in organizational performance?

5. Opportunity and research relevance

For the preparation of the present work, a review was made in the theoretical and empirical literature, with the existing scarce information on the performance applied to organizational learning.

6. Research method

The development of this article has a qualitative analysis approach, which considers the empirical revision of literary and scientific sources. It selects the information in order to consider one that can give an emphasis in answering the problematic raised. It is considered an analytic - descriptive study of an exploratory nature, because it "analyzes how a phenomenon and its components are manifested" (Hernández, 2000 p.259) of organizational learning and organizational performance.

7. Theories of organizations, the main approaches to organizational theories.

7.1. The situational or contingency approach

This approach describes administrative organization based on situations outside of business, the environment and technology. It focuses its attention on the external environment of the company, giving importance to what happens outside the organization, before focusing on the internal elements of the organizational structure (Lawrence and Lorsh, 1987).

7.2. Theory of human relations

Its main precursor is George Elton Mayo. Its central idea was to modify the mechanical model of organizational behavior and replace it with another that takes into account the feelings, attitudes, motivational complexity, among other aspects of the human being. It was basically a movement of reaction and opposition to the classical theory of administration. The theory of human relations arose from the need to counteract the strong tendency towards dehumanization of labor, initiated by the application of rigorous, scientific and precise methods to which workers were forced to submit.

The lack of economic rewards significantly impacts the motivation of workers. Factors, such as recognition, group acceptance, status, prestige, leads to unwanted behaviors of people, which leads to better wages (Chiavenato, 2003).

7.3. Theory of systems

This emerged with the works of the German Ludwig Von Bertalanffy, published between 1950 and 1968. Systems theory did not seek to solve problems or to try practical solutions, but to produce conceptual theories and formulations that can create conditions of application in the empirical reality. Hence, two concepts are deduced: purpose or objective and globalism or totality.

This theory contemplates the environments and interactions of the organizational structure, whose differential nature lies in its own organization, with certain internal balances, feeding and conservation modalities. It also revolutionized existing administrative approaches. It conceives of companies as social systems immersed in systems that interrelate and affect each other. It also rethinks the challenges of redesigning and rethinking organizations with new mental models and different tools for doing so (Lilienfeld, 1991).

8. Organizational learning

Organizations learn as they practice what they do and this makes them perform better. And it is through the learning of its people that it makes them better (Muñoz, 2003). It is said that "learning is defined as a process whereby repetition and experimentation make over time tasks performed better and faster, and that new opportunities are experienced on a permanent basis in the operational areas" (Castillo, 2013: 124).

The term "organizational learning" first appeared in a publication by Miller and Cangelloti (1965). The authors, based on Contingency Theory, proposed the "adaptation-learning" conceptual model to explain why only some institutions survive the demands of their environments over time (Garzón, 2008). Organizational learning is intimately inspired by the conceptions of Argyris and Schon (1978) and Senge (1993). The latter highlights four disciplines in business thinking: Personal dominance, mental models, building a shared vision and team learning (Larrosa, s.f.).

As a consequence, it can be said that organizational learning is intimately linked to personal and organizational performance through knowledge and development of situational learning. During the

daily work different situations arise, of which, the organization and the worker are generating knowledge. Individual and collective learning becomes, in this context, the object of management for the organization and, at the same time, the organization becomes an object of learning. An organization learns when at least one person not only improves his or her individual task or function, but because of this improvement, other people in the organization change the way they work (Meijer et al., 2002).

The capacity for organizational learning is characterized by establishing what it is known, where is that knowledge, how it can be used it and improve productivity; In the same way, what aspects should be taken into account in organizational learning, how organizational learning is conceptually and operationally developed and how they influence organizational performance (Garzón, 2008). This depends on how the organization uses the results obtained in the practices of improvement of personnel, production, organization and control and with it establishes new forms of action for the improvement of organizational performance.

Organizational learning faces at least four mega trends that pose new challenges. They are trends related to the transformation of technology, the market, social and environmental regulation, the meanings of values and cultural symbols, which necessarily modify the content and organization of the work of the people in the organizations (Leonard and Palomares, 2003) (Garzón, 2008). Slater & Narver (1995: 63-75), assume that learning facilitates change and guide towards improving performance. Garvin (1994: 19-29) defines it as a process that takes place over time and leads the acquisition of skills that result in increased performance. Likewise, the results of Bontis, Crossan and Hulland (2002: 437-469), affirm that there is a relationship between organizational learning and its performance.

Organizations capable of intensifying and streamlining the relationship between individual and collective learning are called learning organizations (Meijer, et al., 2002). A learning organization is one that has acquired the continuing ability to adapt to change. Organizations, just as individuals learn. All organizations learn deliberately or not. It is a fundamental requirement to continue its existence (Kim, 1993). The direction of learning should be focused at the micro level and at the macro level. At the micro level depends on the path of innovation that has followed the organization. At the macro level, the direction is to upgrade towards products and services with greater knowledge and therefore added value, incorporated (Mertens, et.al. 2005).

Learning ability is to make learning efforts translate into competitiveness. If capacity is defined as closing the gap between intention and expected outcome, the concept implies innovation, albeit in a much more grounded form, since not every innovation leads to a competitive outcome (Dosi et al. 2000). Nowadays, it is imperative to accelerate learning in organizations in order to stay on the path to success, so it is necessary for organizations to focus on learning to unlearn what has been learned previously, since changing environments require of a rapid adaptation response by the organization.

The acceleration of the learning of new knowledge and skills has also led to the acceleration of the destruction of knowledge and skills, displaced by the former. Individuals and institutions need to renew their competencies more frequently than in the past, because the problems they face change more rapidly (Lundvall, Archibugi, 2001).

In addition, an organization also learns if it has knowledge of what goes on outside of it. Its benefits can be an advantage to the competition if it obtains excellent information and takes advantage of it (Chiavenato, 2001). External learning processes are based on the analysis of external information, from the behavior of competitors, customers and the rest of the organizations, the market or the political economy, among others. They are based on the acquisition and internalization of the outside, information that transforms in knowledge through the process of learning, and integrate it in the knowledge of the organization.

For the aforementioned, it is concluded that learning in organizations is determined both internally and externally. Its results depend on how much is learned from the practice, within it, as well as the handling of information that can be obtained from the environment. Once exposed the most important concepts about learning, it is described the contributions of some theories that have contributed to the generation of organizational learning. This is in order to have a better understanding of the impact on performance within organizations.

8.1. Contextual elements that contribute to the application of organizational learning

8.1.1. A culture of learning

As it is known, the set of beliefs, norms, habits and values frame a distinctive image of a society, which allows identifying characteristic features that strengthen the appropriation of elements that make it up, and is manifested in activities that generate value.

8.1.2. An environment for learning

The consolidation of this culture of learning requires the creation of an environment in which trust, empowerment, shared information and valuation of human talent are constant in the development of activities.

8.1.3. Open and shared communication

The formation of an environment for learning with the aforementioned characteristics should be complemented with the key of all interaction and communication. Sharing relevant information between hierarchical levels and areas of work creates a more objective picture of the needs, opportunities and threats to be addressed.

8.1.4. A scalar integration of its members

The flow of information is enriched thanks to the shared work between each collaborator, team, area and organization as a whole, which is called scalar integration.

8.1.5. A reason for growth

The need for an organization is aimed at meeting financial, commercial, and productive and market objectives, etc., to achieve them in an unpredictable environment. Environmental factors, both internal and external, become the reason for growth. In this regard, talking about learning capacity involves taking into account the contributions of employees to the company, who are generating maturity in their actions, as long as the organization is concerned to involve them in a culture to create, assimilate, disseminate and use the old and new knowledge, within the procedural and operative dynamics of the workdays.

As it can be observed, human talent is the focus of organizational learning, since it is the source that brings knowledge, experiences and behaviors to develop the company's competitiveness (Chavez, 2013).

9. Organizational performance

Performance is a feminine name of English origin that stands for realization, representation, interpretation, fact, achievement. The performance in an organization is based on the capacity it has to adapt and capitalize on internal and external key factors of the environment in which it operates. It is also related to the set of results obtained by an organization. Performance or organizational performance is based on observable results in the real scope of execution and depends on the system, organization and established methods, as well as its relationship with the environment; therefore it is based on the context (Brethower and Smalley, 1998). Profits are made outside the organization, within which there are only costs (Drucker, 1985: 123).

What happens between the design of the strategy and the results achieved has to do with organizational performance. Performance becomes a process of vital importance for organizations, and is sometimes viewed as a human management responsibility in which other business processes are not involved. However, when it goes deeper into this approach, it is recognized that performance is everything that happens from the moment of the strategic formulation to the last contact of the collaborator with what it should do, being the sum of everything, the expected result (Kaufman, et al. , 2004).

Organizational performance is a function of the behavior of external and internal factors of the organization. Tidd (2001) argues that the complexity and uncertainty of the environment affect the internal factors of the company. The better the internal factors match the environment, the better the performance. Thus, because the organizational structure is one of the internal factors of the company, it is better to identify structures suitable for specific environments than to look for a single structure to apply it in any context. Li and Atuahene-Gima (2001) argue that organizational performance and innovation, within internal factors, are linked to contingent factors in the environment.

Chamanski and Waago (2001) argue that organizational performance is related to the behavior of internal factors that vary with the age and the life cycle of the company and the type of industry. Damanpour and Evan (1984) argue that changes and uncertainty in the environment stimulate changes and innovations in the strategy and / or organizational structure. Likewise, they affirm that in order to obtain a high organizational performance it is necessary to implement in a balanced way, the technical innovation and the administrative innovation, which will help maintain the balance between the technical system and the social system of the company.

From the perspective of organizational performance this can be measured in terms of internal and external factors that are keys to the organization. According to Gopalakrishnan (2000), organizational performance can be defined on the basis of different factors, including: a) efficiency, related to inflows and outflows of resources; b) effectiveness, related to business growth and employee satisfaction, and finally, c) financial results, related to the return of assets, investment and profit growth. Tsai (2001) evaluates the management of innovation and its relation to organizational performance, taking into account the number of new products introduced and the return on investment, respectively.

Bernardez (2007) states that because organizational performance depends on internal, rational or informal, factors as well as on external factors, customers, market, technology, alliances and competition, it is necessary to consider for evaluation and improvement, three dimensions which are: The design and analysis of organizational structure (rational), the design of organizational dynamics (open) and analysis of (natural) organizational culture. Based on what was previously written about performance from the perspective of performance and organizational performance, it is possible to study it through organizational theory, because it studies both the internal functioning of organizations and their external functioning, in relation to the environment in which they operate.

10. Performance characteristics

1. Organizational focus: Organizational development (OD) takes the organization as a whole so that change can actually take place
2. Systemic orientation: It is oriented towards the interactions of the various parts of the organization, labor relations between people and organizational structure and processes.

3. Change agent: The DO uses one or more agents of change who are the people who play the role of stimulating and coordinating change within a group or organization.
4. Problem solving: The DO not only analyzes problems in theory, but emphasizes solutions. Through action research, the DO is dedicated to solving real problems.
5. Experimental learning: It means that the participants recognize through the experience in the training environment the various problems that they must face in the work.
6. Group processes and team development: The DO is based on group processes such as group discussions, confrontations, intergroup conflicts and cooperation procedures.
7. Feedback: The DO seeks to provide feedback and feedback to participants to base their decisions on concrete data.
8. Situational orientation: The DO procedure is not rigid or immutable, but situational and contingency oriented. It is flexible and pragmatic and adapts the actions to adapt them to the specific and particular needs previously diagnosed (Bennis 1973).
9. Performance is a very interesting democratic and participatory alternative for the renewal and revitalization of organizations.

11. The organization as an open system

From the perspective of the contingency approach, the structure and functioning of an organization cannot be understood apart from its interaction with specific situations or factors of the environment or context with which it operates (Bedard, 2003). Given that it is an open system, the organization is in constant interaction with the surrounding environment as established by systems theory, and must therefore be focused on such situations so that a social, economic and technological imbalance does not unbalance it, in such a way as to lead the organization into chaos.

The representative authors of this approach have sought to identify the external environment variables that have the greatest impact on organizations and to establish the relationship between these variables and the structure and functioning of the organization (Castillo, 2013). In this variant, it was considered pioneering Joan Woodward, an English industrial sociologist, whose research focused on 100 British manufacturing companies whose aim was to identify differences in their design and organizational structure. With the detailed analysis, it was found that structural variations and success of the company could not be explained to the industrial sector to which they belonged, neither for its size nor for the personality of the managers.

On the contrary, from a critical perspective on the precepts and principles proposed by Taylor and the scientific administration, the author noted that the structure of the organizations were more associated with the technology or methods and manufacturing processes that they used, with that I consider the existence of Three categories: production technology in small units and lots, technology in large quantities or mass production and production technology in permanent process (Castillo, 2013).

With this, it is emphasized that each organization has its own internal characteristics that make it different, that is why each one must look for its own adaptability, not at all to generate a change in the systematization of its processes would mean an increase in its productivity, when by its Own internal and external characteristics in what should establish a change that generates an increase of the performance or the performance of its workers (Castillo, 2013).

Conclusions

Organizations must have their own organizational designs adaptable according to the particular characteristics of each one, considering at all times their interactions with key performance factors at macro and micro levels. The level of performance desired by an organization implies becoming a learning organization, so that from the acquired learning can develop the ability to adapt to the context in which it works, even in turbulent situations.

This implies that the functionality of an organization must focus on a systemic approach so that, from the perspective of being an open system, it can best capitalize on internal and external key performance factors that allow it to position itself in a place apart, with levels of productivity capable of positively impacting the profitability of the same, the satisfaction of its staff and stakeholders that are part of its context.

Organizational learning is considered to be directly related in systems theory. Therefore, a series of strategies considered emerging by organizations should be established in order to generate competitive advantages, with the main focus being that organizations are immersed in a highly changing world.

In order to develop organizational learning, various activities must be established to acquire study, assimilate and transmit information through individual, group and organizational experiences, behaviors and processes. As a result of these actions, it allows learning, adapting and changing in the face of a turbulent, volatile and unexpected business environment.

In the staff of these organizations, there is a better development of abilities to obtain really desired results, since sharing knowledge among the work members, enriching their performance skills.

In the current context, organizational learning is highly correlated with performance. It is a strategy that allows organizations to be competitive, as they tend to improve the value of a result, the cost of the tasks, the implicit activities and the process of the resources to

achieve it, recommending its application. Learning alone does not guarantee effectiveness in the results, even with this one, the results can be negative. This is of great importance for all organizations to learn through their experiences in order to grow to be more competitive at local, regional, national and global levels

Discussion of results

With the above, it is presented a horizon of performance of the organizations profiled to look for the desired performance from an organizational learning platform. The way in which the latter has been approached, does not present the different models and their main learning variables that an organization could use according to its nature and current context, so that the impact can be of importance and actions can be developed "Ad hoc" to the organization. More practical analyzes about organizational learning and their contribution to organizational performance should be developed.

Once the present study has been carried out, it can be said that learning does not always increase the efficacy of the learner (Huber, 1991: 90). Although it is true that learning does not always improve the effectiveness of the learner, it is a key factor as and organization, since it is not only composed of one, which allows to improve its performance within the market in which it competes.

References

- Lundvall, B. A., Archibugi, D; (2001), *The globalizing learning economy.* Oxford: Oxford University Press
- Argyris, C., & Schon, D. (1978) Organisational learning: A theory of action perspective. Reading, Mass: Addison Wesley
- Bedard, M. (2003). *la direction des entreprises.* Canadá: Mc Graw Hill
- Bennis, W. G. (1973). Desarrollo Organizacional, su Naturaleza, sus Orígenes y sus Perspectivas, México: Fondo Educativo Interamericano
- Bernárdez, M. (2007). *Desempeño Organizacional.* Bloomington:Author-House
- Bontis, N.; Crossan, M.M.; Hulland, J. (2002):"Managing an Organizational Learning System by Aligning Stocks and Flows", Journal of Management Studies, vol. 39, núm. 4, pp. 437-469.
- Brethower, Dale M. and Smalley, Karolynn A. (1998). *Performance Based Instruction: Linking training to business resultas.* San Francisco:Jossey-Bass/Pfeiffer
- Castillo, V. (2013). *Teorías de las organizaciones*. México: Trillas
- Chamanski, A., y Waago, S. (2001). Organizational performance of technology based firms: therol of technology and business strategy. En: Enterprise and Innovation Management Studies, 2 (3): 205-23
- Chiavenato, I. (2001). *Administración*. México: Mc. Graw Hill
- Chiavenato, I. (2003). *Introducción a la Teoría General de la Administración*. Quinta Edición, Bogotá, Editorial McGraw-Hill
- Damanpour, F., y Evan, W. (1984). Organizational innovation and performance: the problem of organizational lag. En: Administrative Science Quarterly, 29 (3): 392-09
- Dosi, G; Nelson, R; Winter, S, (2000), *The nature and dynamics of organizational capabilities* .Oxford: Oxford University Press
- Drucker, P. (1985). *Innovation and entrepreneur ship*. New York: Harper Business
- Garzón, M. (2008). Modelo teórico de aprendizaje organizacional . Red de Revistas Científicas de América Latina, el Caribe, España y Portugal , Colombia
- Garvín, David. Crear una organización que aprende. Harvard Bussiness Review, Gestión del conocimiento. Barcelona: Deusto, 2005
- Gopalakrishnan, S. (2000). Unravelling the links between dimensions of innovation and organizational performance. En: *The Journal of High Technology Management Research,* 11 (1): 137-53
- Hernández Sampieri, R. (2000). *Metodología de la investigación.* México: McGraw Hill
- Kaufman, R. et al (2004). *Strategic Planning for Success.* San Francisco: Jossey-Bass
- Kim, D. (1993). The Link Between individual and Organizational Learning, en sloan Management Review, otoño de 1993
- Larrosa, J. (s.f.). Aprendizaje organizacional y administración del conocimiento en los nuevos escenarios.
- Lawrence P.R. y Lorsch, J.W. (1987). Organitation and Eviroment. Managing Diferentiation and Integration, Harvard Business School Press, 1967.Cambridge, edición española: la empresa y su entorno. Plaza / Janés, Barcelona
- Leonard, M., & E. Palomares, L. (2003). Capacidades Dinámicas de Aprendizaje en las Organizaciones. Seminario Internacional Globalización, Conocimiento y Desarrollo (pág. 4). México: UNAM
- Li, H., y Atuahene-Gima, K. (2001). Product innovation strategy and the performance of new technology ventures in China. En: *Academy of Management Journal*, 44 (6): 1123-34
- Lilienfeld, R. (1991). Teoría de sistemas, Orígenes y aplicaciones en ciencias Sociales, México,editorial Trillas
- Meijer, F., Loo, R., Burgt, H. (2002). *Competent in context.* Utrecht, Lemm
- Mertens, L., Brown, F., Domínguez., L. (2005), *Competitividad, productividad y trabajo decente: desafios para la industria manufacturera* en: Trabajo, Julio –diciembre, año 1, No1, Tercera época. México: Plaza y Valdés

- Tidd, J. (2001). Innovation management in context: environment, organization and performance. En: *International Journal of Management Reviews*,3 (3):169- 83.
- Tsai, W. (2001). Knowledge transferin intraorganizacional networks: effects of network position and absorptive capacity on business unit innovation and performance. En: *Academy of Management Journal*, 44 (5):996-04

HUMAN CAPITAL IN ROMANIA - BETWEEN CAPITALISATION AND DISSIPATION - A RETROSPECTIVE APPROACH OVER THE LAST CENTURY

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Abstract

A century of human capital evolution in Romania, from the labour market perspective, meant the transition from the strictly quantitative approach, namely from the labour force / labour resources (due to the emergence of the unemployment phenomenon, but also the industrial relations development) to the integrative human capital one (tangible and intangible) in which skills (professional and those so called „soft") and lifelong learning are associated with technology transfer while decent and efficient employment becomes conditionality to company efficiency. The labour market was developed as the most regulated market, highly dependent on the business environment and labour demand in number and/or skills. Being related to technological transfer human capital becomes a factor of performance and development through its three dimensions: quantitative (indicators that quantify employment and labour), qualitative (the efficiency of labour as production factor and the comparative advantages of education) and behavioural (aspects of industrial relations), in both micro and macroeconomic approach. The paper aims to present the evolution and main peculiarities of the human capital in Modern Romania during the last 100 years, focussed on economy profile - competitive / market oriented (1918- 1947 and after 1989) or centralized (1948-1989). How much we gain and lost in preserving, valuing and efficient allocation of the most valuable asset of a nation? Finally, looking forward to economic, social and societal challenges we are desingning some benchmarks and select few relevant policy recommendations for responsible and accountable management of this wealth of the nation.

Keywords: *human capital, labour market, education for labour market, efficiency, wealth of a country.*

1. Introduction – Conceptual development of human capital in Romania

At the end of the nineteenth century and the beginning of the twentieth, the workforce was strictly considered a classic production factor, predominantly structured according to the Taylorist system and valued us such. From the perspective of human capital and of the labour market performances, Romania has experienced an accelerated process of integration in Europe. International Labour Organisation (ILO) work regulation directives created the framework for countries' labour market modernisation and its equilibrium and it was also in the concerns of the decision-makers after Modern Romania settlement in the new borders (after December 1918). The need for matching the educational system with the labour demand was mentioned for the first time in 1921: "*adapting the schools to the local needs of the work element, depending on culture, age, gender, and profession, which alone accommodates and produces results, enlightening the working mass so that it can respond to the economic and social needs of time"* (BMOS1920-1921, p.410).

From the labour market perspective, a century of human production factor evolution, meant the transition from the strictly quantitative approach, namely from the labour force concept to the integrative one i.e human capital (tangible and intangible). From quantitative approach – i.e number of employed persons and unemployed as main determinants of the labour supply demand, we are considering in the present also skills (professional and those so-called „soft") and adaptability potential - lifelong learning. Because competitiveness is the main conditionality for a sustainable company development, from the human capital perspective, the technological transfer is associated not only with matched employment but also with decent and efficient employment The human capital becomes a factor of performance and potential for development through its three dimensions: *quantitative* (indicators that quantify employment status and labour force), *qualitative* (the efficiency of labour as production factor, i.e productivity and the comparative advantages of education i.e skills mismatch) and *behavioural* (aspects of industrial relations i.e work conditions, social dialogue etc), at both micro and macroeconomic approach.

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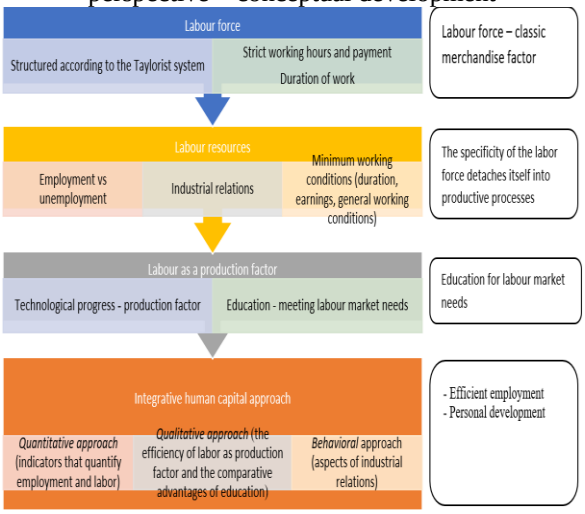
Figure 1 Human capital from the labour market perspective – conceptual development



Source: Author's conception

In Romania, the statistics of labour resources were recorded starting with the 1927 edition of the Statistical Yearbook and included indicators that could characterize the labour market at that time (number of collective agreements, number of the participating employees and the activity of public placement offices). Other sources of data for labour statistics were the Labour Bulletins (published by the Ministry of Labour since April 1920). Some data series are incomplete or discontinued because of various conjunctural facts (the World Wars), factors involved in the evolution of official statistics at national and European level (changes in methodologies for calculating indicators, coverage and definitions), as well as the ability to highlight new aspects belonging to the universe of labour (quantitative expression of labour emerged in different periods).

Nowadays, the indicators that measure human capital and the labour market are diversified, reflecting to a greater extent the attributes of the human factor of production - active and inactive population, unemployment, placement, collective labour agreements, international migration, employed population by activities of the national economy, earnings and graduates of all levels of education. Population and Housing Censuses are also important data sources. There have been organised seven Censuses since the Great Union. Censuses have made an important contribution to shaping the human capital development chart by producing data on the active and inactive population by gender, age group, level of education, socio-professional categories, occupational groups and activities of the national economy.

The recording of the labour market data in the various sources presented above was made according to a reasonable logic of the international regulations imposed by the ILO, which Romania ratified and transposed into national legislation, through its own legislative framework.

During the last century, the labour market functioning in Romania, the human capital activation and efficient capitalisation were strongly influenced by the property on land and assets and of the production modernisation process but maintaining significant and increasing market segmentation. The performance of companies is assessed, among other things, by the volume of exports, the efficiency of production factors and to some extent on the ownership of capital. Foreign direct investment, labor productivity and the export of high-tech products were and still are some of the major factors in strengthening an efficient business model in emerging and less developed countries.

Foreign investments in Romania have been an important source of economic and social development with a strong influence on the political life of our country. Over time, foreign direct investment has been an efficient way to offset the domestic deficit of financial resources and to support the economic growth. It played a significant role in terms of introduction of recent technologies and knowledge as background for productivity gain, competitiveness increse, job creation boosting, the promotion of modern management systems, etc.

Globalization and the creation of single market on regional level, such as the EU, play a key role in the dynamics of the component national economies, increase interdependence, generate both positive externalities (i.e. trade intensification) and negative (higher vulnerability on crises periods with negative effects on social, financial and economic sectors). From this perspective, the paper also highlights some significant elements related to the employment and human capital capitalisation in foreign-owned firms.

2. Main pillars in the development of human capital

2.1. Romania's labour force potential between 1918 and 1947

2.1.1. Establishing the unique labor market of Modern Romania, at the beginning of the XX century

The Great Union in 1918 brought along an active population of about 10.5 million inhabitants, unevenly distributed in the territory.

The characteristics of the organization of the labour market and the structure of employment in each province are summarized as follows:

a) In ***Bessarabia*** there were the so-called "Zemstvele" of crafts, implemented by the Russian administration (BMOS, 1923). They ceased to function at the time of the Great Union, which led to chaos in the Bessarabia working life. Thus, in 1923, the Law of Enlargement in Bessarabia of the Law on the Organization of Crafts, Credit and Labour Insurance of 1912, in force in the Old Kingdom, was adopted. Regarding the structure of the professions, the population of Bessarabia had

the following characteristic: 75.7% farmers, 7% workers in industry and manufacturing, 6.3% workers in trade and 11% other activities (BMOS, 1919, p.28);

b) In 1900, the structure of occupation by economic branch in ***Banat*** was as follows: 71.7% agriculture, 11.8% industry, 3.7% gold and 12.8% other activities. Other information presented in the same Statistical Bulletin shows that, in Banat, the agricultural workers were the best paid, out of all the Romanian lands north of the Carpathians (BMOS, 1919, p.28);

c) ***Transylvania*** was also a specialized in agriculture territory, with 71.4% of the active population working in the sector. The following activities were important: industry (11.9%), servitors (3.8%) and trade (2.1%);

d) In ***Crişana-Maramureş***, 70% of the total active population of 820.6 thousand persons worked in agriculture, 11.8% in industry, 3.9% were servants and 2.9% in trade and credit;

e) Since 1914, the economy of the ***Old Kingdom*** was predominantly agrarian, being dependent on the import of industrial products and technologies. Participation in economic life, or "collective effort" (Gusti D., 1938), was characterized at that time by two indicators: the active population and the passive population. The table below shows the structure of the population in terms of participation in economic life, according to the 1930 Population and Housing Census.

Table 1 Active population and activity rates by residence area and territories, according to the Population and Housing Census 1930

Territory	*Active population (thou))*			*Activity rates (%)*		
	Total	*Rural*	*Urban*	*Total*	*Rural*	*Urban*
Romania	18052.9	4420.7	3632.2	58.4	60.5	50.2
	Of which, in %:					
Bessarabia	15.6	89.1	10.9	57.6	58.9	48.6
Oltenia	9.0	88.9	11.1	62.5	63.9	53.1
Transylvania	17.9	86.2	13.8	58.6	60.1	50.5
Banat	5.6	84.4	15.6	62.2	64.0	54.1
Crisana	7.9	83.1	16.9	59.9	62.1	51.1
Dobrogea	4.3	80.1	19.9	55.2	58.1	46.0
Moldavia	13.2	79.5	20.5	57.2	60.1	48.2
Bucovina	4.8	76.3	23.7	59.2	61.6	52.8
Muntenia	21.8	76.0	24.0	57.1	59.4	50.5

Source: Gusti D. (1938) Romania's Encyclopaedia, vol. III, p. 41, p. 45 and p. 1055

The active population had a significantly higher share in rural areas than urban ones (60.5% vs. 50.2%). The explanation may come from the almost exclusive occupation of rural people in the agricultural sector. Agriculture was, in those years, the most developed economic sector and absorbed a significant amount of labour resources. Agricultural exploitation was carried out on small-scale units, but also on a large scale, attracting a large workforce. Territorial analysis shows that the provinces with the highest degree of rural development were Bessarabia, Oltenia and Transylvania. In Moldavia, Bucovina and Muntenia, the active population exceeded 20% in urban areas, while in Bessarabia and Oltenia, only one in ten active people were living in urban areas. From the point of view of the human potential, the richest province was Muntenia, with 22.3% of the total population and 21.8% of the active population of unified Romania. However, the highest rate of activity was recorded in other provinces: Oltenia (62.5%) and Banat (62.2%).

Regarding the structure of employment by economic sector, in Romania 78.2% of the active population worked in agriculture and 7.2% in industry, these being the most developed sectors of the economy.

In Muntenia, workers in transport activities were more numerous than in the rest of the country. Most of the trade workers were in Bucovina and Muntenia. The highest developed economic sectors were agriculture, mining, transport, metallurgy, food and textile industries.

Industry was the second important branch in all provinces, with an employment rate ranging from 3.2% in Bessarabia to 11.2% in Banat. Public institutions were the third important economic sector, given the legislative and administrative development that Romania continued in that period.

Romania's economic development after the Great Union was primarily based on industry, by encouraging the exploitation of national resources. Following the increased interest in oil extraction, Romania was the first country to produce crude oil, in 1875 with 275 tonnes and in 1858 with 475 tonnes. In 1937, it was ranked no. 6 in the top oil producers, but with a ratio between domestic consumption and production of only 22.5%, the difference being reflected in exports (Lupu M.A. et al, 1974). Thus, although Romania was the leading producer, it was just a supplier of raw materials, fuel for the capitalist countries and the chemical industry failed to grow to the extent of expectations based on the high availability of the primary resource on the national territory.

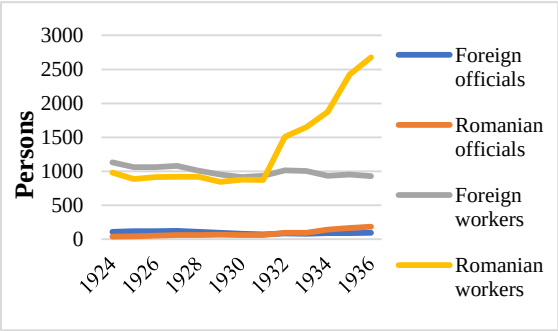
Foreign capital exceeded 2/3 in the wood industry, 3/4 in the metallurgical industry and over 90% in the sugar, oil, gas, electricity and water industries.

These developments are associated with massive immigration flows after the Great Union i.e. the settlement of over 500 thousand foreigners (about 3% of total population), especially in large cities, which deepened the segmentation of the labour market between the sedentary population and the newcomers. The majority of Romanians spent their lives in rural areas, being employed in agriculture, while in urban areas the foreign bourgeoisie increased. Foreign capital also grew in small-scale firms in the trade and services sector. Over 90% of the enterprises were controlled by foreign capital while the labour force was a national majority (Gusti D., 1938, vol. III, p. 227).

In the statistical data sources, labour force was not identified for enterprises with foreign capital in the analysed period. However, considering that most large enterprises were based on foreign capital, the figure below shows the number of the Romanian and foreign

labour force in the mining and metallurgical holdings in Transylvania during 1924-1936.

Figure 2 Number of the Romanian and foreign labour force in the mining and metallurgical holdings, in Transylvania area, 1924-1936



Source: Authors' calculation based on data provided by Gusti D. (1938 Romania's Encyclopaedia , vol. III, p. 708

According to the same source, the Romanization process in the mentioned industries was accomplished by promoting national engineers in leading positions. Nevertheless, through the still dominant positions of foreign capital in the main industrial branches and against the backdrop of protectionist laws, Romania's economic development was far from its real potential. These realities have decisively influenced the structure and economic potential of Romania on property forms, with direct impact on the involved labour force. Although, as mentioned before, statistical sources do not provide information about the labour force in firms controlled by foreign capital, it is well known the tendency to violate the rights of workers and the restraint of rights and freedoms. The cultural differences between employers and employees, the lack of information on the actions of foreign entrepreneurs and the difficulties encountered by the latter on the labour market have led to the conclusion that there was a need for reform of social relation.

In the 1920s, major changes took place, the new labour market systems were implemented in Romania, including the establishment of employment offices and the legislation of collective labour agreements. At the same time, following the recommendations of the ILO, the prevention of unemployment was also in discussion.

2.1.2. Labour force potential - between activation on the labour market and migration

In international context, Romania ranked the first in 1930 in terms of **activity rate**, being one of the most dynamic countries in Europe. Thus, our country surpassed states such as: Russia, Bulgaria, France, Germany, Switzerland, England, Hungary and Norway. Many of these states had a more advanced economic status than Romania, but they had a much smaller share of the active population. Romania had an activity rate of 58.4% as against Switzerland 47.6%, Hungary 46.0%, Japan 45.3% and United States of America 39.8%. (Statistical Bulletin of Romania, 1938, p. 112).

International migration also represented a particularly important aspect in Romanian society at that time. To avoid imbalances between demand and supply on the labour market, it was adopted the 1925 Migration Act (Gusti D., 1938, Romania's Encyclopaedia, Vol. I, p.595). In the explanatory memorandum of this law, the issue of migration from each historic province was presented, showing that this fenomena was not so intense in the years before Great Union. A single article in the Law of Passports from 1912 was enough to regulate the migration flows in the Old Kingdom (Labour Bulletin, 1925, p. 220), which was then a country of destination and origin for workers of Balkan origin who migrated on the short term (Gusti D., 1938, Romania's Encyclopaedia of Romania, Vol. III, p.77).

The Migration Act from 1925 provided protection measures for the transport and shelter of migrants in the country of destination, especially in the context of massive repatriations at the time. After 1926, both emigration and immigration recorded significant decreases because of the post-war restrictions imposed by all states. Another important aspect was that the balance of international migration in Romania was negative until 1930, and from 1931 to 1937 the number of immigrants exceeded the one of migrants. Regarding the migration of the repatriated people, Romania was an immigration country, the number of persons repatriated to our country being 7.8 times higher in 1926 and even 10 times higher in 1935 and 1936. In the years following the economic crisis, efforts were made to ease the national labour market by placing unemployed Romanian workers in the industries in France. Dimitrie Gusti believes that this placement would have been unfavourable to the labour market because it would have officially recognized Romania's inability to use its labour resources. A measure taken by the Romanian state during this period was of active social inclusion of native persons by stimulating employment in enterprises. Many of the foreigners looking for low-skilled jobs have been repatriated. Those with key positions in enterprises or specialists have been maintained. At the same time, the state began to take measures in the education system, supplementing the number of professional schools and introducing merit scholarships abroad (Gusti D., 1938, Romania's Encyclopaedia, Vol. III, p. 78).

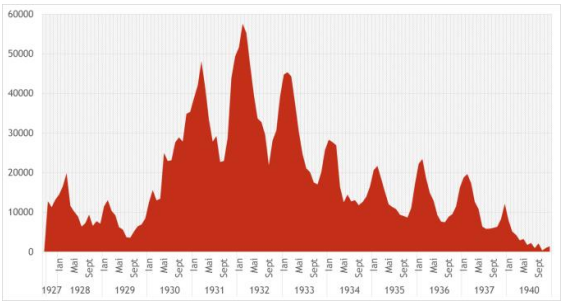
2.1.3. Labour market imbalances during interwar economic crisis

Due to the process of industrialization during 1920s and 1930s, comparing with other European countries, Romania was not much affected by the economic crisis of 1929-1933. It was mainly affected by the economic development cycle, faster in the early 20s, and then, starting with 1927, on a slower curve of growth, with some industries which have entered a period of stagnation. However, this evolution, which is inherent in the development of Romanian economy, overlaps with the effects of the economic crisis. From the labour market perspective, signs of disequilibria

were registered starting with 1927 when, because of the stagnation in some industrial branches, the number of placements sharply dropped compared to the previous period.

The total number of unemployed in 1927 picks up around 20 thousand persons and decrease until late 1929. During crisis, the unemployment problem became more intense, being registered the largest number of unemployed in the period (49.4 thousands in 1931) (Gusti D., 1938, Romania's Encyclopaedia, Vol. III, p. 61), with an increase in the number recorded in the autumn and winter months. Subsequently, it decreased from 39.2 thousand in 1932, to 17 thousand in 1935 and 12.1 thousand in 1937.

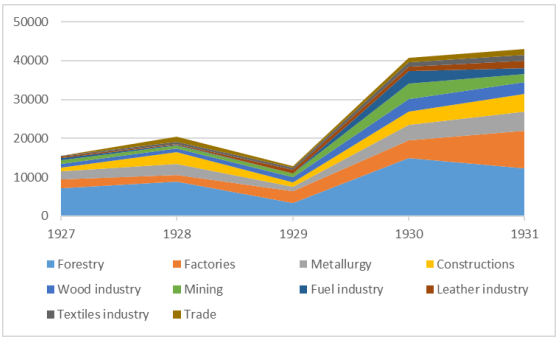
Figure 3 Evolution of the number of registered unemployed, 1927-1940



Source: Gusti D. (1938) Romania's Encyclopaedia, Vol. III, p. 77 for period 1922-1937 and Labour Bulletin 1941, p. 116 for year 1940

On industries, the situation is different. The unemployment incidence was higher in forestry in the beginning. Afterwards, several economic activities were affected more and more: metallurgy, mining, fuel industry and trade. Factories were strongly affected starting with 1929, as well as constructions.

Figure 4 Registered unemployed persons, by main economic sectors, 1927-1931



Source: Banu G. (1931) Unemployment in Romania

2.1.4. Labour relations development

The increase in the number of employees due to industrialization at the beginning of the 20th century led to the need to regulate the employment relationships between employers and workers through the collective labour contracts. Its implementation was considered a remarkable success of the workers' movement. For two decades, the contractual arrangements between the employers and the employees were based on negociation process at the company level.

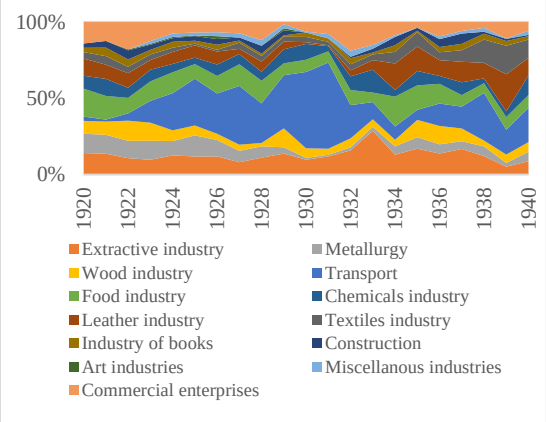
A short historical overview underlines the main steps in social dialogue development:

a) In Romania, the first written source of the collective labour contract was the Orleanu Law of 1909. This law suppresses the right to associate and to strike for employees in public enterprises from industrial, economic or commercial sectors. In 1912, it was adopted the Law on the Organization of Crafts, Credit and Labour Insurances, which regulated the apprenticeship contract, the employers' regime, the craftsmen, the workers, the factory workers and the workers, the guilds, corporations, insurance against illness, accidents, old age insurance and invalidity insurance from sickness, contributions, working day length. This law abrogates the Law on the Organization of Crafts of March 5, 1902.

b) The achievement of the Great Union demanded by itself a modernization of the "relations between capital and the employees", for the integration of Romania in Europe (BMOS, April 1920-March 1921). Countries such as France, England, Germany, Hungary, Belgium, the Netherlands, Switzerland, Spain, Portugal and Turkey were already covered by the labour contract, and Romania needed to align with this trend. In 1920, the Labour Disputes Act was adopted. This was the first law applied on the entire territory of Romania and **opens the series of legislative projects that will compose the Labour Code.** The law introduced the compulsory conciliation or arbitration procedure for strikes or labour disputes. Arbitration decisions often materialized in collective labour agreements. Subsequently, the 1929 Labour Contract Law regulated the following types of contracts: the apprenticeship agreement (between the apprentice and the employer with a maximum of 4 years), the individual labour contract (between the employee and the employer, with special provisions regarding individual work contracts of industrial and commercial officials), team contract (between several employees and a single entrepreneur), collective labour agreement (between one or more group entrepreneurs or associations thereof and, on the other hand, professional associations or employee groups).

Data provided by the 1941 Labour Bulletin show that in 1920 most collective agreements were concluded in the food industry, i.e. 18.3% of their total, but almost three quarters of the participants were in the extractive industry. Since 1922, commercial companies have been leading in the agreement of these contracts, but almost half of the participants were in the metallurgical industry.

Figure 5 Structure by industry of the number of collective labour contracts, 1920-1940



Source: Authors' calculation, based on data provided by Labour Bulletin 1941, p. 101

In 1930, the coverage of collective labour contracts at national level was insignificant, of only 0.4%, but the breakdown by industry was high differentiated. Thus, in extractive industry, 46.1% of the active persons were under collective agreements. In other industries, the percentages were much lower: 6.3% in the chemicals industry, 4.3% in the transport industry and 3.7% in the food industry. The scarcity of information and statistical data doesn't allow a wider picture of the industrial relation development in the period, but we can underline the emerging initiatives to modernise the work conditions and to develop some good working relations on company level. Also, the strikes and other collective or individual conflicts registered at courts or mediated, and the legislative framework proved the social partners involvement in labour market modernising.

With the outbreak of the World War II, the issue of labor organization in peacetime compared to wartime work was tackled. In peacetime, three aspects were concerned: tradable production, competitiveness and specialization of the workforce. In wartime, the first two aspects were in some respects irrelevant because all efforts were mainly for war industry development. The working time was regulated according to "war needs", the work payment was associated with subsistence wage, all effors were oriented to fuel the war industry in several forms: establishing quantitative limits for imported and exported goods and taking part in compulsory, requisitioned labour.

2.2. Human capital valuation in the centralized economy 1948-1989

2.2.1. Labour market reorganisation

After the World War II, under the centralised economy period (of the socialist regime), the unemployment disappeared. It was assumed that all people are social responsible to graduate at least the compulsory education and afterthat to be employed during lifetime. The full employment was considered as a success of the centralised economy, but employment efficiency measured by overemplyment remains as a forbidden discussion issue. Data on unemployment, job vacancies were no more available, therefore interrupted and will resume in the period after 1990.

The main peculiarity of the period was the higher rate of activity in the rural area compared to the urban one. In 1956, for example, 64.3% of rural residents and 49.7% of the urban ones were active in the labour market. Ten years later, due to high industrialisation process and internal migration from rural to urban areas, the rural activity rate dropped to 57.9% and in 1977, it declined by 6.8 percentage points (census data). The activity rate in urban area remains as average under 50%, partially explained by the increasing of compulsory initial education period (from 8 to 10 and, for a brief period before 1989 events, to 12 years)

Of the two categories of population by participation in the economic activity, the inactive population showed the highest volatility among the residence environments in the three censuses of this period. In 1956, nearly two-thirds (60.9%) of inactive people were distributed in rural areas, and in 1977 their proportion dropped to 55.2%. This change can be explained not only by internal mobility to urban areas and old cities development, but also by the urbanization of Romania, through changing the rural localities in small cities. The share of active (employed) persons in urban areas increased from 35.0% in 1966 to 42.4% in 1977.

Table 2. Categories of population by participation in economic activity, by residence area, according to the Population and Housing Censuses 1956, 1966, 1977 and 1992 (%)

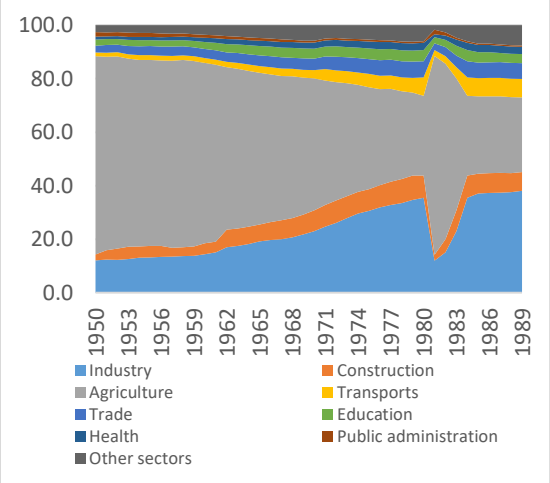
	Total population		*Active population*		*Inactive population*		*Activity rates*	
	% of total category		*% of total category*		*% of total category*		*% of total population*	
Year	*R*	*U*	*R*	*U*	*R*	*U*	*R*	*U*
1956	68.7	31.3	74.0	26.0	60.9	39.1	64.3	49.7
1966	60.9	39.1	65.0	35.0	56.1	43.9	57.9	48.6
1977	56.4	43.6	57.6	42.4	55.2	44.8	51.1	48.7
1992	45.7	54.3	44.1	55.9	47.0	53.0	44.3	47.2

Source: Authors' calculation, based on data provided by Population and Housing Censuses 1956, 1966, 1977 and 1992 The activity rates were computed as the share of active population in total population.

Between 1950 and 1989, the structure of employment in the main activities of the national economy has some peculiarities. It is important to underline that the rate activities at that time were considered as the shares of active population in total population.

Most branches (industry, agriculture, transport, education and health) recorded the highest rate of activity at the end of the period. The public sector experienced a peak in employment at the beginning of the period, and the minimum was reached after 1985. Trade and construction peaked at the end of the 1970s.

Figure 6. Employed population structure, by sectors of national economy, 1950-1989 (%)



Source: Romanian Statistical Yearbooks, 1962-1990

In agriculture, the mechanisation of the working methods, by technological transfer, has partially released the workforce, being oriented to processing, construction and transport industries. At the same time, the education system was focused on vocational training and technical domains, ensuring the necessary graduates (employees) according to the specific emerging activities. This was an example of good practice in adapting the education system to the needs of the labour market, so necessary for the extensive process of industrialisation and for the proper valuing and capitalisation of domestic human capital.

The deepened process of industrialization is seconded by the capital centralisation, by the firm's dimension increasing. If in 1950 most of the enterprises (73%) were small and medium, of less than 500 workers, in 1968 highest share was of the large enterprises of over 1000 workers (39.0%). At the same time, the concentration of the labour force has increased. In 1950, there were 1136 enterprises with 549.3 thousand workers, and in 1968 there were 1104 enterprises with over 2.4 times employees (1335.5 thousand workers) (General Directorate of Statistics, 1969, p. VII).

Romania's economic growth and the engagement of a large production capacity due to industrialization led to the need of an increasing number of employees on newly created jobs. Official statistics (General Directorate of Statistics, 1969, p. X) show that 3.9% of the total number of employees hired for the first time between 1961 and 1967 were graduates of higher education, 10.3% were graduates of secondary schools (technical schools and technical schools of foremen or other medium-sized schools), 18.3% were graduates of professional apprenticeship schools and the remaining 67.5% had elementary school. Economic development and labour force allocation were reflected in the five-year plans, giving prerequisites for expanding the most efficient economic sectors, depending on existing natural and labour resources (Romania's Geographical Encyclopaedia, 1982, p. 107). The annual growth rate of the employed population was of 0.48% in the period1965-1975, and of 0.56% in 1970-1975, based mainly on the employment policy promoted at that time focused on increasing women participation on the labour market. During the third five-year plan (1976-1980), this growth rate decreased to 0.5% because of the drop in the share of the active population in the total population from 47.8% in 1975 to 46.6% in 1980. This may be approached positively because it directly reflects the intense process of automation of the main economic sectors but also negatively through the aging of the population.

The effort to industrialize and diversify the processing activities, although mainly based on extensive growth, has also resulted in sustained increases in labor productivity. The average annual growth rate of the industrial workers' productivity was of 8.5% in 1951-1968, of 7.9% in 1961-1968 and of 8.2% in 1966-1968 (General Directorate of Statistics, 1969, p. XII),

2.2.2. Education for labour market

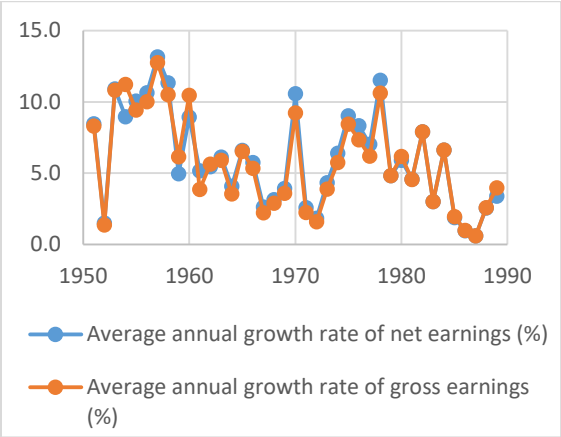
As stated previously, the industrialization of Romania increased demand for specialized workers, diversified range of professions for economic development, including increased demand for trainers and teachers to prepare the workforce needed. Therefore, the education system was centered mainly on education for the labor market, the evolution of the students enrolled in fields of science and levels of education being constantly adapted to the development requirements specified in the five-year plans.

Starting with 1950, the data on the education system in Romania and the number of graduates of all levels of education were available. The development of formal education and the gradual increase of the average number of years spent in school had significant potential benefit on the labour market, where the demand for qualified staff was growing. During the whole period 1949-1989, the most graduates were those of lower secondary education, with an increase from 55.6 thousand in 1949 to a maximum of 526.7 thousand in 1979. Upper secondary education gradually developed, the number of graduates increasing from 100.1 thousand in 1967 to 170 thousand in 1978 and 200.9 thousand to 1986. Education statistics show that tertiary and upper secondary education have had about the same level until 1971, when the number of university graduates became more numerous.

2.2.3. Wage policy

The official data show an inconsistent evolution of the average annual growth rate of earnings, both net and gross.

Figure 7. Average annual growth rates of net and gross earnings, 1951-1990 (%)



Source: Authors' calculation, based on National Institute of Statistics, Earnings – annual series

The highest annual growth rates were registered in 1957 (13.2% for net earnings and 12.8% for gross earnings), while the lowest rates were registered in 1987 (0.6%) for both types of earnings.

The efforts for industrialization were secondated by wage austerity and inneficient wage policies. The full employment policy was not correlated with economic development and technological transfer, registering many situations of lack of correlation with the efficiency indicators of the human factor allocation. Labor remuneration was mainly aimed at maintaining a minimum standard of living, rather low compared to the level in other countries of the communist bloc (CAER/Comecon- Council of Mutual Economic Assistance). Decoupling wages from job content and work performance was more pronounced in the 80s when the effort to reimburse the loan from the International Monetary Fund for industrialization was emphasized.

Moreover, the wage and salary scales (both vertically on the level of education and horizontally on the professions) were administratively established. Individual performance was poorly remunerated, and only apparently was determined by technological criteria, productivity, quality of work, etc. The practice of exception in work payment favored some categories of employees, the differentiation criteria being mainly those related to the political attachment and preservation of the interests of the elite of the communist leadership, both at company level and at national level.

Increasing in-work-poverty, precarious working conditions and scarcity of consumer goods on the market has fueled discontent (lower perfoemance at workplace) and intensification of emigration (official for some ethnicities - Germans, Jews) and illegal for Romanians. Wage policy pushed up labor inequities, increasing income gap by developing and maintaining a rich communist elite and at subsistence level of the most employees, with social polarisation. In fact, during this period, the labour market was rigid, practically did not work on efficient allocation principles, and was mainly based on the quantitative principle of labour participation.

In the last decade of the analyzed period, labor remuneration reform allowed employee participation in the ownership by distribution of "companies' shares". Basically, it was a hidden form of taking over of a part of individual labour incomes, available to companies for financing current activity.

2.2.4. Industrial relations development

By the nationalization of enterprises in all productive sectors, industrialization policy, centralized planning of economic activity and, last but not least, the collectivization of agriculture, state ownership was quasi-total and industrial relations were managed by the state through trade unions, which partically did not have any functional role in regulating imbalances and at alleviating the inequities created on the labour market. Also, the social dialogue was formal, trade unons being another appendix to (unique) communist party.

Complete leverage of the market economy was missing, such as the demand and supply law, or free competition on the labour market. Against the backdrop of high social discontent (generated by both inadequate earnings and improperly working conditions and deprivation of social rights), lack of interest in performance, since 1987 there have been brutal social strikes interrupted by the police state and later culminated in a general discontent that led to the events of December 1989.

2.3. Human capital – a multidimensional production factor during 1990-2018

2.3.1. A general overview

From the perspective of labour market developments, the period 1990-2018 is characterized by several pillars:

a) Preaccession period – up to 2007 – labour market deeply reform to accommodate with competitiveness and performed industrial relation development. Most relevant evolutions are considered the following:

- Association of privatisation, economic restructuring and reform, labor force reallocation with layoffs, respectively the boost of unemployment between 1991-1992; in generally in 1990 around 20 percent of the employment was considered overemployment, as result of full employment policy during the communist regime;
- The sharp decline in real wage earnings between 1993-1995, because of reduced demand for labour (companies' reorganization was seconded by the loss of external markets and exports decreasing) and hyperinflation; asymptotic and poor performance of labour;
- Chronic emigration (about 150 thousand people in the first two years after the 1989 event) and increased migration for work flows;
- Steadily devaluation of human capital by

education performance decreasing, increasing skills mismatch and incapacity to regulate through the TVET system or lifelong learning;

− Labour market inadequate reform and delayed industrial relation consistent reorganisation; lower performance of supporting mechanisms and policies for managing imbalances;

− Unionism level decreasing and imbalanced negociation power of the social partners

− Preparing for European integration, which included a negotiation chapter dedicated to social policies and employment;

− Reform of labour market specific indicators and methodologies of official statistics surveys, according to the requirements of the EU;

b) Post-accession period, characterised by crisis managing and continuing labour market reform for better responds to economic challenges – economic relunch and increasing performances, including sustainable development measures and quality of work and active social inclusion. Some initiatives are continuing the last period efforts for labour market efficient redesign and consolidation and others are related to different forms of efficiency:

1. Developing the model of human capital management; awareness and operationalization of the shift from labour force / labour resources to human capital - after 2000, including the transition from POSDRU (2007-2013) to POCU (2014-2020);
2. Managing the employment crisis following the 2008-2009 financial crisis, whose effects are still obvious on the labour market;
3. Ongoing wage and associated fiscal reform – redesign the wage scale, social contributions, etc.;
4. A spatial development of the labour market, adapting both the new challenges of labor mobility for workers and models of local business development.

2.3.2. Main developments of labour market indicators

After 100 years from the Great Union, Romania, with a resident population of 19.6 million inhabitants on 1 January 2017, shows heterogeneity of the **active population** at the territorial level, much more pronounced. Although it is the smallest in size, Bucharest-Ilfov region has the highest population density among all development regions (1256 inhabitants/km^2) and the active population registered in the second quarter of 2017 was almost 60% of the resident population aged 15 and over. At the opposite end, the West Region has the lowest density of 56 inhabitants/km^2, with a population of 1.8 million inhabitants, and a 49.7% activity rate. The highest rate of activity of people aged 15 years and over was recorded in the North-East region. Rates with an activity rate below the national level of 56.6% were Centre, South East and West.

The qualitative aspects of human capital and the reconciliation of the professional and competence profile with the demand on the labour market are highlighted by the **structure of employment** on education levels, labour productivity and the skills mismatch.

In 2004, 72.9% of people with higher education were working in the secondary sector, while in industry and construction only 23.9%. The share of people with higher education in the service sector declined in the year of accession to the EU (2007) and three years later it falls again to 74.6%, to reach 78.2% in 2016. This means that people with higher education are more likely to be employed in the tertiary sector of the economy. The share of people with secondary education in the primary sector has continuously increased between 2004 and 2013 and afterthat, in 2016 decreased by 2.8 percentage points compared to 2013. These persons are distributed evenly between the other two sectors, in 2016 working in the secondary sector 36.4% and, respectively 46.5% in services. People with a low level of education are working mainly in the agricultural sector due to the supply of low-skilled jobs. Fewer people with primary education work in the tertiary sector (12.6% in 2004 and 12.1% in 2010, the trend in recent years is rising to 17.2% in 2016), but more and more work in the secondary (14.4% in 2004, 14.8% in 2007, 15.3% in 2013 and 21.6% in 2016). This unfavourable dinamics of educational level profile in employment is mainly a result of the local economic distruction i.e. the effect of both factors - the (cheaper) import annihilates the opportunities for small domestic businesses development and because of labor migration for workers (especially for financial advantages).

The skills mismatch in formal education as against the labour market demand is highlighted by the structural employment deficit, the dynamics of vacancies vs. the unemployment rate and the demand for training for new qualifications and competences, including those integrated in the "soft skills" category. This demand has changed substantially, asymmetry through educational supply has been deepened, both as a quantitative and qualitative deficit. Moreover, the deficit on the labour market is cronicised for some strategic professions (health care specialists, engineers in high-tech industries, IT specialists etc) and is struggled by the annual migrant's contingents (graduates or young or middle-aged people already on the labour market), the stock of people outside the Romanian labour market surpassing 4 million workers.

The labour productivity per employed person was 2.9 times higher in 2014 (60.4 thousand lei / person) than in 2004 (23.6 thousand lei / person). (National Institute of Statistics, Statistical Yearbook 2017), but remains at second lowest level in EU. The activities of the national economy where labour productivity stagnated during this period are agriculture, forestry and fishing, public administration and defence, social security in the public sector, education and health. Real estate activities were the most efficient as their

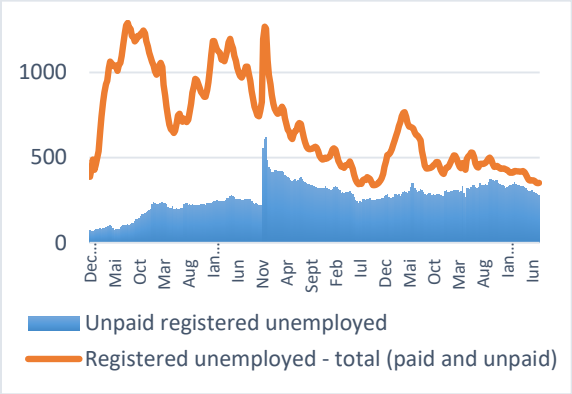
productivity increased 6.4 times in 2014 compared to 2004 and by 125.7 times compared to 1995. Other activities with important evolution of labour productivity are the cultural ones, the repairs of the goods in household and other services, professional, scientific and technical activities; administrative and support service activities.

To summarise for the whole analysed period, agriculture remains the lowest productive activity. Public administration and cultural activities undermined average productivity by 1998, and then outweighs average productivity per person employed level. Since 2010, trade's productivity remained significantly lower than the national average level. Moreover, low-skilled jobs have become more and more automated; the need for cognitive abilities and craft skills has decreased, while the demand for digital and communication competences is constantly expanding.

2.3.3. Labour market imbalances

The labor market imbalance, measured by the unemployment rate, ignored during the communist period, has been a preoccupation for political decision-makers after the transition to a market economy. The maximum number of unemployed persons (paid and unpaid) was registered in March 1994 – almost 1.3 million people. In June 2008 only 337.1 thousand people were registered as unemployed.

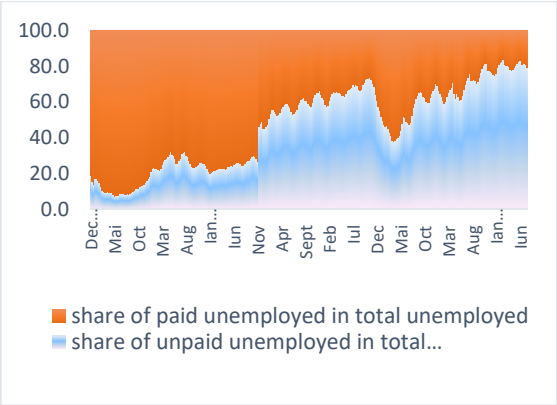
Figure 8. Unemployed persons, 1991 - 2017 (thousand)



Source: NIS, Tempo online, SOM101A

The legal framework of unemployment was reflected in the distribution of paid and unpaid unemployed persons

Figure 9. Share of paid and unpaid unemployed in total unemployed, 1991 - 2017 (%)

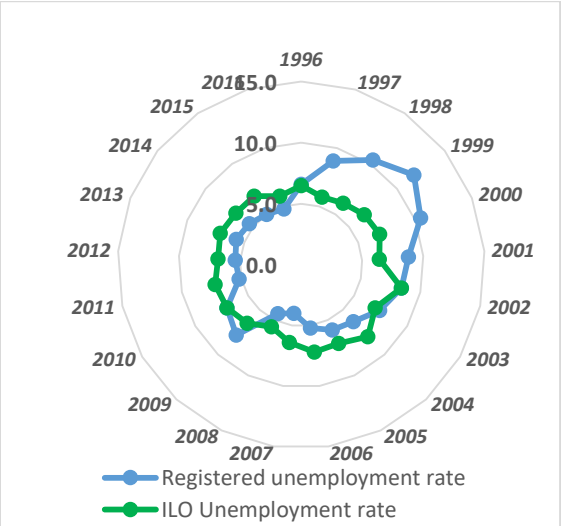


Source: Author's calculation, based on data provided by NIS, Tempo online, SOM101A

Meanwhile at the beginning of the period there were paid around 80-90% of the total unemployed persons, the same share of about 80% was represented by unpaid unemployed people in the year 2017. The proportion of paid and unpaid in total has been overturned starting with the year 2002, when the dedicated law has restricted the access at payment for unemployed people.

Currently two unemployment rates are registered in the official statistics. One is the registered unemployment rate and the other refers to the definition of unemployment according to ILO and is provided by Labour Force Survey (ILO Unemployment rate). Since 2004, the Labor Force Survey has highlighted a higher rate of ILO unemployed than those officially registered. The largest difference between the two rates was 2.4 percentage points in 2007 and respectively 266.5 thousand unemployed. There were two exceptions to these gaps; in the years 2002 and 2010, the registered unemployment rate was at the same level as the ILO unemployment rate.

Figure 10. Share of paid and unpaid unemployed in total unemployed, 1991 - 2017 (%)



Source: NIS, Tempo online, SOM103A and AMG157A

The evolution of unemployment does not capture:

- the human capital, which, being unable to be employed in decent jobs in Romania (good working conditions and supportive payment), is being used in other markets (as EU workers or labor migrants in non-Eu area). Their employment model is primarily multiannual and in many cases, they become permanent immigrants in host countries;
- people involuntarily leaving the labor market who have not found re-employment solutions after long-term unemployment

All these potentially active persons are present in Romania and, together with NEETs, are important resources of unused human capital

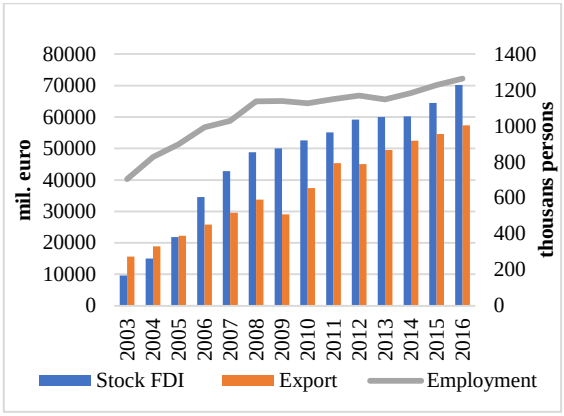
2.3.4. Employment and jobs' quality in FDI sector

As Romania's integration into international structures (NATO, EU) increased the interest of foreign investors for our country, the stable framework created, and the opportunities offered by geographical location, the low cost of labour and the availability of primary resources are the main conditions which led to an increased role of foreign capital in Romania.

In general, the presence of foreign firms has a positive impact on the economy, notably through its influence on foreign trade activity. The degree of similarity between the areas of interest of foreign capital in Romania at the beginning of the nineteenth century and the beginning of the 21st century is quite important for the historical perspective of its role in valuing human capital. According to the statistical data, 50% of the foreign capital is interested in industrial sectors, of which the processing industry, especially processing of crude oil, rubber and plastics, hold a high share. Foreign capital being well integrated in economic value chains are mainly focused on export activity- export of manufactured goods for final consumption or export of intermediate products for production.

The main push factor for FDI inflows in Romania was and remained the lower labour cost as against in the origin country of the capital.

Figure 11. FDI stock, total export of Romania and employment in FDI companies (2003-2016)

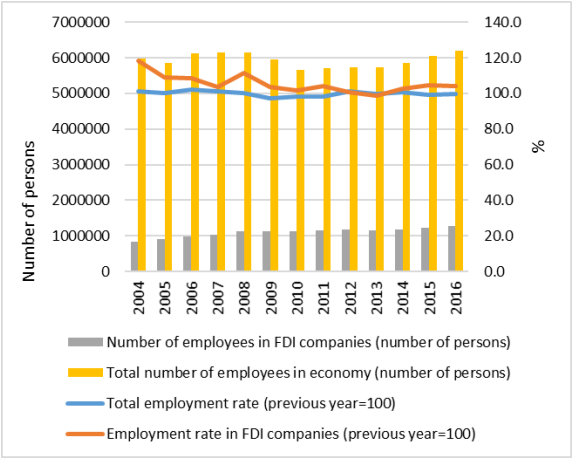


Source: INS, NBR

Some specialists in labour market consider the FDI firms as an opportunity, an alternative solution to higher unemployment or labour migration. The comparative advanteges in FDI firms (higher wages and better working conditions) were not able to reduce or reverse the labour mobility flows, which underlined the limited potential of this employment option. However, the employment growth, higher productivity and relatively better incomes of domestic workers in firms with FDI should not be ignored.

FDI firms are using superior technology, have access to larger product markets than companies with Romanian capital, are well integrated into the value chain of production, etc. Data recorded an increase of the employment in the foreign trade companies by 30% in 2016 compared to the year before the accession of Romania to the EU (2006). Nowadays, FDI companies perform about 80% of Romania's total export of goods, based on an average of 25% of total employment.

Figure 12. Evolution of total employment and employment in FDI companies in Romania, 2004-2016



Source: INS, NBR

Capitalization of human capital in FDI companies is therefore not only employment in quantitative terms, but primarily high-quality employment. The evolution of the employment rate in FDI companies is higher than the dynamics of the total employment rate in the period 2003-2016, the number of employees in FDI firms increasing from about 12% of the total number of employees in the economy in 2003 to over 20% in 2016. As for FDI distribution on industries, investors are oriented towards productive branches with high growth potential and profitability.

3. General comments and results

Every period has its own specificities regarding the labour market and human capital evolution. Therefore, we identified some specific pros and cons policies, according to the general framework of both types of economy: market oriented (1918-1947 and after 1989) and centralized one (1948-1989).

1. Market oriented economy in 1918-1947

Pros:

- Romania's membership in ILO conducted to modernisation of labour market policies and regulations;
- Romania had a developed economy, in which the population was employed, and the work was equally diversified and specialized in professions, the education system being adapted to the labour market needs.
- Protectionist policy produces effects on different areas: labour force, industrial production, resources, and especially external trade. The protectionism allowed: national resources to develop and create added value through goods and services for the benefits of Romanian citizens first of all, as well as for export; increasing the share of Romanian capital in certain economic activities considered strategically important. To some extent also support the native experts to be employed in technical and top staff position.

Cons:

- Massive immigration after the Great Union deepened the segmentation of the labour market; in rural areas people were employed mostly in agriculture, while in urban areas the foreign bourgeoisie developed;
- Compared with other European countries in the interwar period the national labor market is characterized by a small number of employees, and a low dynamic of institutional reform, even if there was a principled alignment to organizational requirements of the labor market, according to ILO recommendations. Practical business application of measures to reform the labor market has been sporadic and / or delayed. Compared with other European countries in the interwar period the national labor market is characterized by a small number of employees, and a low dynamic of institutional reform, even if there was a principled alignment to organizational requirements of the labor market, according to ILO recommendations. Practical business application of measures to reform the labor market has been sporadic and / or delayed. Protective policy was a common practice of the interwar period that led to unequal development of national labor markets, restricted labor movement and delayed industrial relations modernization. Foreign firms promote their own employment models, tailored to specific requirements, not always adapted to the ILO's modernization recommendations (Vasile, 1995)
- The Romanian economic nationalism, manifested in the interwar period, was characterized by: trade protectionism, substitution of imports (with tendencies towards economic autarchy); controlling and restricting external economic relations;

2. Centralized economy 1948-1989:

Pros:

- It was assumed that all people who graduate a form of formal education enter the labour market, the full employment was considered.
- Industrialisation and urbanization increased activity rate and diversified jobs, based on technical progress.
- Rational use of labour force in the context of efforts to mechanize production processes with effects on increasing labour productivity.
- Development and diversification of production and external trade, creating and preserving specific external markets, trading partners and goods.

Cons:

- The labor market was rigid, strictly regulated by the administrative allocation of labor force, which led to over-employment in some industries, and the inadequate (egalitarian) pay policy reduced the quality of work and did not stimulate performance.;
- There was a lack in applying the international regulations specific to the labour market, which were transposed in national legislation or some regulations were only formal (trade unions activity);
- The efforts for industrialization were followed by a period of wage austerity, mitigating the dynamics of the efficiency of the use of labour factor and an intensification of legal emigration for some ethnic groups and illegal emigration for Romanians. In addition, wage policy was accentuating the social polarization, with the development of a category of regime favours.
- The nationalization of enterprises in all productive sectors, centralized planning of economic activity, and the collectivization of agriculture – all led to the impossibility to support free business initiative or cooperation with foreign companies from outside od Comecon.

3. Market oriented economy during 1990-2018

Pros:

- Labour market deeply reform and consolidation, managing the supporting mechanisms and policies for managing imbalances;
- Reconsider industrial relations, social partners' reorganisation and social dialogue development and

consolidation;

- EU accession, which brought along important well-known advantages for national economy the labour market opening for Romanian workers;
- Re-opening of the national economy to both FDI and external trade relations strengtening with EU trade market, with all the benefits provided by them: access through imports to technology with higher performances, high-qualified jobs, new directions for industrial restructuring with new products and services development, access to new external markets (including extra-EU ones) and diverisfying external trade partners, increased productivity at national level, etc.

Cons:

- The economic reform from early '90s was associated with layoffs, respectively the increase of unemployment;
- The sharp decline in real wage earnings between 1993-1995, due to reduced demand for labour and hyperinflation; asymptotic and poor performance of labour;
- Chronic external mobility for work, associated with low efficient policies for returning migrants;
- Devaluation of human capital because of skills and qualification mismatch; increasing gaps on skills and competences between (new) jobs demand and labour supply (graduates);
- Long-term effects on the labour market of the 2008-2009 crisis, i.e. structural and qualitative employment crisis.
- Employment chronic deficits of specialists in health care system and high level of migration flows of the graduates from upper secondary and university education;
- A very high trade market integration with EU area and increased vulnerability of export in the crisis period.
- The dependency of national exports on companies with foreign capital.
- Peference for imports into domestic consumption of goods and imports' pressure on similar or substitute national products, even with lower price but not enough developed in terms of marketing and sometimes quality, with negative impact on national companies' development.

4. Conclusions

From the information presented in this paper, it can be concluded that each period in the historical path has brought its contribution to the evolution of the human capital and the labour market. Further evolutions may follow in the context of the new global challenges of digitalization, competences development in response to technological transfer in the business environment and day-by-day life of individuals. E-employment and multi-year labour mobility and the shaped model of labor - leisure time sharing are current realities that bind to labour relation modernization and of labor market redesign for a higher level human capital capitalisation. The needs of the labour market shall be met by structural reform and increasing performance in education, through decent employment, and aditional on-the job-training in enterprises for special competences, etc. The discrepancies between the education supply (graduates) and the labour market demand are ultimately materialized through loss of human capital and of potential business added value. Moreover, because of jobs skill mismatch and/or uncorrelated wages with payment expectation of the potential new entrants, the inactivity after graduation increase the NEETs level. This became the most important imbalance in the labor market in Romania along with the in-work-poverty increasing trend and the promotion of less-favored wage policies for higher productivity.

The historical evidence shows the high potential of human capital lost mainly by labour mobility and more recently by increased NEETs contingents. Human capital is the most important potential asset of Romania and policy-makesrs should focuss political priorities to both education and decent jobs. Also, the completion and application of policy instruments, the methodologies for monitoring the insertion of the graduates shall be a priority at national level.

Nowadays, to face the future, there is a need for a more in-depth analysis of the skills that Romanian employers consider important for the success of their companies and therefore for better fitting of the educational and training supply to those requirements, for periodical upgrading of the occupational and vocational training standards and of the curriculum.

The trade relations and quality of the goods offered by Romanian capital on external market stimulate the human capital in terms of performances. To increase companies' competitiveness level, investments for technological renewal must be made in all industries and labour force is the main driver for value added growth. A close permanent correlation between educational and the labour markets could redesign the labour supply to respond in more flexible way to modern life main challenges: inclusiveness, digitalisation, quality of life.

References

- Banu G. (1931) Șomajul în Romania
- M.A. Lupu, P. Tudor, V. Bozga, N. Marcu, I. Puia, A. Cherciu, Istoria Economiei Naționale a României, Editura Didactică și Pedagogică, București, 1974
- Dimitrie Gusti (coord.) (1938) Romania's Encyclopaedia, Vol. I-IV

- Vasile, V. (1995) Piaţa muncii sectorului de stat în România interbelică. Revista Română de Economie, Volumul 5, pp. 127-135; http://www.revecon.ro/articles/1995-1-2/1995-1-2-11.pdf
- *** Labour Bulletins, May 1920- October 1923
- *** Labour Bulletins, November 1923 - 1943
- ***Statistical Bulletin of Romania, 1919
- ***Statistical Bulletin of Romania, 1938
- *** Statistical Bulletin of Romania, Vol. XL (1941-1945), edited at April, 1st, 1948
- *** General Directorate of Statistics (1969) Forța de muncă în Republica Socialistă România
- *** Romania's Geographical Encyclopaedia (1982) Editura Științifică și Enciclopedică, București
- *** Central Institute of Statistics, 1930 Population and Housing Census, Vol. I – X
- *** Central Institute of Statistics (1948) 1948 Population and Housing Census - Provisional Results *** National Institute of Statistics, Tempo on-line Database
- *** National Institute of Statistics, Earnings – annual series, http://www.insse.ro/cms/ro/content/castiguri-salariale-din-1938-serie-anuala-0, Accessed at 02.08.2017
- *** National Institute of Statistics (1994) 1992 Population and Housing Census, Vol. I – V
- *** National Institute of Statistics (2003) 2002 Population and Housing Census, Vol. I – V
- *** National Institute of Statistics (2013) 2011 Population and Housing Census, Vol. I - V
- *** National Institute of Statistics (2017) Statistical Yearbook of Romania, Time series, ISSN 1841 – 5431
- *** Ministry of Agriculture and Domains (1914) Statistic Dictionary of Romania based on 1912 Population and Housing Census Results, Vol. I- II
- ***http://www.costelgilca.ro/stiri/document/4776/legea-pentru-organizarea-meseriilor-creditului-si-asigurarilor-muncitoresti-din-27-ianurie-1912.html, Accessed at 03.02.2018

ASPECTS REGARDING THE PROMOTION OF ECOTOURISM TO CONSUMERS

Mirela-Cristina VOICU[*]

Abstract

The environment is a key factor for the success of the tourism industry. If we consider nature a product of the tourism industry, it is obvious that the product will no longer be purchased by consumers, if it begins to have a low quality. This is why all stakeholders of the tourism business should be aware of the importance of preserving the environment and natural resources. Hence the need to promote and stimulate ecotourism consumption.

Ecotourism combines the pleasure of discovering and learning about fauna, flora, and spectacular cultural sites with educational accents, environmental, and local community benefits. Ecotourism that is properly designed and managed leads to a balance between nature conservation and the need for tourism development.

Due to growing demand, the eco-tourism market is becoming more and more diverse, so for businesses operating or seeking to operate in this market the need to know the behavior of ecotourists is becoming increasingly important in order to „manipulate" more efficiently both the ecotourist and his experience. Thus, understanding the needs and attitudes of ecotourists who spend their holidays in protected areas can contribute to the development of tourism marketing strategies and plans. In this context, the following paper reveals some important aspects regarding the characteristics of ecotourists behavior together with solutions that marketers can apply to stimulate the consumption of ecotourism.

Keywords: *tourism marketing, consumer behavior, ecotourism, sustainable marketing, green marketing.*

1. Introduction

Tourism specialists are assigning the emergence of alternative forms of tourism, such as sustainable tourism, cultural tourism, adventure tourism, ecotourism, etc., to the significant negative impact of mass tourism on the environment, the economy and the socio-cultural elements of society. Among the forms of alternative tourism, ecotourism is distinguished as an option to mass tourism leading to an economic development using and protecting the natural resources of an area.

The environment is a key factor for the success of the tourism industry. If we consider nature a product of the tourism industry, it is obvious that the product will no longer be purchased by consumers, if it begins to have a low quality. This is why all stakeholders of the tourism business should be aware of the importance of preserving the environment and natural resources. Hence the need to promote and stimulate ecotourism consumption.

Ecotourism combines the pleasure of discovering and learning about fauna, flora, and spectacular cultural sites with educational accents, environmental, and local community benefits. Ecotourism that is properly designed and managed leads to a balance between nature conservation and the need for tourism development.

Demand for ecotourism appeared also due to changes in the behavior of tourists who began to focus towards more individualistic, intense experiences, and as a result the consumer feels "enriched", at the expense of mass tourism. Thus, understanding the needs and attitudes of ecotourists who spend their holidays in protected areas can contribute to the development of tourism marketing strategies and plans.

2. Ecotourism and its current prospects

The tourism industry is one of the main driving forces of the global economy, playing an important role in regional and tourism destinations development. A successful tourism activity can generate significant external exchanges, population employment and many opportunities for local communities. However, despite the benefits, mass tourism has a negative long-term impact, causing environmental and socio-cultural degradation. In the process of finding solutions to balance the negative and positive effects of mass tourism, ecotourism, a symbiosis between environmental conservation and the maintenance of tourism as a profit-generating industry has been developed.

Two categories of tourism activity can be delimited. First, there is mass tourism that represents the activity of a large group of people looking for a replica of their own culture in an organized setting. In other words, mass tourism is the traditional travel in which tourists are visiting places that have a certain link with their culture (the same country or a similar country). The second form of tourism is called alternative tourism, representing tourism activity carried out in a sustainable manner. Ecotourism is one of the socially and environmentally benign alternative forms of tourism, representing, according to The International Ecotourism Society, that form of

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responsible tourism carried out in natural areas that protects the environment and improves the living standards of the local population.

Ecotourism is that segment of the tourism industry that attracts environmental conscious individuals, having a low impact on the environment and at the same time contributing to local economic activity. Also, ecotourism is a sustainable alternative to mass tourism involving:

- Traveling to a natural area with a traditional culture;
- Profit reinvested in local environmental protection activity and in the involvement of the local population;
- Assimilation of the principles of biodiversity conservation by the local population and tourists by minimizing the impact of visitors and promoting the education of tourists;
- Visiting relatively protected natural areas to enjoy nature.

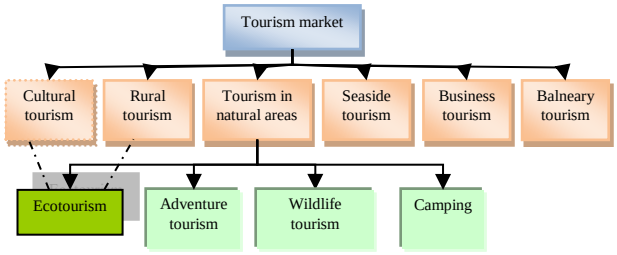
Since the 1980s, ecotourism has become one of the fastest-growing segments in the tourism industry with an annual growth rate of 5%, reaching 5-10% of the global tourism market[1].

The main principles underpinning ecotourism are represented by:

- Non-destructive use;
- Protecting and restoring biodiversity;
- Promoting environmental sustainable development;
- Education and awareness;
- Direct economic benefits for the local population, combating poverty;
- Health and well-being for all parties involved.

Figure 1 shows how ecotourism integrates into the wider tourism market. Thus, ecotourism is a segment of tourism carried out in natural areas alongside adventure tourism, camping and wildlife tourism. In addition, ecotourism is linked to cultural and rural tourism, distinguishing itself to a certain extent from tourism developed in natural areas.

Figure no. 1. The place of ecotourism within the tourism market



Source: Nistoreanu, P. (coordinator), Tigu, G., Popescu, D., Pădurean, M., Talpeș, A., Tala, M., Condulescu, C., 2000, *Ecotourism and rural tourism,* ASE Publishing House, Bucharest, pp.80

Among the ecoutourism activities we can include[2]:

- adventure activities such as rafting, canoeing, equestrian tourism on pre-arranged routes, bicycle trips on arranged trails, etc.);
- guided trips/hikes;
- trips for nature (flora, fauna) observation;
- trips for nature conservation activities;
- trips to local communities (visiting cultural objectives and traditional farms, watching traditional cultural events, eating traditional food, buying traditional non-food products etc.).

Activities that are carried out in nature but have a clear negative impact on the natural or socio-cultural environment cannot be considered as being ecotouristic activities. Ecotourism focuses on local culture, wildlife adventure, volunteering, personal development, and the assimilation of a new way of living on this vulnerable planet.

Ecotourism is not a marketing plan and it is not a scenic journey in nature, it is an approach that creates a variety of high quality tourism products, environmentally friendly or environmentally sustainable, economically viable and socially and psychologically acceptable.

The ecotourism product varies between two extremes, represented on the one hand by products focused on various elements of an ecosystem, such as the wolves of the Zarnesti reservation or the bisons within the various reserves in Romania (Slivut-Hateg Bison Reserve, ”Valea Zimbrilor” Bison Reserve etc.), and on the other hand, by products covering the whole ecosystem from a certain area (holistic products).

Romania's ecotourism potential is significant if we take into consideration the fact that our country is the only European country in which 5 (alpine, continental, panonic, steppe and pontic) of the 11 European biogeographical regions can be found, the (still!) low level of natural resources exploitation compared to other European regions, 47% of the country`s territory is represented by natural and semi-natural ecosystems with a great diversity of flora and fauna reflected by the 783 identified types of habitats in 261 analyzed areas across the country with 3700 plant species, of which 23 are declared nature monuments, 39 are endangered, 171 are vulnerable and 1,253 are rare together with 33,792 species of animals. In Romania there are 28 major protected natural areas of national interest represented by the Danube Delta Biosphere Reserve, 13 national parks and 14 natural parks, the total area of protected natural surface in Romania (excluding Natura 2000 sites) covering over 7% of the terrestrial area of the country. Along with the

[1] Pearcy, D.H., Story, W.K., 2013, *Exploring the Role of the Public Policy in Promoting Holistic Ecotourism,* Journal of Applied Business and Economics, Vol. 15, No 2, pp. 9-16, http://www.na-businesspress.com/JABE/PearcyDH_Web15_2_.pdf

[2] Tudorache, D. (coordinator), 2009, *National Strategy for Ecotourism Development in Romania – Phase I,* National Institute for Research and Development in Tourism, http://www.mdrl.ro/_documente/turism/studii_strategii/ecoturism_faza1.pdf

natural environment, Romania benefits from a rich original and authentic ethnographic and folkloric potential[3].

Despite the important tourism potential represented by various natural resources and the cultural heritage of our country, ecotourism is still under-exploited due to poor local cooperation, poor development of infrastructure for ecotourism activities carried out in the protected areas, poor promotional activities, rather limited and undiversified offer, poor staff training in the field, etc. In addition, ecotourism is an area almost unknown to Romanian travel agencies[4].

Forecasting studies show that in 2020 there will be 1.5 billion international tourism travels and Central and Eastern Europe will exceed the volume of tourism services in Western Europe. In this respect, strategic investments in tourism are being made in Romania, concentrated mainly in the Prahova Valley and Poiana Braşov, on the Black Sea coast and in the Danube Delta. Business development in tourism will, however, depend on the quality of the natural environment, representing a priority for managers and marketers from tourism companies[5].

And if we take into account the World Tourism Organization's forecasts on tourism trends within the timeframe spanning up to 2020, according to which the number of tourists concerned about environmental protection will increase, we can consider ecotourism to have a spectacular evolution during the next period. Taking this into consideration, we can conclude that studying tourists' behavior should be considered an extremely important activity by ecotourism operators. By understanding the reasons and their impact on the intentions of ecoutourists, operators can develop better offers for specific tourists' needs, and at the same time manage more effectively the relationship between product development and the environment of the ecotourism destination. Also, beyond sightseeing, opportunities for other forms of ecotourism support can be identified, such as volunteering and making donations. And last but not least, consumers can be persuaded to choose an eco-tourism product through adequate promotion.

3. Ecotourists and their behavior

According to specialists, the most important feature of ecotourism and, by extension, of ecotourists, is the protection of natural resources. Ecotourism emphasizes on the sustainable development of the environment and a responsible behavior towards the environment is a mechanism for environmental conservation. The environmentally responsible behavior of tourists contributes to limiting or preventing the destruction of the environment . Thus, behaviors such as volunteering within an environmental conservation association, adherence to ecotourism principles, and consumption of local products can give us an idea of who is a "true" ecotourist and who is not . Ecotourists are those tourists who are guided in the travel choices and their participation in those trips by the principles of ecotourism. The current ecotourist cherishes nature and a clean environment, and at the same time understands the local population and its culture. The ecotourist has a sustainable lifestyle even when traveling.

Ecotourists are individuals who show increased intellectual curiosity and seek to enjoy in depth the experience offered by the destination, being, according to some studies, mainly women , having a medium age and a high level of education and income. Also, the ecotourist is an experienced, more aware and active traveler in terms of environmental protection preferring individual tourism or in groups of up to 25 people and low-capacity accommodation. Ecotourists are individuals who visit a natural area with the intention to observe, learn and experience nature.

Also, according to studies conducted in this field in which the premises of Maslow's theory on the hierarchy of needs were applied, it is clear that the future intentions of ecotourists are motivated to a significant extent by higher needs, such as the need for self-esteem or the need for personal development (fulfillment).

On the other hand, there are marketers who consider that tourists engaged in ecotourism range from "real" ecotourists ("hard" ecotourists) to occasional tourists visiting a destination to experience something new or fashionable ("soft" ecotourists). For "hard" ecotourists, the satisfaction of participating in ecotourism activities and environmental observation has a much greater significance than the satisfaction derived from the high level of services offered, unlike "soft" ecotourists where the situation is reversed. Clearly, in this context, the approach of different ecotourists categories must be done on the basis of different marketing strategies, which does not necessarily imply the creation of sustainable tourism offers.

There are also opinions that argue that ecotourists can be divided into two groups: "born ecotourists" and "made ecotourists". "Born ecotourists" are those visitors who have an internal predisposition to in-kind travels, while "made ecotourists " are those visitors who are not familiar with this type of tourism but can be involved in ecotourism through an effective marketing activity. This classification points to the fact that even

[3] Tudorache, D. (coordinator), 2009, *National Strategy for Ecotourism Development in Romania – Phase I*, National Institute for Research and Development in Tourism, http://www.mdrl.ro/_documente/turism/studii_strategii/ecoturism_faza1.pdf

[4] Ban, O.I., Iacobaş, P., Nedelea, A.M., 2016, *Marketing research regarding tourism business readiness for eco-label achievement (case study: Natura 200 Crişul Repede Gorge – Pădurea Craiului Pass Site, Romania)*, Ecoforum, Vol. 5, Issue 1, pp. 224-234, http://www.ecoforumjournal.ro/index.php/eco/article/view/359/225

[5] Gherman, M.C., Butnaru, G.I., 2012, *Tourism MarketingManagement Company Ecological Role*, Romanian rural tourism in the context of sustainable development, Volume I, Issue 1, pp. 169-180

tourists unfamiliar with ecotourism can participate in eco-trips and can thus be called eco-tourists. In addition, the likelihood of identifying themselves with the concept of ecotourism will increase.

Experts in the field even argue that there is little evidence to suggest that the notion of ecotourist is qualitatively different from that of a mass tourist in terms of motivation to choose ecotourism over other forms of tourism.

The Master Plan for National Tourism Development in Romania 2007-2026 states that the number of foreign ecotourists who visit our country ranges from 10,000-25,000. Also, in 2014, the vast majority of tourists accommodated in the accommodation facilities of the Ecotourism Association of Romania - AER members (data from a number of 15 hostels) came from Romania (55%), Great Britain (13%), Germany (7.3%), France (3.5%), etc. with an average stay of 2.41 days/tourist. In the same year, the majority of tourists participating in the programs offered by AER members (data from a total of 20 tour operators) came from Romania (22.5%), Germany (21.4%), Great Britain (21.1%), Austria (3.0%), Belgium (5.6%), Switzerland (2.5%), Hungary (2.0%), etc.

In our country, however, a passive and casual ecotourism is practiced by "mass tourists" as part of a holiday with different objectives. Thus, the categories of tourists visiting Romania's national/natural parks are represented by: weekend tourists, tourists practicing religious tourism, tourists practicing sport fishing, mountain tourists, adventure tourists, researchers, pupils, students (scientific tourism), cyclotourists, etc. The vast majority of Romanian tourists are not interested in adopting a sustainable lifestyle or in supporting tourism products in this category.

4. To do's in marketing regarding eco-tourists' behavior

The marketing applied in the field of ecotourism falls within the category of social marketing, given that in practice this approach is an attempt to mediate between tourists' preferences and the long-term interests of the host community. In the category of tools and strategies commonly used to boost sustainable tourism consumption, such as eco-tourism, we can usually find rewards, eco-certification, awareness and educational campaigns[6].

The success of marketing in ecotourism is reflected not by the number of tourists visiting a particular destination but by the level of consumer satisfaction and their intention to return in the future[7].

Information is essential for the success of the ecotourism industry. In order to choose the destination to which they want to go and the various services they wish to purchase (accommodation, transport, activities and routes, etc.) consumers need information. On the other hand, in order to develop a sustainable tourism-oriented consumer behavior, organizations from various relevant sectors need to carry out a sustained marketing activity aimed at educating the public on environmental conservation and ecotourism. Communication technology is so advanced these days that environmental education, the content and spirit of ecotourism can be easily propagated in the online environment, on TV and in the press.

Also, the marketing activity in this field should be focused on the development and promotion of *holistic ecotourism* products. In this regard, an essential component must be integrated into ecotourism products represented by consumer learning opportunities varying in intensity and formality, from suggestive signs to lectures and printed materials containing, among other things, aspects related to the impact of tourists' behavior on the visited ecosystem, with a transformative effect on their behavior. In addition, the process of informing and educating consumers on the environmental consequences of tourism consumption will be centered on the tourism product. In other words, it is important to focus on promoting specific positive consequences of the consumption of certain ecotourism products and the negative consequences of the consumption of alternative non-responsible products rather than a presentation of the consequences of tourism consumption in general[8].

Information is particularly important in the process of ecotourism product consumption, providing it through professional or local guides, informative leaflets, explanatory maps, etc. is ensuring the ecotourist's high satisfaction and increased likelihood of returning to the destination and, moreover, recommending the destination to other consumers. Of these, the use of guides is especially distinguished by the fact that they fulfill multiple roles in the ecotourism product consumption (information provider, behavior model, etc.). Using the services offered by a tourist guide in ecotourism can increase the awareness, knowledge, the formation of positive attitudes and participation intentions of ecotourists. Travel guides should be considered key intermediaries between ecotourists and the environment, having a significant role in shaping consumer behavior.

[6] Budeanu, A., 2007, *Sustainable tourist behavior – a discussion of opportunities of change*, International Journal of Consumer Studies, Vol. 31, pp. 499-508, ftp://puceftp.puce.edu.ec/Facultades/CienciasHumanas/Ecoturismo/ArticulosTurismo/Art%C3%ADculos%20cient%C3%ADficos/Turismo%20sostenible/comportamiento_turistas_sostenibilidad.pdf

[7] Paço, A., Alves, H., Nunes, C., 2012, *Ecotourism from both Hotels and Tourists' Perspective*, Economics & Sociology, Vol. 5, No 2, pp. 132-142, http://www.economics-sociology.eu/files/15_Paco_3_4.pdf

[8] Barber, N., Taylor, D.C., Deale, C.S., 2010, *Wine Tourism, Environmental Concerns, and Purchase Intention*, Journal of Travel & Tourism Marketing, No 27, pp 146-165, https://www.researchgate.net/profile/D_Taylor4/publication/247495272_Wine_Tourism_Environmental_Concerns_and_Purchase_Intention/links/57308c0b08ae7d0d05660ecb.pdf

Information also covers specific aspects of the activity of entrepreneurs which are providing ecotourism services. They need to consider effectively delivering messages explaining the objectives of their environmental policies to help consumers better understand the idea behind the entrepreneur's green activity or to build a good reputation and an environmental profile for the company. In addition, it is a good idea for managers of such organizations to remind consumers of their social responsibility to protect the environment, beyond the pursuit of satisfying their personal needs and desires[9].

While research in the field highlights the negative impact of the lack of information about the visited destinations on consumer behavior, however, a simple increase in the level of information will not cause significant changes in consumer behavior, taking into account that, paradoxically, the ecotourism offer is much more expensive and often considered as being rather uncomfortable in relation to mass tourism[10]. Along with passive information whose role is to inform about the overall impact of tourist behavior on the environment, it is necessary to include those elements that trigger consumer feedback. These elements can take the form of incentives to reward the tourist for his expected sustainable behavior, or the form of experiences designed to create social norms for the expected ecotourist behavior. People's involvement in activities with a direct impact on the destination ecosystem, such as, the greening campaigns organized in certain tourist areas stand out amongst the social experiences with great effect on consumers. These campaigns can be organized with the help of environmental associations, school ecoclubs and tourism associations.

On the other hand, feelings are a key element of consumer buying and consumption experience, with an impact on how they evaluate tourism products. Positive feelings testify to the benefits of consumed products/services. In the context of tourism activity, destinations generate positive feelings for tourists and genuine experiences create positive impressions. Tourists' experiences are to a certain extent related to the expectations regarding the destination they are visiting, and after the visit they will remain with memories. This experience influences tourists on a cognitive and emotional level, which leads to a positive behavior towards the environment. Marketing research specialists have noticed that changes in tourists' behavior are related to the knowledge and affection regarding tourist destinations. From this point of view, we can affirm that tourists' overall experience has an impact on their attitude towards ecotourism and, consequently, towards environmental behavior. A satisfactory ecotourism experience, the perceived value of the tourism product and the involvement in various ecotourism activities can lead to an increasingly responsible behavior towards the environment, as well as an increase in concern and sensitivity to environmental issues.

Changes in individual behavior regarding the environment can be initiated through eco-education, and personal experience and participation in environmental protection can promote responsible behavior towards the environment. In this sense, it is useful to organize actions to support ecological clubs, including the ones in the vicinity of protected areas in order to form ecological mentalities, leading ultimately to the participation in ecotourism actions and promotion of the ecotourism phenomenon.

Also promoting ecotourism can be done successfully even through ecotourists. Taking into account that tourism in general and ecotourism in particular are regarded as social phenomena, it is considered that once ecotourists adopt a certain sustainable behavior, they share it within the group of friends/acquaintances they belong to[11].

The transformation of the tourists' behavior into ecotourism behavior is an extensive and long-lasting process and in its development many actors must be involved - the administrations of protected areas, county, municipal and communal authorities, the school inspectorate and schools, tourism services providers from the areas near the ecotourism objectives, tourism agencies, etc.

On the other hand, bearing in mind that the basis of ecotourists' motivation is a superior need, ecotourism operators will have to develop marketing strategies aimed at a long-term relationship with them.

5. Conclusions

The real challenge for eco-tourism marketing is not primarily to develop a strategy to attract as many tourists as possible, but rather to educate tourists in the spirit of responsible consumption, consumption that follows the principles of sustainable development. To this end, it is necessary to introduce elements such as guided activities, leisure facilities development, maintenance of destination's environmental quality and providing an authentic ecological experience.

Also, the ultimate goal of any tourism marketing activity should be to protect the environment of the tourist destination through a positive interaction between all involved, resource managers, tour operators, local population and tourists.

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[9] Chen, M.F., Tung, P.J., 2014, *Developing an extended Theory of Planned Behavior model to predict consumers' intention to visit green hotels*, International Journal of Hospitality Management, No 36, pp. 221-230, http://download.xuebalib.com/xuebalib.com.23934.pdf

[10] Hultman, M., Kazeminia, A., Ghasemi, V., 2015, *Intention to visit and willingness to pay premium for ecotourism: The impact of attitude, materialism, and motivation*, Journal of Business Research, No 68, pp. 1854-1861, https://pdfs.semanticscholar.org/9ca5/035c59bef4088f7a40a1b7350ad8bc8b8733.pdf

[11] McKenzie-Mohr, D., Schultz, P.W., 2014, *Choosing effective behavior change tools*, Social Marketing Quarterly, No 20, pp 35-46

References

- Ban, O.I., Iacobaș, P., Nedelea, A.M., 2016, Marketing research regarding tourism business readiness for eco-label achievement (case study: Natura 200 Crișul Repede Gorge – Pădurea Craiului Pass Site, Romnia), Ecoforum, Vol. 5, Issue 1, pp. 224-234, http://www.ecoforumjournal.ro/index.php/eco /article/view/359/225
- Barber, N., Taylor, D.C., Deale, C.S., 2010, *Wine Tourism, Environmental Concerns, and Purchase Intention*, Journal of Travel & Tourism Marketing, No 27, pp 146-165, https://www.researchgate.net/profile/D_Taylor4/publication/247495272_Wine_Tourism_Environmental_Concerns_and_Purchase_Intention/links/57308c0b08ae7d0d05660ecb.pdf
- Budeanu, A., 2007, *Sustainable tourist behavior – a discussion of opportunities of change*, International Journal of Consumer Studies, Vol. 31, pp. 499-508, ftp://puceftp.puce.edu.ec/Facultades/ CienciasHumanas/Ecoturismo/ArticulosTurismo/Art%C3%ADculos%20cient%C3%ADficos/Turismo%20 sostenible/comportamiento_turistas_sostenibilidad.pdf
- Chen, M.F., Tung, P.J., 2014, *Developing an extended Theory of Planned Behavior model to predict consumers' intention to visit green hotels*, International Journal of Hospitality Management, No 36, pp. 221-230, http://download.xuebalib.com/xuebalib.com.23934.pdf
- Chiu, Y.T.H., Lee W.I., Chen, T.H., 2014, *Environmentally responsible behavior in ecotourism: Antecedents and implications*, Tourism Management, Vol. 40, pp. 321-329, http://jptedsi.ir/wp-content/uploads/2015/10/Environmentally-responsible-behavior-in-ecotourism.pdf
- Fennell, D.A., 2003, *Ecotourism*, Second Edition, Routledge, London
- Gherman, M.C., Butnaru, G.I., 2012, *Tourism MarketingManagement Company Ecological Role*, Romanian rural tourism in the context of sustainable development, Volume I, Issue 1, pp. 169-180
- Hartley, N., Harisson, P., 2009, *An Exploration of Motives for Attending Australian Ecotourism Locations and their Influence on Future Intentions*, Australian and New Zealand Marketing Academy Conference (ANZMAC): Sustainable Management and Marketing, Monash University, Melbourne, 30 November-2 December, published in ANZMAC 2009 : Sustainable Management and Marketing: Australian and New Zealand Marketing Academy Conference, http://dro.deakin.edu.au/eserv/DU:30024194/harrison-anexploration-2009.pdf
- Hultman, M., Kazeminia, A., Ghasemi, V., 2015, *Intention to visit and willingness to pay premium for ecotourism: The impact of attitude, materialism, and motivation*, Journal of Business Research, No 68, pp. 1854-1861, https://pdfs.semanticscholar.org/9ca5/035c59bef4088f7a40a1b7350ad8bc8b8733.pdf
- Kerstetter, D.L., Hou, J.S., Lin, C.H., 2004, *Profiling Taiwanese ecouturists using a behavioral approach*, Tourism Management, Vol. 25, Issue 4, pp. 491-498, http://www.socsc.hku.hk/sigc/gc2012/pdf/ Reading%20Materials_Taiwan/Lecture%206_Profiling%20Taiwanese%20Ecotourists%20Using%20a%20 Behavioral%20Approach.pdf
- McKenzie-Mohr, D., Schultz, P.W., 2014, *Choosing effective behavior change tools*, Social Marketing Quarterly, No 20, pp 35-46
- Nistoreanu, P. (coordinator), Tigu, G., Popescu, D., Pădurean, M., Talpeş, A., Tala, M., Condulescu, C., 2000, *Ecotourism and rural tourism*, ASE Publishing House, Bucharest
- Paço, A., Alves, H., Nunes, C., 2012, *Ecotourism from both Hotels and Tourists' Perspective*, Economics & Sociology, Vol. 5, No 2, pp. 132-142, http://www.economics-sociology.eu/files/15_Paco_3_4.pdf
- Pearcy, D.H., Story, W.K., 2013, *Exploring the Role of the Public Policy in Promoting Holistic Ecotourism*, Journal of Applied Business and Economics, Vol. 15, No 2, pp. 9-16, http://www.na-businesspress.com/JABE/PearcyDH_Web15_2_.pdf
- Perera, P., Vlosky, R., 2013, How Previous Visits Shape Trip Quality, Perceived Value, Satisfaction, and Future Behavioral Intentions: The Case of Forest-Based Ecotourism in Sri Lanka, International Journal of Sport Management, Recreation & Tourism, Vol. 11, pp. 1-24, http://www.ijsmart.eu/onlinepic/vol11_a% 20Priyan%20Perera.pdf
- Perkins, H.E., Grace, D.A., 2009, *Ecotourism: Supply of nature or tourist demand?*, Journal of Ecotourism, Vol. 8, No 3, http://www98.griffith.edu.au/dspace/bitstream/handle/10072/26791/58100_1.pdf?sequence=1
- Tudorache, D. (coordinator), 2009, *National Strategy for Ecotourism Development in Romania – Phase I*, National Institute for Research and Development in Tourism, http://www.mdrl.ro/_documente/turism/studii_strategii/ecoturism_faza1.pdf
- * * * - *Romania National Tourism Development Master Plan 2007-2026*, the official website of the Ministry of Regional Development and Public Administration, http://www.mdrl.ro/_documente/turism/studii_strategii/masterplan_partea1.pdf
- * * * - *National Strategy for Ecotourism Development in Romania. Context, vision and objectives 2017-2026*, the official website of the Ministry of Tourism, http://turism.gov.ro/web/wp-content/uploads/2017/02/Strategia-na%C5%A3ional%C4%83-de-dezvoltare-a-ecoturismului-%C3%AEn-Rom%C3%A2nia-context-viziune-%C5%9Fi-obiective-2017-2026.pdf

THIRD-COUNTRY MIGRATION TO THE EU: BETWEEN NORMATIVE EUROPEAN FRAMEWORKS AND NON-EUROPEAN IMMIGRANTS' PERSONAL EFFORTS

Demir ABDULLAH *

Abstract

European leaders' rhetoric on third-country migration ranges from a discourse extolling the benefits of a United Europe, to one upholding Europe's repute as a bastion of fundamental human rights, to yet another one out of which the continent emerges as a repressive fortress. Third-country migration not only engages the EU's efforts, but also those exerted by non-EU immigrants towards integrating and becoming more open to their European host culture. This paper will be focusing both on the EU's commitment to honing its third-country migration policies, as well as on the non-EU immigrants' potential and limitations when it comes to their assimilation/integration into EU countries, in particular, Romania.

Methodologically this paper uses the content analysis of European leaders' discourses and also the qualitative analysis of data collected from 40 interviews carried out with non-EU immigrants into Romania. Another methodological tool will consist in an analysis of official EU documents. What will be pursued is the way in which the EU official documents reflect the shared interest proved by European leaders concerning the immigration processes. It will touch upon how the integration processes reclaims on the one hand permanent exchanges between the host European society and non European immigrant and on the other hand sustained efforts from these two parts in order to meet their needs and recognise their limits, in terms of economic, professional and social resources.

Keywords: *third-country migration, non-EU immigrants, social and systemic integration, EU policies, European values.*

1. Introduction

Cultural diversity represents an element based on which the EU defines itself. The unity within diversity that is specific to the EU now represents, despite the cultural differences, the unity between EU members, and it crystallizes due to the values that are shared at the collective level such as the respect for human rights and for fundamental liberties, for democracy and for the rule of law. These values generate in turn, through the processes of socialization, European attitudes and behaviours. On various occasions, European leaders remind people about the values that stand at the basis of the EU, but also about certain moments that have configured the union: freedom, solidarity and diversity; Magna Carta, The Bill of Rights, The French Revolution, the Berlin Wall.[1] In turn, in Article I-2 from the Treaty that was constructed to be a Constitution for Europe but which was taken over by the Treaty of Lisbon, it is mentioned that: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. These values are common to the Member States..."

In the attempt to describe and explain heterogeneous human societies from a cultural point of view, a series of concepts have been put forward among which: pluralism and assimilation. *Pluralism* asserts that multicultural states have accommodation at their basis, in other words the practicing of interaction between people from different cultures[2]. On the other hand, *assimilation* develops based on a project that favours cultural homogeneity around a national culture and identity, cultural differences being annulled[3].

The processes of immigration of non-European citizens have determined important debates within the EU regarding its role but also its resources in articulating a coherent and adequate policy regarding the extra-Community immigration. The debates that have taken place especially within the context of the refugee crisis from the last few years (over 2,5 million asylum requests have been submitted in the 2015-2016 period)[4], also emphasize the shortcomings of the EU in offering both immediate and long-term answers regarding the waves of immigrants from third countries. On the other hand, the extra-Community immigrant is confronted with a double challenge: on the one hand the demands on the European job market and on the other the European cultural values, which most

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[1] European Council Meeting in Laeken, SN 300/1/01 REV 1, available at http://ec.europa.eu/governance/impact/background/docs/laeken_concl_en.pdf, accessed February 2018.

[2] Stephen Castles, "How nation-states respond to immigration and ethnic diversity", *Journal of Ethnic and Migration Studies*, 21(3) (2010): 293-398.

[3] Min Zhou, "Segmented Assimilation: Issues, Controversies, and Recent Research on the New Second Generation", *The International Migration Review*, 31(4) (1997): 975-1008.

[4] Migrația în Europa, available at http://www.europarl.europa.eu/news/ro/headlines/society/20170629STO78632/migratia-in-europa, accessed February 2018.

often are fundamentally different from their fundamental baggage of traditions and values.

Social integration, in the broader sense, represents a social process that presupposes interactions between the side that is integrated and the side that is integrating, the final purpose being of establishing a functional relation between the two sides.[5] According to the specificity of the sides that are being integrated (individuals, groups, communities, social subsystems) the integration can be professional, urban, and societal. In a restricted sense, when one treats the relation between an individual and the medium where the integration is taking place (group/community/society), one should distinguish between systemic and social integration. Systemic integration presupposes the learning of the rules of the game whether it is about the new living context (*political and civic* integration) or about language, without which *economic* integration cannot take place. Social integration, on the other hand, presupposes from the individual who is being integrated that they be aware of the differences specific to other individuals who come from other cultures and that they establish interactions with the latter, interactions based on acceptance and permanent exchanges. These interactions between individuals belonging to different cultures specific to plural societies, represent the basis for the formation of new identities, different from the ones that the individuals had before being integrated in the new social structures. At an ideal level, for an individual to function in the new social structure where they decide to integrate, the two types of integration should complement each other: on the one hand respecting the rules from the host society and learning the language of communication (systemic integration) and on the other hand accepting the cultural differences and configuring a new identity based on the already existing one (social integration).

In the demonstration of this paper we will take into account the fact that the process of integration presupposes a permanent interaction between the society that integrates and the extra-Community immigrant who is integrating with the purpose of developing a functional relation between the two sides. In the first part we will analyse how the EU has treated extra-Community migration in its normative system. To this end, we will diachronically present the main documents (communiqués, reports, decisions, etc.), which translate the preoccupations of the European leaders regarding extra-Community migration but also the analysis of certain debates form 2015 on the topic of migration and asylum. The second part of the paper will concentrate on the content analysis of the data obtained as a result of conducting 40 structured interviews with non-EU immigrants from Romania, carried out during October 20017 – February 2018 in Bucharest with women and men between the ages of 18 and 65, of different professions and levels of education. The content analysis focused on the human and professional resources that the non-EU immigrant is willing to invest in order to integrate but also on the professional and cultural limits that hinder their process of integration.

2. A Fortress Europe Versus a Responsible, Sympathetic Europe, True to the Values That It Is Founded On

After the crisis triggered by World War II, the markets were experiencing the need for workforce, so that this is the moment that also marks a process of territorial mobility for the citizens of a country onto the territory of another country. Thus, the immigrants who were coming from southern EU countries but also from countries outside the EU, were responding to the need for workforce at the regional and international level, and on the other hand they were responding to the personal need of improving one's own and/or their families' living conditions. The immigrants preferred countries where the living conditions were superior to the one from their country of origin. As a result, the immigrants from former European colonies received with open arms the new migratory policy and immigrated to Europe with their families. After the boom of the previous years, a series of changes intervene namely, the 70s bring the petrol crisis and imbalances on the workforce market, materialised in high unemployment rates. Western and Northern Europe impose new conditions for immigrants from the south and for those outside the continent. Not only does the number of immigrants decrease, but the policy regarding migration changes as well. The societies become more and more plural, and the workforce market becomes more flexible and specialised. Were immigrants ready for the new specialisations that appeared on the job market, for the new plural societies? Unlike in previous years, for an immigrant to integrate in the new society, work was no longer sufficient, moreover, not any type of work. Beside these aspects, the process of immigration also involves the immigrant's willingness to adapt to the new plural societies, in other words to socialise in accordance with the values of plural societies. With the arrival of the 80s, the economy becomes increasingly globalized, the job market increasingly specialized and societies increasingly plural. The Communist block from Eastern Europe, with countries encapsulated inside their borders, is disconnected from the circuit of migratory movements from within or from outside the EU. However, the end of the 80s marks a landmark given by the implosion of the Communist regime from Eastern Europe. After the terrorist attacks from 2001 but also after those that took place on the European continent, migratory processes become an independent variable of the security equation, determining states and

[5] Cătălin Zamfir & Lazăr Vlăsceanu (eds), *Dicționar de sociologie* (București: Ed. Babel, 1993), 555.

transnational structures to adapt their migratory policies to new challenges.

The cooperation within the EU regarding migration can be understood in relation to functionalist and intergovernmental theories that explain and describe the process of European integration. *Functionalists and neofunctionalists* [6]put forward the idea that the federation/confederation would be a coherent form of functioning for the EU, by creating inter-dependencies with the EU at the economic and political level, by having a close cooperation between the national and the supranational. According to this perspective, European cooperation in matters of migration is a must since the states have limited capacities to control immigration. *Inter-governmentalism*[7] explains the cooperation within the EU as a response to external stimuli but also to certain political constraints from within the states. The engine of cooperation from the intergovernmentalist perspective is represented by the freely consented agreements, the constant debates between the representatives of the states and the institutional forms are more permissive and more flexible than the transnational ones which are specific to the functionalists. Extra-Community migration represents in this intergovernmental optics both an external challenge for the EU and a problem that appeared as a result of the constraints at the level of internal politics.

The debates in the past few years from the European Parliament regarding migration and asylum are divided, in certain cases finding themselves at opposite ends.

On the one hand, what is being shaped is a union true to its own principles, a *sympathetic, responsible, moral Europe* that has political stands and policies that are adapted to the crises triggered by the humanitarian catastrophes from Syria and other countries that have been permanently marked by wars. This type of responsible, sympathetic, moral Europe fits more with the model proposed by the functionalist theories.

The commissioner for Migration and Home Affairs, Dimitris Avramopoulos considers that only a *responsible, unified, sympathetic Europe* can be the solution for the extra-Community migration phenomenon[8].

"The answer to these challenges is definitely not 'Fortress Europe'… When it comes to Migration and Home Affairs if we do not move together as a Union, we will not move at all…More solidarity is needed and this is possible only if Member States trust each other and assume also their responsibilities…Being there, as a United Europe for people who face persecution and danger in our inflamed regional environment is not only a moral responsibility for Europe, but a real promise for Europe's position in the world."

Malin Björk considers in turn that articulated, community oriented and responsible actions are nothing more than a logical extension of a Union that is true to the values on which it was founded.[9]

"[T]he response to the catastrophes in the Mediterranean is about what kind of societies we are building for the future. Are we going to turn people against each other – as the PPE just did – or are we going to have politics, economics, social and human rights that actually bring us into the future together? That is the choice we have to make. That is why the Council conclusions, I would say to Mr Tusk, are nothing less than shameful because they do not focus on saving lives and opening this continent to people seeking refuge. Instead they focus on keeping people away. Therefore the response of this House is especially important."

Guy Verhofstadt emphasises in turn the importance of cooperation with the purpose of finding European solution, to "European problems".[10]

"The Commission has, in fact, taken a stance that is absolutely necessary because it promotes the interest of all, rather than focusing on single Member States, and that is what we have to do to tackle this problem. We cannot continue to say it is only the Italians who have to do their job; we cannot say it is the European Union which is at the source of this problem. What we need is a European solution to a European *problem*".

Cecilia Wikstrom reminds us about the moral responsibility that Europeans have towards people from other continents who are confronted with threats, violence and the lack of resources:[11]

"To give asylum to people who run from wars, conflicts and human rights violations, this is not about generosity. It is a duty that the 28 Member States have taken upon themselves to respect by means of international rights. The EU has succeeded in building a Monetary Union. We are now on the verge of building a Union of Energy. When are we to build a Humanitarian Union as well?"

On the other hand, another series of discourses contain messages that translate the hiatus between "them", extra-community citizens, and "the others", European citizens. These discourses propose as a solution a *fortress Europe* which "protects" Europeans

[6] Jeppe Tranholm-Mikkelsen, "Neo-Functionalism: Obstinate or Obsolete? A Reappraisal in the Light of the New Dynamism of the EC." *Millennium: Journal of International Studies*, 20 (1) (1991): 1-22.

[7] Garrett Geoffrey & George Tsebelis, "An Institutional Critique of Intergovernmentalism", *International Organization* 50(2) (996): 269-299.

[8] Hearing by the European Parliament - Introductory Statement Of Commissioner-designate Dimitris Avramopoulos (Migration and Home Affairs), 30 September 2014, available at https://www.youtube.com/watch?v=K2ageBOTJmA, accessed December 2017.

[9] European Agenda on Migration (debate), available at http://www.europarl.europa.eu/plenary/en/gsahighlight.html?query=farage&url=http%3A%2F%2Fwww.europarl.europa.eu%2Fsides%2FgetDoc.do%253Ftype%253DCRE%2526reference%253D20150520%2526secondRef%253DITEM-007%2526format%253DXML%2526language%253DEN, accessed February 2018.

[10] Idem.

[11] Idem.

against the wave of refugees and extra-Community immigrants and which considers that each Member State has the freedom to decide on the number of immigrants/refugees it can receive within its territory. The prevalence awarded to national states and not to supranational structures, positions this perspective of a fortress Europe closer to the intergovernmental theories. This type of discourse presents the EU as a community of citizens that has to be "defended", "protected", a community that does not have the necessary resources to be able to respond to the demands of the immigrants and refugees from its borders.

Kristina Winberg, for example, considers that each Member State should have the freedom to decide regarding the immigrants/refugees who enter its territory.

"I support the principle that each Member State should have the unconditional right of deciding who comes on its territory and who does not. We must first of all protect the population against terrorism and each country must be able to protect its democratic system, its system of social care." [12]

The prevalence of national states over transnational structures is reflected in the discourse the MEP *Udo Voight* as well:

"…the supranational principles should not be imposed on the rights of Member States. Refugees should not endanger the systems of national states."[13]

Jussi Halla-aho considers that economic resources are limited and that a better solution would be an approach that is more realistic and more concentrated on the needs of the EU Member States.

"The question is: can Europe indefinitely afford, economically or socially, a massive influx of people for whom the European labour market has very little to offer?"[14]

Nigel Farage[15] associates immigrants/refugees from third countries with disaster and considers that closing the borders can be a solution for European citizens to be safe.

"[I]f the message is that anybody that comes will be accepted, we are headed for disaster."

3. The European Normative Frame That Translates The Eu Interest Regarding Migration And Asylum

The EU has gone through several stages that translate its interest to respond to the challenges that have been generated by the processes of extra-Community immigration. A first stage was that which would last until 1986 when the policy regarding the extra-Community migration in the EU was mainly a responsibility of the national governments which, as a result of dialogue, decided upon the security measures at the EU borders, the movement of goods, capital and individuals. The year 1986 marks the second stage when one could notice a tighter communication between EU governments, this being evidenced by the constitution of the *Ad-hoc working group regarding immigration*. The year 1993 marks a third stage regarding the community efforts to treat immigration as a phenomenon that is of common interest for the EU states, as it can be observed from the Maastricht Treaty. Pillar III presupposes an intergovernmental communication with the purpose of offering European citizens protection in a space of security and freedom. Among the objectives included in Pillar III one also finds combating illegal immigration, border safety, and asylum policy. In order to achieve these desiderata, what was needed was cooperation between governments whose efforts were complemented by the activity of supranational structures such as the European Commission and the European Parliament, which were consulted regarding certain issues. The Treaty of Amsterdam marks the beginning of the fourth stage of the EU attempts to treat European problems such as immigration and asylum in a communitarian way. This is also the reason why the policy regarding migration and asylum is included in the communitarian pillar I. The EU Council decides that starting with 2005 decision-making regarding EU policies in relation to legal immigration will be done by means of voting with a qualified majority[16].

In Dublin, in 1990, the EU states signed the intergovernmental accord through which they decided that only one member state is responsible for the examination of an asylum request according to which the asylum-seeker receives or not the residence permit[17]. In the case where the asylum-seeker does not fulfil the criteria, the state's refusal is valid for the other states as well. There were seven years needed for this accord to become compulsory.

[12] European Agenda on Migration, Strasbourg, available at http://www.europarl.europa.eu/plenary/en/gsahighlight.html ?query=farage &url=http%3A%2F%2Fwww.europarl.europa.eu%2Fsides%2FgetDoc.do%253Ftype%253DCRE%2526reference%253D20150520%2526secondRef%253DITEM-007%2526format%253DXML%2526language%253DEN, accessed February 2018.

[13] European Agenda on Migration, available at http://www.europarl.europa.eu/plenary/EN/vod.html? mode=chapter&vod Language= EN&startTime=20150520-09:03:29-960#, accessed February 2018.

[14] Idem.

[15] Idem.

[16] Petra Bendel, "Immigration Policy in the European Union: Still bringing up the walls for fortress Europe?", *Migration Letters*, 1(2005): 21-32.

[17] Agnès Hurwitz, "The 1990 Dublin Convention: A Comprehensive Assessment", *International Journal of Refugee Law*, 11 (4) (1999): 646–677.

In 1999, EU leaders participated at the Tampere Summit in Finland where they established lines of action for a *communitarian* response to the phenomena of non-EU citizen immigration. The necessity of a communitarian approach was needed since the immigration of non-EU citizen had increased in frequency and intensity, and it could not be treated in isolation or avoided. Among the lines of action a first step that was established was that of harmonising national legislations and of creating a common European system regarding immigration and asylum. To support these desiderata it was necessary to have partnerships with the immigrants' countries of origin and of transit but also to revise the EU policy regarding the rights and obligations of non-EU immigrants. The principle that they started from was that a coherent integration policy can only be created if third country immigrants who have a legal residence permit on the territory of Member States benefit from rights comparable to those enjoyed by European citizens[18].

The EU continues in the same direction of consolidating its policy so that, domains that regard asylum and migration are transferred to the *communitarian* pillar I (from the *intergovernmental* pillar III) along with the Treaty of Amsterdam. The Laeken Summit from December 2001 reaffirms the necessity of a common policy in terms of immigration, especially regarding data exchange, managing migratory fluxes, establishing common norms for receiving and reuniting a family, as well as programmes for fighting against discrimination and racism.[19] In 2003, the Council of the European Union publishes three directives in matters of immigration and asylum.[20] The first, entitled the *Directive regarding the minimum standards for reception*, emphasises the necessity to adjust the legislation for the creation of a common European system for asylum, in other words a legal system that would clarify the common minimum condition for the reception of asylum-seekers. The second directive has as a purpose to clearly establish the necessary steps for immigrants from third countries, who are legally settled in EU countries, to *reunite their families*. The third directive proposes a set of criteria based on which a non-EU immigrant can obtain the status of long-term resident within an EU state, but also the residence conditions in other Member States (not the same as the ones that have awarded residence). The Dublin Regulation II[21] of 2003 returned to the decisions regarding the 1990 intergovernmental accord in order to clarify which Member State has the assignment to treat the asylum requests presented by a citizen of a third country. To avoid overlaps and abuses it was reaffirmed that only one Member State is responsible for the examination of an asylum request. Moreover, another Regulation entitled Dublin III was signed in 2013 in order to adjust the ambiguities which appeared as a result of the application of the provisions included in the previous regulations.[22] The year 2003 is a prolific one regarding common decisions in matters of migration and asylum, so that at Thessaloniki, in June, the leaders who gathered at the European Council reaffirmed the necessity of developing a common European policy regarding asylum and migration. It was reiterated that a European frame cannot be functional without the states assuming responsibility for the implementation of integration strategies for immigrants. Furthermore, it was established at Thessaloniki that each year the European Commission will present a report with the purpose of monitoring the progresses but also the shortcomings of the EU policy regarding extra-Community migration.[23] In 2004, the European Agency for the Management of Operational Cooperation at External Borders (FRONTEX)[24] was created. FRONTEX has aimed to secure the act of immigration but also the EU borders. Among the actions undertaken we have technical assistance and expertise given to states that have external borders and which are directly confronted with illegal immigration. For example, according to statistics, between 2015 and 2016 the Agency managed 2,3 million people who were trying to illegally cross EU borders. [25] Despite the Agency's intentions to secure the act of immigration in and of itself, illegal routes towards the EU are increasingly used and risky for immigrants,[26] with 2030 people losing their lives just at the beginning of 2017.[27]

The Hague Programme adopted by the European Council in November 2004 reaffirms the need of a higher coordination of Member States but also of the EU initiatives regarding the process of integrating non-

[18] *Tampere European Council, 15 and 16 October 1999 – Presidency Conclusions,* available at http://www.europarl.europa.eu/summits/tam_en.htm, accessed February 2018.

[19] Laeken Declaration on the future of the European Union (15 December 2001), available at https://www.cvce.eu/en/obj/laeken_declaration_on_the_future_of_the_european_union_15_december_2001-en-a76801d5-4bf0-4483-9000-e6df94b07a55.html, accessed January 2018.

[20] Directiva 2003/9/CE a Consiliului din 27 ianuarie 2003, available at http://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32003L0009&from=RO, accessed February 2018.

[21] Regulamentul Dublin II, available at http://eur-lex.europa.eu/legalcontent/RO/TXT/?uri=LEGISSUM%3Al33153, accessed January 2018.

[22] Regulation (Eu) No 604/2013 Of The European Parliament And Of The Council of 26 June 2013, available at http://www.consilium.europa.eu/media/20847/76279.pdf, accessed February 2018.

[23] Declaration, EU-Western Balkans Summit, Thessaloniki, 21 June 2003, available at http://www.consilium.europa.eu /ueDocs/cms_Data /docs/pressdata/en/misc/76291.pdf, accessed November 2017.

[24] FRONTEX, European Border and Coast Guard Agency, available at http://frontex.europa.eu, accessed February 2018.

[25] Migrația în Europa, available at http://www.europarl.europa.eu/news/ro/headlines/society/20170629STO78632/migratia-in-europa, accessed February 2018.

[26] Lutterbeck Derek "Coping with Europe's Boat People. Trends and Policy Dilemmas in Controlling the EU's Mediterranean Borders", *Mediterranean Politics*, 11(1) (2006): 59-82.

[27] Idem.

EU immigrants.[28] It is decided that clear action principles are needed since they are necessary both in future policies but also in evaluating the steps that the states and the EU will take in the efforts of integrating non-EU immigrants. Within the same programme, the Commission is also invited to present a plan regarding legal migration until the end of 2005. A first step to this end is the Commission's publication of the Green Charter regarding the manner in which economic migration was treated. The Commission emphasises the necessity of a direct proportionality between the admission procedures for immigrants and the measures taken by the EU and the Member States with the purpose of integrating them. The Council for Justice and Home Affairs adopted in 2004 the fundamental common principles regarding integration, principles that have as a central pillar the promotion of fundamental rights, of non-discrimination and of equal chances. Thus, the Council established a set of principles of action which ascertain that: integration is a dynamic, bi-directional process of reciprocal adaptation from behalf of all immigrants and residents of Member States; integration involves the respect for the fundamental values of the European Union; workforce occupation represents a key part of the integration process and is a central point for immigrant participation, for the contributions that immigrants bring to the host country and to make these contributions visible; fundamental knowledge regarding the language, history and the institutions of the host society is indispensable for integration; allowing immigrants to acquire this basic knowledge is essential for their good integration; efforts in the field of education are vital for training immigrants, and especially their descendants, to become active members of society; immigrants' access to institutions, as well as to private goods and services, in a manner equal to that of national citizens and non-discriminatory is a vital element for a better integration; the frequent interaction between immigrants and citizens of Member States is a fundamental mechanism for integration; forums for information exchange, inter-cultural dialogue, education regarding immigrants and their cultures and stimulating living conditions in urban areas intensify the interactions between immigrants and citizens of Member States; practicing different cultures and religious is guaranteed by the Charter of Fundamental Rights and has to be defended as long as these practices do not enter in conflict with other inviolable European rights or with national laws; the participation of immigrants in the democratic process and in formulating integration policies and actions, especially at the local level, supports their integration; the inclusion of policies and actions regarding integration in all policy portfolios and at all levels of government and relevant public services represents an important factors in forming and implementing public policies; the development of some clear objectives, indicators and mechanisms of evaluation is necessary to adjust policies, to evaluate the progress regarding integration and to exchange information more efficiently.[29] Member States are encouraged to integrate *The Basic Principles* in their integration policies, but each state had the freedom to manage their actions in accordance with their priorities. In 2008, the European Parliament voted the *Blue Card directive for immigrants with higher professional qualification*, with the purpose of proposing more flexible conditions for obtaining the paperwork for citizens from third countries who had a legal work contract in a EU country. This represented a step in the promotion of integration based on the immigrant's skills, on the capitalisation on his/her potential.[30] A year later, the EU proposed two more instruments namely the European Integration Forum and the European Website on Integration.[31] The Stockholm Programme[32], published at the end of 2009, replaces the Hague Programme and defines in its seven chapters the direction regarding immigration and asylum for the next five years. The emphasis is directed towards a Europe of citizens, secure, protective and responsible. The Council proposes policies regarding integration focused on immigrant participation, on respecting their rights but also policies for combating illegal immigration. In 2011, on the occasion of the presentation of the European agenda for the integration of immigrants from third countries, the Commission mentioned that the EU had fulfilled the actions provided by the Common agenda for integration from 2005. Furthermore, the EU considers that a new European policy is needed for the integration of immigrants from third countries, a policy that takes into consideration access to work places, a better cultural insertion, and more flexible procedures for awarding citizenship. The Commission thus proposes integration actions through participation, more actions at the local level but also the involvement of the immigrants' countries of origin. They also tried to bring out the professional and cultural resources of immigrants, to this end immigration being approached as a means of capitalising on the migration's potential both from an economic and cultural point of view.

The number of refugees and extra-Community immigrants has increased more and more as a result of

[28] *A Common Agenda for Integration Framework for the Integration of Third-Country Nationals in the European Union*, available at http://eur-lex.europa.eu/legal content/EN/TXT/PDF/?uri=CELEX:52005DC0389&from=EN, accessed February 2018.

[29] Justice and Home Affairs Council of 19 November 2004, available at http://europa.eu/rapid/press-release_PRES-04-321_en.htm, accessed February 2018.

[30] Carte albastră pentru imigranţii cu înaltă calificare profesională, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20081107FCS41562+0+DOC+XML+V0//RO, accessed Mars, 2018.

[31] European Website on Integration, available at https://ec.europa.eu/migrant-integration/home, accessed January 2018.

[32] *Programul de la Stockholm: către o Europă deschisă, mai sigură...*, available at http://www.ana.gov.ro/doc_strategice/documente%20strategice%20europene/programul%20stockholm%20romana.pdf, accessed December 2017.

the war in Syria, of the Iraq conflict, and of the African humanitarian crises. After the tragic events from the Mediterranean Sea from 2015, the European Commission presented the *European Agenda on Migration*[33] where one can find immediate actions but also medium and long-term ones regarding migration and asylum. Among the immediate actions we can name: tripling the capacities of the Frontex, activating an emergency mechanism to help Member States that are confronted with an unexpected influx of immigrants, a European system for permanent relocation and military operations in the Mediterranean Sea with the purpose of combating human trafficking. In regards to medium and long-term structural changes, the EU has proposed: reducing economic stimulants for illegal immigrants, saving lives and securing external borders, a solid policy regarding asylum, and a new policy regarding the domain of legal migration.

In February 2016, the Commission presents a Report[34] regarding the actions that the EU undertook in accordance with the duties taken on within the Agenda, namely the re-establishment of order on the Eastern Mediterranean and Western Balkan route, the support offered to states for controlling unregulated migration, the actual access to asylum procedures for people who need international protection, decision regarding the access points and transfer points. The European Council from March of the same year concluded that there is a need to reform EU policies, in other words more attention needs to be given to humanitarian problems and efficiency needs to exist regarding asylum policies. The EU considers that its instruments are limited and decides to adequately equip itself especially in crisis situations in order to ensure an equitable treatment of immigrants from third countries. It is mentioned that it is important to look at the immigrants' potential, at their contribution to the economic and cultural development of the EU. The new instruments aim at a higher order, assuming solidarity and responsibility at the level of all Member States. The Commission's Report[35] from April proposes a set of actions meant to make the EU actions for migration and asylum to be more efficient, actions that have to be centred on the real causes of immigration and on the capacity of attracting talents and skills. It is emphasised that without ensuring participation and support for integration in the community where the immigrant resides, the immigration and asylum policy remains void of content. Among these actions we can mention: a sustainable system and more clarity when deciding which Member State has the responsibility of examining asylum requests, a new regulation regarding common asylum procedures, combating unregulated movement, a new mandate for the EU Agency for Asylum, combating illegal immigration and ensuring the protection of the immigrant.

In September 2017, the Report was presented regarding the progresses recorded after the implementation of the actions decided starting with 2015[36]. Better results were recorded at the level of managing borders, at the level of reception points (hotspots) which allowed the registration and the taking of the digital fingerprints of all immigrants at arrival, the transfer mechanisms, more solidarity among EU states. One could be observe that efficiency in the area of migration and asylum policy is directly related to solidarity and to a better coordination between the actions of Member States. Also in 2017 there were a series of documents representative for the Commission that were presented such as "Migration on the Central European route", "A new approach regarding the collaboration with countries of origin and of transit regarding cooperation in matters of migration", "The renewed plan of action of the EU regarding the return policy", "The protection of migrant children". As it was presented in the discourse regarding the "State of the Union" as well, it is necessary for the efforts in the domain of migration to continue coherently and sympathetically, by maintaining the spirit of reason which has consecrated the foundation of democracies since, as state by Jean Claude Junker: "Europe is not and it must never become a fortress. Europe is and has to remain the continent of solidarity where people who are running away from persecution can find refuge"[37].

4. The Efforts Made By Turkish Immigrants To Integrate Themselves In The Romanian Society

Previously, we have succinctly emphasised the efforts made by the EU to manage the institutional, organisational and administrative shortcomings in its policy regarding extra-Community migration but also

[33] A European Agenda On Migration, Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions, Brussels, 13.5.2015 COM(2015) 240 final, available at https://ec.europa.eu/antitrafficking/sites/antitrafficking/files/communication_on_the_european_agenda_on_migration_en.pdf, accessed February 2018.

[34] Communication From The Commission To The European Parliament And The Council On The State Of Play Of Implementation Of The Priority Actions Under The European Agenda On Migration, Brussels, 10.2.2016 COM(2016) 85 final, available at https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-85-EN-F1-1.PDF, accessed January 2018.

[35] Comunicare A Comisiei Către Parlamentul European ȘI Consiliu, Posibilit ăți de reformare a sistemului european comun de azil și de îmbunătățire a căilor legale de migrație, Bruxelles, 6.4.2016 COM(2016) 197 final, available at http://ec.europa.eu/transparency/regdoc/rep/1/2016/RO/1-2016-197-RO-F1-1.PDF, accessed March, 2018.

[36] Comunicare A Comisiei către Parlamentul European, Consiliu, Comitetul Economic și Social European și Comitetul Regiunilor cu privire la rezultatele Agendei Europene privind Migrația, Bruxelles, 27.9.2017, COM(2017) 558 final, available at http://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:52017DC0558&from=EN, accessed January, 2018.

[37] Discursul Președintelui Jean-Claude Juncker privind starea Uniunii 2017, available at http://europa.eu/rapid/press-release_SPEECH-17-3165_ro.htm, accessed February 2018.

the efforts made regarding the integration of extra-Community immigrants. This paper also focuses on the efforts made by immigrants in the process of their integration. The social and systemic processes of integration are not unidirectional. In order for a functional relation to exist between the side that is being integrated (the non-EU immigrant in the present case) and the side that is integrating (EU states), both sides suffer changes and make efforts. There are cases where the immigrant is not open or he/she resists the efforts made by the host societies in offering them the possibility to exercise social, cultural, economic, civic and political rights, according European and international treaties. Conversely, despite the openness proven by the immigrant towards learning, developing social relations with the citizens of the host society, the latter might treat the former as second-rate citizens even though they hold professional and social skills.

This part of the paper is dedicated to the attempt to point out the potential, skills, limits but also the efforts made by Turkish immigrants in Romania. I conducted fieldwork during November 2017-February 2018, during which I interviewed Turkish immigrants who reside in Bucharest, Romania. The interview guide followed: the reasons for which Turkish immigrants decided to choose Romania, the efforts made by Turkish immigrants to become integrated, the professional and cultural resources that they have, the representations that they have about democratic values, the relation between the efforts made and their desire to become Romanian/European citizens.

I have interviewed 43 people out of which 13 women and 30 men, with an average age of 38. Out of these, 24 have undergraduate studies, 8 have post-graduate studies, 8 have a high school education and 3 a middle-school education. Out of the 13 women, 7 have undergraduate and post-graduate, 4 have a high school education and 2 a middle-school education. In regards to professional mobility what can be noticed is an ascending vertical mobility for 15 of those interviewed who had a student status in Turkey and who became teachers, tourist agents, administrators of their own businesses in Romania. Maintenance of the professional status was found with 25 immigrants, maintenance of the status but a change in the professional role for a teacher who becomes a businessman and three situations descending vertical professional mobility for two female teachers and one female student who have change their status to homemakers.

The reasons for which Turkish immigrants decided to emigrate are as follows: for 50% of them the causes were related to work, the rest of them for studies and to reunite their families, with only one case for the accumulation of a cultural experience. 10 of the 13 women who were interviewed immigrated to be with their families while only two men had as a reason to reunite their families. Over 50% of the immigrants consider that they chose Romania because it is a "virgin" market, "better for making a lot of money", "cheap", "with cheap workforce", "freer". Another four of them consider that they chose Romania because education here is "more qualitative" than in their country, "better" but also "cheaper". One of those interviewed considers that he wants to teach Romanian Turkish language and culture, while another one states that he chose Romania in order to learn Romanian language and culture. 3 of those interviewed consider that Romanian is a "safe" country where they feel secure, where "the society is freer" than the one in Turkey. Only five of the informants chose Romania because it is a European country and a member of the EU.

7 of the Turkish immigrants hold Romanian citizenship, 1 is a German citizen, 1 is a French citizen, 18 wish to obtain citizenship, while the rest do not have this in mind. A 44 year old man, the administrator of his own business, does not wish to have Romanian citizenship although he has been living in Romania for 24 years. Another case is that of a 44 year old man who, after living in Romania for 22 years with a residence permit, considers that he would like to apply for Romanian citizenship.

The analysis will concentrate on the efforts that the Turkish immigrants are making in order to become integrated. To this end, what I will examine is whether they did or did not attend Romanian classes, whether they use another language for communication beside Romanian and their mother tongue, whether they develop friendships with Romanian citizens, whether they get informed, whether they have reading and writing skills in Romania. I will also examined the representation that Turkish immigrants have about the EU but also about democracy given their intention of obtaining citizenship in a country that is a member of the EU. I will also analyse the relation between the efforts the immigrants consider that they are making and their level of integration.

Regarding the number of those who did or did not attend Romanian classes, 21 attended such classes, 3 of them intend to do this while the other 19 did not attend any classes. Some of those who did not attend Romanian classes consider that they can manage to communicate in Romanian at a basic level since they learnt with the help of friends. 8 of those who wish to obtain citizenship did not take classes to learn Romanian, and one of them has citizenship without taking such classes. 5 of those who attended such classes consider that they were useful not just for speaking correctly in Romanian but also for understanding Romanian culture.

15 of those interviewed do not have friends in Romania, out of which 5 are men while 10 are women. Those who have friendships with Romanian citizens participate in different activities with them as follows: business, sport, eating together. Only two of the 43 state that they frequently visit with Romanian families and that they participate at various Romanian holidays at the invitation of their Romanian friends. The number of women who do not succeed in establishing social

relations outside of their family is higher than in the case of men, with only three of the 13 women having Romanian friends. It should be noticed that neither of the informants knows or has ever turned to the social networks that are offered by specialised institutions that deal with refugees and immigrants.

Although a significant number have higher education, 24 of the immigrants who were interviewed do not write in Romanian while 30 of them do have the habit of reading books, journals, or news websites. Of the 13 who state that reading is one of their preoccupations, 3 read specialised books, 3 read fiction, while 7 read the news in order to be informed. A particular case is that of a woman who holds a PhD and who declared that she does not read specialised books, fiction or media articles. 20 of them have English skills that allow them to communicate with other individuals.

Regarding the question "What does the EU represent?" the answers were extremely diverse. 2 of the informants do not know what EU means (both are students), for another 3 the EU does not represent "anything special". For one of them, the EU has a negative connotation since it is associated with "trickery" while for another it is associated with "social aids". For the majority, the EU is associated with democracy, freedom of movement, freedom, equality, safety. Two of the responders consider that the EU is a space of multiculturalism, while another two see it as a space of peace and security. Neither of the immigrants offered a clear definition of the EU, admitting that the information they have about the EU is from friends or from TV.

Democracy has some of the most diverse connotations for the Turkish immigrants. If a 23 year old woman considers that "democracy is everything", at the opposite end are five other informants for whom it does not represent "anything" since it "does not exist". 7 of those asked consider that democracy represents "rights" for citizens and "law", in the sense of a functional justice system. Democracy is associated with "morals" for one of the immigrants while for another it is associated with "the freedom to do anything". A 45 year old woman considers that in any democracy it is important for people to trust the institutions. For the other participants in the study, democracy is freedom, equality, brotherhood, an education superior to the one in their country, and "clean politics". It can be noticed that the majority of the immigrants have fragmented representations about what democracy is or about how a democratic system functions, with representations formed either as a result of informal conversations with friends, or after watching some TV shows. Neither of those interviewed offered a more complex description of what democracy means.

In regards to the question "Do you think that you are making enough efforts to integrate?" 30 answered no, 3 said that they were trying although they thought that it was not enough, while 10 appreciated that they are making/made efforts. 28 consider that they are in the process of integration, 10 are well integrated, while 4 have a lower level of integration.

According to the analysis above it can be concluded that:

The reasons why immigrants decided to settle in Romania determine the path of their integration. In other words, the majority of the immigrants decided that Romania is a country where they can develop businesses. To this end, they learnt Romanian in order to develop the skills for a basic verbal communication. English is often used as well complementing the gaps in their knowledge of Romanian. The immigrants learnt the rules of the game in order to support and consolidate their businesses and investments. They respected the rules imposed by the political decision-makers, they adjusted to the working norms of the institutions and to the economic mechanisms in Romania. All of these ensured a systemic integration for the Turkish immigrant.

Regarding the social integration, the following specifications can be made. For Turkish immigrants socialization takes place mainly within the immigrant group that shares the same values and customs. A 44 year old male informant considers, for instance, that religious traditions and values are being lost in Romania. A small part of those interviewed develop durable friendships with Romanian citizens outside the immigrant group. Conversely, it can be observed that despite the fact that they conserve they identity founded on traditional and religious values, they do not completely reject or resist developing relations with Romanian citizens or with citizens belonging to other ethnicities. Their social integration is not done with the same rhythm as the systemic one. This can be observed especially in the women who decided to immigrate in order to be with their husbands and who frequent Romanian socialization mediums to a lesser extent than the men.

Despite their wish to obtain citizenship and to enjoy the possibility of travelling and getting to know the EU, the immigrants do not make efforts to reach their objectives. The preparation of the citizenship test does not automatically constitute a step towards the social and systemic integration of the immigrant. One notices the need of a permanent socialization, of an availability to learn. The immigrants have not read books for general knowledge that would help them to better understand European and Romanian culture, they do not get informed lest in a small degree about political and civic culture, and about the democratic principles. This is disproportionate to their level of preparation with the majority, as aforementioned, having undergraduate and post-graduate studies.

5. Conclusions

The integration process of non-EU immigrants has raised questions regarding the European capacity, institutional resources and mechanisms for managing the extra-Community migration in general and the

migration crisis of the past few years in particular. The paper has presented the main stages that the EU went through in its attempt to manage extra-Community migration, which has been considered, since the Treaty of Amsterdam, as being a European problem which needs a communitarian response. The communications, the common decisions, the documents produced starting with the 90s translate the EU's interest for the extra-Community migration, but also the shortcomings that the Union is trying to overcome. On the other end of the spectrum, the extra-Community immigrant who aims at integration is confronted with economic, cultural, normative and social challenges. As it was mentioned in the first part of the paper, the social integration can complement the systemic integration for the purpose of a functional relation between the immigrant and the host society that is integrating him/her. The fieldwork that was done pointed out, as a result of the qualitative analyses of the data obtained, that the Turkish immigrants in Romania are well integrated from a systemic point of view, by having language skills that ensure a basic communication, by respecting the economic rules and those of the institutions with which they enter in contact. Regarding social integration, which is more profound, what prevails is the base identity, which is founded on religious traditions and values. Even though there is no evident resistance from the Turkish immigrant towards Romanian and European values in general, they do not make efforts to become integrated in accordance with their desires.

The integration process represents a bi-directional relation which is wished to be functional. In the case where the efforts for change to not come from both sides, the relation will not be functional, and there will be imbalances between the part that is being integrated (the immigrant) and the part that is integrating (the European society)

References

- Bendel, Petra, "Immigration Policy in the European Union: Still bringing up the walls for fortress Europe?", *Migration Letters*, 1(2005): 21-32
- Castles, Stephen, "How nation-states respond to immigration and ethnic diversity", *Journal of Ethnic and Migration Studies*, 21(3) (2010): 293-398
- Derek, Lutterbeck "Coping with Europe's Boat People. Trends and Policy Dilemmas in Controlling the EU's Mediterranean Borders", *Mediterranean Politics*, 11(1) (2006): 59-82
- Geoffrey, Garrett & Tsebelis, George, "An Institutional Critique of Intergovernmentalism", *International Organization* 50(2) (1996): 269-299
- Hurwitz, Agnès, "The 1990 Dublin Convention: A Comprehensive Assessment", *International Journal of Refugee Law*, 11 (4) (1999): 646–677
- Tranholm-Mikkelsen, Jeppe "Neo-Functionalism: Obstinate or Obsolete? A Reappraisal in the Light of the New Dynamism of the EC." *Millennium: Journal of International Studies*, 20 (1) (1991): 1-22
- Zamfir, Cătălin & Vlăsceanu, Lazăr (eds), *Dicționar de sociologie* (București: Ed. Babel, 1993)
- Zhou, Min, "Segmented Assimilation: Issues, Controversies, and Recent Research on the New Second Generation", *The International Migration Review*, 31(4) (1997): 975-1008
- *A Common Agenda for Integration Framework for the Integration of Third-Country Nationals in the European Union*, available at http://eur-lex.europa.eu/legal content/EN/TXT/PDF/?uri=CELEX :52005DC0389&from=EN, accessed February 2018
- A European Agenda On Migration, Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions, Brussels, 13.5.2015 COM(2015) 240 final, available at https://ec.europa.eu/antitrafficking /sites/antitrafficking/files/communication_on_the_european_agenda_on_migration_en.pdf, accessed February 2018
- Carte albastră pentru imigranții cu înaltă calificare profesională, available at http://www.europarl.europa.eu /sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20081107FCS41562+0+DOC+XML+V0//RO, accessed Mars, 2018
- Communication From The Commission To The European Parliament And The Council On The State Of Play Of Implementation Of The Priority Actions Under The European Agenda On Migration, Brussels, 10.2.2016 COM(2016) 85 final, available at https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-85-EN-F1-1.PDF, accessed January 2018
- Comunicare A Comisiei Către Parlamentul European ȘI Consiliu, Posibilit ăți de reformare a sistemului european comun de azil și de îmbunătățire a căilor legale de migrație, Bruxelles, 6.4.2016 COM(2016) 197 final, available at http://ec.europa.eu/transparency/regdoc/rep/1/2016/RO/1-2016-197-RO-F1-1.PDF, accessed March, 2018
- Comunicare A Comisiei către Parlamentul European, Consiliu, Comitetul Economic și Social European și Comitetul Regiunilor cu privire la rezultatele Agendei Europene privind Migrația, Bruxelles, 27.9.2017, COM(2017) 558 final, available at http://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:52017DC0558&from=EN, accessed January, 2018
- Declaration, EU-Western Balkans Summit, Thessaloniki, 21 June 2003, available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/misc/76291.pdf, accessed November 2017
- Directiva 2003/9/CE a Consiliului din 27 ianuarie 2003, available at http://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:32003L0009&from=RO, accessed February 2018

- Discursul Președintelui Jean-Claude Juncker privind starea Uniunii 2017, available at http://europa.eu/rapid/press-release_SPEECH-17-3165_ro.htm, accessed February 2018
- European Council Meeting in Laeken, SN 300/1/01 REV 1, available at http://ec.europa.eu/governance/impact/background/docs/laeken_concl_en.pdf, accessed February 2018
- European Website on Integration, available at https://ec.europa.eu/migrant-integration/home, accessed January 2018
- FRONTEX, European Border and Coast Guard Agency, available at http://frontex.europa.eu, accessed February 2018
- Justice and Home Affairs Council of 19 November 2004, available at http://europa.eu/rapid/press-release_PRES-04-321_en.htm, accessed February 2018
- Laeken Declaration on the future of the European Union (15 December 2001), available at https://www.cvce.eu/en/obj/laeken_declaration_on_the_future_of_the_european_union_15_december_2001-en-a76801d5-4bf0-4483-9000-e6df94b07a55.html, accessed January 2018
- *Programul de la Stockholm: către o Europă deschisă, mai sigură*., available at http://www.ana.gov.ro/doc_strategice/documente%20strategice%20europene/programul%20stockholm%20romana.pdf, accessed December 2017
- Regulamentul Dublin II, available at http://eur-lex.europa.eu/legalcontent/RO/TXT/?uri=LEGISSUM%3Al33153, accessed January 2018
- Regulation (Eu) No 604/2013 Of The European Parliament And Of The Council of 26 June 2013, available at http://www.consilium.europa.eu/media/20847/76279.pdf, accessed February 2018
- *Tampere European Council, 15 and 16 October 1999 – Presidency Conclusions*, available at http://www.europarl.europa.eu/summits/tam_en.htm, accessed February 2018

CHALLENGES OF THE KNOWLEDGE SOCIETY: EXPLORING THE CASE OF QATAR

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Abstract

Qatar's Permanent Constitution and National Vision 2030 constituted the turning point in Qatar's transition towards knowledge society. Articles 22-49 of Qatar's Permanent Constitution together with the 4 pillars of Qatar's National Vision 2030 explicitly refer to the importance of knowledge acquisition, production and dissemination, and promotion of human socio-economic development. Qatar has remarkably invested in education, human capital, R&D, and ICT. Institutions such as Qatar Foundation (QF) and its entities like Qatar National Research Fund (QNRF), Qatar Science and Technology Park (QSTP), in addition to Qatar University and ictQatar are in the heart of Qatar's knowledge society construction. Moreover, Qatar has capitalized in importing existing organizational capacity, faculty and staff, and accumulated reputation of a number of eminent global higher education institutions such as Georgetown University, Texas A&M University, and Weill Cornell Medical College. Despite many years of substantial investments in human capital, ICT and the relevant infrastructures, Qatar's transition toward knowledge society is facing serious challenges. These challenges relate to reform and development of education and training to make knowledge as a principal driver of growth, diversification of the economy to ensure endurance of adequate revenues to fund projects, resolve the expatriate and workforce issues to ensure excellence and efficiency, efficient management of growth and uncontrolled expansion to avoid duplication of works and waste of recourses, good governance across government and private sectors and projects to cope with modernization, balancing between modernization and preservation of traditions in responding to the convergent impacts of globalization, balancing the needs of current generation and the needs of future generations, and sustain the environment. The aim of this paper is threefold: Outline the main features of Qatar society, highlight the status quo of Qatar knowledge society and explore the major challenges for it.

Keywords: *Knowledge Society, Qatar, Tradition, Modernization, Challenges.*

Introduction

Qatar has emerged as a renowned country for its remarkable achievements in education, human development, economy, media and politics despite its relatively small geographical and population size. In recent years, Qatar has become eminent to the international community because of hosting the 2022 World Cup, having Al-Jazeera Agency Networks, its humanitarian support to victims of war and conflicts zones including Syria, Yemen, Libya, Sudan, and for its successful mediation and conflict resolution efforts particularly in the Middle East such as resolving the conflict between Djibouti and Eritrea, Sudan and Chad, also the internal conflicts between Sudan and Darfur opposition, the Palestinian Authority or more specifically Fatah and Hamas in Palestine. Few decades ago, the state and society in Qatar were traditional in values, social, political and economic institutions. The country's economy was solely depending on hydrocarbon resources and almost all projects were funded from oil and gas revenues. However, the enormous transition took place since the ratification the Permanent Constitution in 2004 and the approval of the vision 2030 in 2008. The case of Qatar is worth investigating to understand how the country is transitioning from traditional society to dynamic knowledge society and economy and analyzing key challenges ahead. This research is descriptive and analytical however; it includes some normative perspectives as the author uses the participant observation method to incorporate some insights from his work experience as a full time employee of HBKU for more than 4 years also for working almost two academic years as an Assistant Professor of Sociology with Qatar University. The author has also been participating and attending several knowledge production and dissemination events in Qatar. The significance of this study stems from the being quite comprehensive in terms of the scale of topics covered, most updated in terms of data, and original in terms of referring to primary sources and references. Therefore, this paper begins with analyzing the main features of Qatar traditional and modern socio-cultural, economic and political setup. It then investigates the challenges to Qatar's evolution toward knowledge society. The author concludes that Qatar's development to knowledge society is crippled with major challenges however the country got what makes it succeed essentially the political will, National Vision, economic wealth, right infrastructure, institutions in place, and the human capital.

Country Profile

In this part of the analysis it is important to provide a concise overview on Qatar's geography, history, socio-cultural, political, demographic, and

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economic background. Qatar is a relatively small peninsula located in the midst of the western coast of the Arabian Gulf with some islands namely Halul, Shira'wa, Alashat. The total area of Qatar is approximately 11,627 sq. km and it shares a land border with the Kingdom of Saudi Arabia to the South and maritime border with Bahrain, the United Arab Emirates and Iran. It occupies a strategic location in the central Arabian Gulf near major petroleum deposits. (Hukoomi n.d.; Al-Sharqawi 2013, 189) Qatar was inhabited since 4000 BC. The origin of the name is uncertain, but according to some references it dates back at least 2,000 years since the term "Catharrei" was used to describe the inhabitants of the peninsula by Pliny the Elder (1st century A.D.), and a "Catara" peninsula is depicted on a map by Ptolemy (2nd century A.D.) It was ruled by the Ottomans for 4 consecutive centuries until 1915 then it became a British protectorate from November 3, 1916 until it gained independence on September 3, 1971 during the rule of the former Emir Sheikh Ali bin Abdullah Al-Thani who is a decedent of Al-Thani family which ruled the country since 1868 A.D. The Al-Thani family descents from Al-Ma'adhid who are from Tamim clan, which is a branch of the tribe of Wahba. They migrated from Najd region in Saudi Arabia and settled in Qatar peninsula (Al-Sharqawi 2013, 196-198; Hamdan 2012, 111-113; Central Intelligence Agency n.d.) Qatar society traditionally consists of nomadic Bedouin tribes, Indian and Iranian trading families clustered in villages of Doha, Al-Wakra, Al-khor and Al-Zubara. The inter-tribal relations were unofficial and based on personal relationships between the tribe-chiefs who enjoy absolute power. The Qataris are simple, easygoing, kind people who engaged in farming, hunting, fishing, pearling and trade. Their social and cultural values such as tolerance and generosity are rooted in the Islamic tradition. They are family oriented people, consanguinity and arranged marriages are widely practiced, segregation of males and females in education and work places is enforced, and respect of kinship ties and the elderly is widely observed. Before, the discovery of oil and gas Qatar was a poor small nation; less than 35,000 people, which receives financial aid from Great Britain in return for protection. However, after the discovery of oil in 1939 and the establishment of Qatar Petroleum Company which started exporting oil in 1949, as World War II interrupted oil production, the society undergone remarkable changes. These changes could be attributed to the huge positive impacts of oil and gas revenues on the welfare of the people, the increase of the government investment in improving the infrastructure and funding development projects, and the flow of migrant laborers who were recruited from many countries including India, Iran, Palestine, Egypt, and the Philippines to work in the oil and gas industry, construction projects and in other government and private sectors in addition to foreign investors who found the country safe, stable and promising for making business and maximizing the profit. Among the significant changes in the Qatari society is the empowering of women to study, work and lead. The generous scholarship for those Qataris who are interested in studying abroad whether in the Arab countries or in Europe and America and the knowledge and skills they brought to the country. The two significant factors that have been driving the changes in the country are the high integrity and political will of the leaders and the huge investment in human capital in general and in education, healthcare, and innovation in particular. This is what made Qatar enjoys prominent positions in human development, literacy, diplomacy, and humanitarian works at the regional and international levels. For instance according to the data provided by the World Intellectual Property Organization (WIPO) in 2016, Qatar filed 142 application for intellectual property 48 of which have been granted, submitted 690 patent applications, lodged 3,328 trademark submissions and the top Patent Cooperation Treaty Applicants in 2017 are QF with 10 applications and QU with 3 applications (Hamdan 2012, 25-51, 104-159, 179-183; Weber 2014, 63-65; WIPO n.d) As of 1 February 2018, the population clock indicated that Qatar has a population of over 2.7 million with a gender distribution of over 2 million males and approximately 0.7 million females. The total population includes 11.6% or approximately 310,000 Qatari and 88.4% non-Qatari mainly male immigrant workers who arrive in Qatar on work visas without their families, making the country number 143 in the world and the population growth rate estimated at 2.27%. Qatar is a young society, the median age of population is 33.2 years, and more than 25% below 25 years, over 70% below 55 years, only 1% above 65 years and the life expectancy rate is 78.9 years. Over 99% of the population lives in Doha city and suburb on the eastern side of the peninsula with a considerable community clustered in Dukhan and Al-Khor villages. Arabic is the official language in Qatar and English is commonly used as a second language. Islam is the official religion of the State of Qatar and the Islamic Law (Sharia) is the principal source of legislation. The Qataris are generally conservative Sunni Muslims but there are other religious groups living in Qatar namely Christian, Hindu and Buddhist. Public spending has witnessed and increase in the pace of the economic development to achieve Qatar National Vision 2030, therefore Qatar earmarked 3.5% of GDP for public spending on education. The youth literacy rate is above 98% of the total population and the unemployment rate is 0.3%. (Hukoomi n.d.; Ministry of Development Planning and Statistics n.d.; Al-Sharqawi 2013, 189; World Economic Forum 2016; Central Intelligence Agency n.d.) Historical sources indicate that the founder of the Al-Thani monarchy in Qatar was Sheikh Muhammad bin Thani who officially ruled the country from 1868 to 1876 and died in 1979. While investigating the political history of Qatar, one cannot overlook Sheikh Khalifa bin Hamad Al-Thani who was born in 1932, took power

on 22 February 1972 and ruled the country until 1995. Perhaps he could be considered as the real founder of the State of Qatar because of amending the Provisional Constitution, forming the first Council of Ministers, establishing the different government structures such as the Ministries, *Shura* (consultative) council, and the Audit Bureau. He also expanded and strengthened Qatar's foreign diplomatic relations and increased the number of agreements and contracts with oil and gas international corporations such as OMACO, Standard Oil of Ohaio and Elf Equitaine. It is also very important to mention the great contribution of His Highness Sheikh Hamad bin Khalifa Al-Thani, the Father Emir, who ruled Qatar from July 27, 1995 to June 25, 2013. Many observers view HH Sheikh Hamad as the father founder of modern Qatar. He is directly credited with many of the huge changes in almost all aspects of the Qataris life particularly education, socio-economic, political, and media that occurred through his visionary and outstanding leadership. It is worth mentioning that the Permanent Constitution of the State of Qatar and Qatar National Vision 2030 were drafted, ratified and came into effect during his rule. Moreover, in a unique act in modern political history especially in the Middle East, HH Sheikh Hamad peacefully abdicated on June 25, 2013, and transferred power to his son the current Emir His Highness Sheikh Tamim bin Hamad Al-Thani who became the 9th Emir since the beginning of the rule of Al-Thani. (Hamdan 2012, 111-126, 155; Weber 2014, 63) Qatar is one of the world's most dynamic and fastest growing economies. According to the official figures, the Qatari economy grew by 2.2% in real terms in 2016 reaching QR796.2 billion (approximately US$219 billion) and the IMF projects an overall 2.6% GDP growth for 2018. With its US$124,900 GDP per capita in 2017, Qatar ranks as the wealthiest nation of the almost 200 countries in the world. Qatar booming economy enabled the country to invest in general infrastructural development and mega projects in line with Qatar National Vision 2030. Few examples could be cited here including US$11 billion for Doha International Airport, US$5.5 billion for new Doha Port, US$25 billion for Doha Rail and US$45 billion for Lusail which is considered as 'Qatar Future City'. Qatar's industries include natural gas, crude oil production and refining, ammonia, fertilizer, petrochemicals, and steel reinforcing. Despite the dominance of oil and gas sector, other non-hydrocarbon sectors such as manufacturing, financial services and construction has grown by 5.6% or QR21.4 billion (approximately US$0.66 billion) to reach QR400 billion (approximately US$110 billion) in 2016. Oil and gas revenues stood as QR132.9 billion (approximately US$36.5 billion) in 2016 comparing to QR170.6 billion (approximately US$47 billion) in the previous fiscal year, recording a decline of 22.1% due to the decline in oil and gas prices. In addition, public revenues fell by 12.2% or QR161.2 billion (approximately US$44.5 billion) public expenditures increased by 11.6% in order for the government to ensure continuity of public projects and infrastructure to realizing Qatar National Vision 2030 in human, social, economic and environmental development. The low oil and gas prices, the decline in public revenues and the rise in public spending caused a budget deficit of QR49.858 billion (approximately US$14 billion) comparing to approximately US$1.6 billion budget deficit in previous fiscal year. However, Qatar sovereign wealth fund (SWF) currently stands at US$335 billion that backs Qatar's booming economy and society. (Ministry of Development Planning and Statistics n.d.; Qatar Central Bank 2016, 21-48; IMF n.d.; Weber 2014, 64)

1. Key Constituents Of Qatar's Knowledge Society

It is important for any investigation on Qatar's evolvement to a dynamic knowledge society to bring into limelight the key foundations, institutions, stakeholders, and partners, and highlights their role, efforts, and contributions to the transition to a knowledge society. These constituents include the Permanent Constitution of the State of Qatar, Qatar National Vision 2030, Qatar University (QU), and Qatar Foundation for Education, Science and Community Development (QF) and its entities, and ictQatar.

2. The Constitution of the State of Qatar

The Provisional Constitution of Qatar was issued on April 2, 1970 and thus the first Council of Ministers was formed on May 28, 1970 however the amended version was issued and came to force in the Sate on April 19, 1972. (The Permanent Constitution of the State of Qatar 2004; Hamdan 2012, 116) During the rule of the Father Emir His Highness Hamad bin Khalifa Al-Thani, a constitution committee was formed by an Emiri decree in July 1999 and submitted the draft of the constitution in July 2002. The Permanent Constitution of the State of Qatar passed the referendum on 29 April 2003 with 96.6% majority votes. It was ratified on 8 June 2004, and came into effect on 9 June 2005. (The Permanent Constitution of the State of Qatar 2004; Hamdan 2012, 122; Al-Sharqawi 2013, 69-71) The new constitution establishes the main foundations of the community, accomplishes the people's participation in decision-making and guarantees their rights and freedoms. It includes 150 articles that regulate all aspect of life in the country pertaining to rights and duties. For instance, articles 22, 24, 25 and 49 explicitly refer to the right to education and emphasize on the role of the state in promoting sound education, fostering and encouraging scientific research, helping disseminate knowledge in addition to making general education compulsory and free of charge. It is worth mentioning in this context that while article 21 focus on preserving the family,

supporting its structure and protecting women, children and the elderly, article 23 refers to the state's obligation to foster public health, provide the means of prevention of disease and epidemics and promote cure. Ensuring the public welfare, raising the standard of living and insuring fundamental freedoms such as freedom of expression, freedom of scientific inquiry, freedom of media, and freedom of worship are guaranteed by articles 28, 47, 48 and 50. It is essential to note that articles pertaining to citizens' rights and liberties cannot be amended. (The Permanent Constitution of the State of Qatar 2004)

3. Qatar National Vision 2030 (QNV)

QNV was published in July 2008. It is based on the guiding principles of the Permanent Constitution of Qatar besides it has emerged from intensive consultation across Qatari society. The Vision defines broad future trends and reflects the aspirations, objectives and culture of the Qatari people. It provides a framework within which national strategies and implementation plans can be developed. The Vision rests on four pillars which are (a) Human development to enable its people to sustain a prosperous society, (b) Social development to build a just and caring society based on high moral standards and capable of playing a significant role in the global partnership and development, (c) Economic development of competitive and diversified economy capable of meeting the needs of, and securing a high standard of living for all its people, for the present and future, and (d) Environmental development that maintains balance and harmony between economic growth, social development and environmental protection. In this Vision, Qatar has explicitly indicated the need to shift from the reliance on hydrocarbon revenues to knowledge production activities particularly education, research, patenting, intellectual property, peer-reviewed science and engineering papers and media. In summary, the Vision outlines how Qatar will use the vast revenues from its substantial hydrocarbon resources to transform itself into a modern knowledge-based society. The vision regards the people of Qatar are key to achieving its aim, and the plan places developing human capitals as the fundamental priority for the next 15 years. The Vision is being implemented in a series of five-year strategic plans. The strategic plans will help the nation to realize the Vision by setting and prioritizing concrete goals with time-bound targets. It will also articulate the necessary processes, stakeholders' roles, and the expected standards which are needed to deliver on the Vision. (QNV 2008, 1-2, 10-34; Weber 2014, 61) It has been stated in the introduction of the second Qatar National Development Strategy 2018-2022 that the Strategy builds on the achievements of the first strategy 2011-2016 and focuses on attaining eight objectives which are; (a) focus on people because they are both the means and target of development, (b) ensure clarity of national priorities included in the strategy, (c) ensure clarity and realistic identification of goals and expected results, (d) ensure clarity in roles and responsibilities in executing programs and projects, (e) strengthening the relationships between the different strategies and executive plans and the allocated budget, (f) improving the mechanisms of monitoring and follow up, (g) develop and modernize the administration particularly in the financial, human resources, technology and legislative sectors, and (h) design a comprehensive communication strategy which includes a coordination mechanism in each sector and in between the sectors and all stakeholders engaged in executing the strategy. The strategy consists of 15 chapters beginning with the achievements and lessons learned from the first strategy covering almost all areas of sustainable development such as education, health, human capital, culture, sports, administration, infrastructure, environment and diversifying the economy. (MDPS 2018)

4. Qatar Education System

Traditional education in Qatar before the 1950s was based on few schools and informal classes (*kuttab*) offering religious, Qur'an reading and reciting, and Arabic language lessons. Traditionally trained teachers usually conduct these classes at mosques or at home. Some families have sent their children to pursue their traditional studies abroad mainly in Egypt and Lebanon. Qatar's modern education system officially began in 1951 by establishing the Ministry of Ma'arif (education) by which the state became directly responsible and involved in supervising and developing it from all angles, in addition to allocating substantial budgets. The education system is guided by three principles; protecting the heritage of the Muslim nation, preserving the Arab-Islamic identity of the people, and developing the education system and curricula through benefiting from the modern era achievements in technology and educational methods and techniques. Modern public schools and relevant infrastructures were built in the 1950s and 1960s. For instance, the first school for boys established in the school year 1952-1953, the first school for girls established in the academic year 1954-1955, and adult and illiteracy education began in 1954. The first secondary school for boys began operating in 1961 and the first secondary school for girls started operating in 1965. The tertiary education system began with the establishment of the College of Education in 1973 with a vision to place education as a priority in the country's expansion. In its first year, the College enrolled 57 male and 93 female students. The primary, secondary and vocational education has remarkably expanded throughout the years because rapid demographic growth and the government support and spending on education infrastructure, employees and development. For instance, the government covers costs of schooling in public schools and provides textbooks, stationary,

health services, electricity and water free of charge and. The Supreme Education Council (SEC) founded in 2002 and the Emir of the State himself oversees it. SEC is the highest educational authority responsible for the education policy, planning, development and enforcement. It includes three executive departments that are the department of education, the department of evaluation, and the department of higher education (Hamdan 2012, 199-207; Al-Sharqawi 2013, 203-206; Powell 2014, 258-259)

5. Qatar University (QU)

Due to the country's rapid development and need to provide additional areas of specialization, Qatar University (QU) was founded in 1977 as the national institution of higher education in Qatar. It became the home of four new colleges namely College of Education, College of Humanities and Social Sciences (currently named College of Arts and Sciences), College of Sharia, Law and Islamic Studies (currently became two colleges; College of Sharia and Islamic Studies and College of Law), and the College of Science which later became part of the College of Arts and Sciences. Thereafter, the College of Engineering was founded in 1980, the College of Business and Economics in 1985, the College of Pharmacy in 2008, the College of Medicine in 2014, and the College of Health Sciences in 2016. The university is also the home of more than 15 research centers which strive to make an impact on a global scale. These research establishments include Gas Processing Center, Biomedical Research Center, Qatar Mobility Innovation Center, Center for Sustainable Development, Social and Economic Research Institute, and Gulf Studies Center. QU currently boasts a population of over 20,000 students, and an alumni body of over 40,000. It also employs over 2,000 local and international highly experienced teaching and research faculty. QU faculty members are not only engaged in teaching, research and student care, but also contributes actively to the needs and aspirations of society and present their expertise in the media. In 2003, the University embarked on an ambitious Reform Plan to increase the efficiency of its administrative and academic processes, and promote quality education. To this end, a university-wide Strategic Plan 2010-2013 was launched focusing on efficient and effective services, and research, leading to the establishment of the Office of Academic Research in 2007, which oversaw a growing number of high-profile satellite research centers. Community service also became a large focus, and many facilities and services were enhanced and expanded upon, to meet the needs of the public. Qatar University has recently launched its five-year strategy (2018-2022) 'From Reform to Transformation'. This strategy is aligned to Qatar National Vision 2030 and seeks to promote excellence in four key areas of education, research, institution, and engagement with a view of occupying an outstanding position in the map of excellent education providers at the international and regional levels. (Hamdan 2012, 207; Qatar University n.d.)

6. Qatar Foundation for Education, Science and Community Development (QF)

QF was founded by His Highness Sheikh Hamad Bin Khalifa Al Thani, the Father Emir, and his wife Her Highness Sheikha Moza bint Nasser in August 1995. QF is the largest private non-profit organization in Qatar dedicated to helping shape the future of the Qataris through advancements in education, research & development, and community development. The foundation aims at making Qatar a vanguard for productive change in the region and a role model for the broader international community. Through its wide range of activities and institutions, the Foundation promotes a culture of excellence and furthers its role in supporting an innovative and open society that aspires to develop sustainable human capacity, social, and economic prosperity for a knowledge-based society. It is worth emphasizing that the Sidra tree (*Ziziphus spina-christi*) in the logo of QF symbolizes the essence of the vision and mission of the organization. The Sidra is a native tree, which could be found throughout the country, especially in northern and central Qatar. It grows in the wild and flourishes in the harsh and arid climate. With its roots bound in the soil and its branches reaching upwards toward perfection, it is a symbol of solidarity and determination. The Sidra tree's deep roots regarded as a strong anchor, connecting contemporary learning and growth with the country's culture and heritage. Poets, scholars and travelers would traditionally gather in the shade of the Sidra's spreading branches to meet and talk. This aspect of the Sidra tree's role is reflected in QF's commitment to education and community development as well as being a naturally healthy and comfortable place at which to gather and exchange knowledge and opinions. The tree's fruit, flowers and leaves provide the ingredients for many traditional medicines, which reflects QF's science and research objectives. The branches of the Sidra tree represent the diversity of QF today. The leaves, flowers and fruits equate to the individual lives that the tree nourishes, with the fruits going on to produce seeds that guarantee sustainability and a healthy future. Hence, the Sidra tree is perhaps the most prominent tree in Qatar and it certainly occupies a special position in the hearts of the Qatari people that is why it stands out as the perfect symbol for the vision and mission of QF. The foundation is the largest organization in Qatar and it consists of around 50 entities. (See examples in Table 1) QF Education City is a 2,500-acre campus launched in 2003 and today it is the home of Hamad Bin Khalifa University (HBKU), eight of the eleventh International Branch Campuses (IBCs) of worldly renowned universities such as Georgetown University, Texas A & M, Weil Cornell Medical College in addition to several research

establishments. The attempt to circumscribe all QF entities is not the purpose of this paper hence few key entities will be introduced here. (Qatar Foundation n.d.; Al-Sharqawi 2013, 216-217; Hamdan 2012, 207; Powell 2014, 269)

6.1. Hamad Bin Khalifa University (HBKU)

HBKU was founded in 2010 with a vision to be an innovation-based entrepreneurial university leading in education and research, solving critical challenges facing Qatar and the world. HBKU today has five colleges; College of Islamic Studies, College of Science and Engineering, College of Law and Public Policy, College of Humanities and Social Sciences, and College of Health and Life Sciences. In addition to a number of research institutes and centers including Qatar Biomedical Research Institute (QBRI), Qatar Environmental and Energy Research Institute (QEERI), Qatar Computing Research Institute (QCRI), Qatar Cardiovascular Research Center (QCRC) and the Research Center for Islamic Legislation and Ethics (CILE). The University offers 17 programs such as multidisciplinary PhD in Genomics and Precision Medicine, and MA in Digital Humanities and Societies. HBKU employs 75 faculty members and enrolls over 625 students from 57 nationalities, 41% of them are Qataris. QSience.com, which is an open access academic journals platform, initiated by QF and was first launched on 13 December 2010. It signified QF commitment to disseminate research to the widest possible international knowledge seekers. The pioneer publications were in the fields of medical studies and practice particularly cardiology and heart disease treatment. Articles have to be submitted online and every article is rigorously reviewed by international experts. QScience has become a part of HBKU Press and it is today the online home for a growing range of peer-reviewed open access journals that publish the latest research and reviews in Medicine and Bioscience, Healthcare, Social Science, Islamic Studies and Engineering. QScience has more than a dozen of affiliated peer-reviewed journals such as Global Cardiology Science and Practice, Journal of Emergency Medicine, Trauma Acute Care, Qatar Medical Journal, Near and Middle Eastern Journal of Research in education, Religions, and QScience Connect. QScience journals have won the recognition of renowned international data bases such as PubMed Central and the premier full-text database of medical articles. This means that all articles published on the database will have a much higher visibility among the global research community. (Hamad Bin Khalifa University n.d.; QScience.com n.d.)

6.2. International Branch Campuses (IBCs)

Qatar has invested substantially in attracting the best international higher education institutions to open branches in Doha. Comparing to GCC, Qatar differ immensely in the scale of investment, the number of universities and the variety of programs offered. In the period from 1998 to 2012 Qatar entered into agreements with 11 international prominent higher education institutions from USA, Canada, UK, France and the Netherlands. These universities aim to prepare students for employment as well as for global citizenship by emulation of global principles and norms adapted to local or national contexts of Qatar. QF Education City hosts eight branch campuses; six American universities, one from UK and one from France. The IBCs offer specializations and programs such as medicine and health sciences, engineering and applied sciences, IT and design, foreign affairs, journalism, and tourism and hospitality. (See Table 2) These institutions bring their own principles, personnel, and student culture. Some researchers noted that the investment in inviting IBCs have been oriented mainly to Western models without sustained reflection on and tackling all of the contextual condition needed to implement and sustain them. (Ministry of Education and Higher Education n.d.; Hamdan 2012, 123; Powell 2014, 259- 270)

6.3. Qatar Science & Technology Park (QSTP)

QSTP was inaugurated in 2009 and it is located in QF Education City as a part of QF R&D and incubator for technology production development in Qatar. The park fosters an innovation and entrepreneurship ecosystem in Qatar that works to accelerate commercialization of market-ready technologies to realize Qatar's national diversification drive. It focuses on four overarching themes; Energy, Environment, Health Sciences, and ICT. QSTP is a leading institution committed to investing in new technology development programs, creating intellectual property, enhancing technology management skills, and developing innovative new products. QSTP does not only support the economic and human development objectives for Qatar through incubation, funding, training, and mentorship, but also increasingly becoming a recognized regional and international hub for applied research, innovation, development, and entrepreneurship. QSTP has developed a smart partnership with a variety of stakeholders including QF research institutes and the private sector to accelerate product innovation, encourage new product and services development, and boost the commercialization of scientific research. QSTP is a free zone that hosts more than 50 local and international companies such as ExxonMobil, SIEMENS, AIRLIFT, MEDI, Vodafone and QNB. It offers various benefits to local and international entities including 100% foreign ownership, operate as a local company or as a branch of a foreign company, hire expatriate employees, tax-free, duty-free import of goods, equipment and tools into the free zone, and unrestricted repatriation of capital and profits. It provides two types of funds: (a) Product Development Fund: funding for small and medium-sized enterprises (SMEs) and startups that develop products and services relevant to the local market needs, and (b) Tech Venture Fund: provides an opportunity for tech

founders and entrepreneurs to source seed-stage capital when they are first embarking on their journey. Besides, QSTP work on student development and exposure to see what's happening on the other side of the world; discover their potential, open up your horizons and meet people who disrupt the world and enhanced peoples' lives by organizing students' innovation trips for instance trips to the Silicon Valley, the world's leading hub for innovation and technology development, and engage the students in a summer training program provided by the European Innovation Academy (EIA). (QSTP n.d.)

6.4. Qatar National Research Fund (QNRF)

QNRF was inaugurated in 2006 and it has reached cycle 11 for funding. It is currently located within the premises of QSTP in Education City. QNRF's vision is to enable research and development excellence in Qatar in order to achieve a knowledge-based economy. It aims to foster original, competitively selected research in engineering and technology, physical and life sciences, medicine, humanities, social sciences and the arts. It encourages dialogue and partnership, and currently focuses on optimizing resources, encourage innovative research, and is moving from predominantly investigator-driven research to mission-driven research. QNRF provides funding for research projects in three main areas; Research, Capacity Building and Development Programs, and K-12 Programs. Under each area QNRF funds various research program projects, initiatives, competitions and awards comprising the National Priorities Research Program (NPRP), the Thematic and Grand Challenges Research Program (TGCRP), Technology Development Fund (TDF), Undergraduate Research Experience Program (UREP), Qatar Research Leadership Program (QRLP), National Scientific Research Competition, and Managing Award. Submission for research fund is open for local and international researchers and organizations. For example, the NPRP funding award is up to four years where funds for a one year project may not exceed US$200,000, US$400,000 for a two year project, US$600,000 for a three year project and US$700,000 for a four year project. For example QNRF awarded over US$53 million of research grants to investigators in Qatar in 2012. Among the completed researches DeSIGN: Guided Practice for Sign Language which is an educational software application for deaf and hard-of-hearing students, which provides guided communication practice using sign language. The DeSIGN tutor utilizes a knowledge-tracing algorithm to adapt its tests to the learning level of the students. Another successful research was about wind and wave studies in Qatar where for the first time, fine detail about the wind and wave conditions around the coast of Qatar has been recorded. By arranging the most sophisticated equipment available on the edge of a 500-meter pier extending into the Gulf. This replaced the very poor models to track winds and waves and helped marine life and the offshore oil and gas industry, and renewable energy initiatives. (QNRF n.d.; Weber 2014, 77-78)

6.5. World Innovation Summit for Education (WISE)

WISE was initiated by QF under the leadership of Her Highness Sheikha Moza bint Nasser in 2009 and thus the first WISE was held in Doha from 16-18 November 2009. It is an international, multi-sectorial platform for creative thinking, debate and purposeful action. The WISE community is a network of education stakeholders; from students to decision-makers, coming from about 200 countries who share ideas and collaborate to seek creative solutions to solve challenges facing education. WISE has become a global reference for innovative approaches to modern education. While WISE leaders recognize the gap between the technology and healthcare sectors and education where the latter is lacking innovative approaches in both policymaking and in the classroom, they envision education as the key to addressing the toughest challenges facing communities around the world today. These challenges particularly include eradicating poverty, resolving conflicts peacefully, eliminating inequality and injustice, reducing unemployment, enhancing environmental sustainability and be ready to respond to future challenges. Therefore, WISE is a response to the necessity of revitalizing education and providing a global platform for the development of new ideas and solutions. Since 2009, WISE continues to generate fruitful dialogue and productive partnerships. The WISE research reports produced in collaboration with recognized experts from around the world, address pressing global education issues and reflect the priorities of the Qatar National Research Strategy. It is important to emphasize that these timely, comprehensive reports feature action-oriented recommendations and policy guidance for all education stakeholders, offering concrete, improved practices in specific contexts such as school leadership and collaborative professionalism, design thinking, apprenticeship, disability, early childhood education, and migration. The Reports are available on the WISE website and through the mobile application in addition to a limited number of printed editions in English and Arabic. (WISE n.d.; Hamdan 2012, 199-200) The 9th edition of WISE took place on 14-16 November 2017 in Doha under the theme 'Co-Exist, Co-Create: Learning to Live and Work Together'. A large number of educationists and opinion makers from around the world have participated in the summit to address important education challenges in times of disruption and economic uncertainty stemming from conflict, mass migration, growing inequality, on-going, rapid technological change and other forces. The 2017 WISE Summit was an opportunity to rethink and reorganize the way learning is delivered in an age of disruption. Participants explored and discovered several topics that are shaping the future of teaching and learning

including the impact of artificial intelligence on education, transforming roles of teachers and leveraging social entrepreneurship for innovation. The summit has also had several discussions on changing mindsets toward migrants, reimagining higher education in the connected world, the impact of nudging, connecting private and public actors and strategies to build future knowledge societies. Challenges in education also present opportunities to break down old assumptions and bring forth the new ideas that are paving the way for positive disruption. With the topic of co-existing in a changing world, developing skills, attitudes and values to shape tomorrow, the conference explored the role of innovation in education to cultivate values, behaviors and attitudes. It addressed complex challenges, advance cultural cohesion and nurture global citizenship in the rapidly evolving world. The second pillar of co-creating knowledge societies; transitioning from knowledge economies to knowledge societies, examined strategies, policies and practices to empower individuals to become highly skillful innovators who can drive economic development, contribute to social good and design our future world. The final pillar of the program is learning to learn: New perspectives and practices in teaching and learning. It aims to discover new and emerging teaching and learning approaches that help learners develop relevant cognitive, social and emotional skills to live and work in an age of disruption. WISE summit 2017 highlighted that the pace of scientific and technological development continues unabated. Constant advances in artificial intelligence, automation and biotechnology have the potential to dramatically overturn long-held assumptions about what it means to be human. (Varghese 2017)

6.6. World Innovation Summit for Health (WISH)

WISH was incepted in 2013 as a global healthcare community dedicated to capturing and disseminating the best evidence-based ideas and practices. It is a solution-focused establishment which aims to create and disseminate world-class, evidence-based content and knowledge, face the most pressing global healthcare challenges, and influence healthcare policies locally and globally. Its core values include collaboration, mutual trust and respect, generosity (sharing and giving) and transparency at all times. WISH has held three summits since its inception; in 2013, 2015, and 2016, and the fourth summit will be held from 13-14 November 2018. More than 1,000 leaders and healthcare delegates and experts from over 100 countries have attended previous summits including more than 50 ministries of health that oversee healthcare policy for more than 2 billion people, and representatives of major international organizations such as the United Nations, the European Union, the Carter Center, the Bill & Melinda Gates Foundation, and the Rockefeller Foundation. (WISH n.d)

6.7. Qatar Foundation Annual Research Conference (ARC)

QF began organizing its ARCs in 2010 with a vision that research and innovation are the keys that unlock discovery's doors to strengthening societies and achieving the most ambitious goals. It has become a platform where aspiration, expertise, and pioneering spirit meet, where challenges become opportunities to improve lives, and where drive and direction come from the templates of inspiration, Qatar National Vision 2030, and the Qatar National Research Strategy (QNRS). Therefore, each ARC represents a unique yearly opportunity for knowledge sharing and partnership to boost Qatar's research and innovation agenda. The Conference usually take place in March of every year at Qatar National Convention Center (QNCC) in QF Education City in Doha. This year ARC'18 is the 9th edition and it was held from 19-20 March 2018 under the theme 'R&D: Focused on Priorities, Delivering Impact'. It endeavored to pursue the vision of developing Qatar into a leading center for research and development excellence and innovation. ARC'18 featured thought-provoking panel discussions and technical presentations, where leading experts shared constructive experiences and innovative approaches aimed at addressing critical issues facing Qatar and the region. Her Highness Sheikha Moza bint Nasser, Chairperson of Qatar Foundation, and Her Excellency Sheikha Hind bint Hamad Al Thani, Vice Chairperson and CEO of Qatar Foundation, together with other government ministers and dignitaries, and about 2,600 delegates from Qatar and around the world have attended ARC'18. In order to consolidate the management of all QF research development and innovation (RDI) activities into one executive position, H.H Sheikha Hind announced the establishment of a nationally-focused Research, Development and Innovation (RDI) Council which consist of government representatives, RDI stakeholders from the nation's key sectors, and experts from academia and industry. The Council is tailored to the specific needs of Qatar while drawing on international examples of best practice. It will be led by Dr Richard O'Kennedy and it aims to bring together the stakeholders to provide direction and guidance on all RDI efforts, ensuring alignment to national priorities in order to contribute to major national RDI decisions collaboratively. (Qatar Foundation ARC n.d) The ARC'16 could be a another illustrative example which is worth mentioning here. It was held at QNCC from 22-23 March 2016 under the theme 'Investing in Research and Innovating for Society'. ARC'16 emphasized that strategic investment in research and development is instrumental for the future of Qatar and global society. More than 2,000 people including dignitaries, senior officials, and delegates have attended the conference. Her Highness Sheikha Moza bint Nasser, Chairperson of Qatar Foundation, addressed the conference and highlighted that the Arab world's investment in research and development is minimal compared with the Western

countries and Eastern Asia. She considered this as a dilemma, which requires immediate action and explained how QF plays a significant role in responding to the necessity of building Qatar's knowledge base society. ARC'16 is a showcase of how this is being produced and supported within QF from the breakthroughs made by its research institutes, to the enabling effect of QF R&D entities Qatar National Research Fund (QNRF) and Qatar Science & Technology Park (QSTP). According to its organizers, the conference was a magnet for the national, regional, and global research community, and a platform for strengthening the chain connecting the many vital elements that progress basic research to innovation. It also provided researchers from all over the world with the tools that will enable them to share knowledge and inspire future generations. ARC'16 also showcased exemplars of pioneering research and impactful innovation developed within QF, such as Masarak which is an intelligent traffic monitoring and navigation application developed by Qatar Mobility Innovations Centre (QMIC), tenant of QSTP, in partnership with the Ministry of Municipality and Planning. the QF R&D's Best Innovation Award is usually awarded to the winner during the conference. The Award winner was Dr Adnan Abu Dayya, Executive Director and CEO, QMIC for his innovative project on tailored technology which is designed to make roads safer, while providing the basis for a homegrown technology-based industry built around intelligent transport. The value of this project lies in addressing national mobility strategies, supporting mega-projects, creating economic value, and eventually creating a high-tech export industry. ARC'16 also included the winner of QF R&D's Best Research Project Award, presented to Dr Shehab Ahmed from Texas A&M University at Qatar for his work in developing power electronics and systems for integrating renewable energy into Qatar's power grid. In this way, ARC'16 exhibited how the pursuit and creation of innovation is being embraced at all levels and ages across Qatar, within an ambitious research and innovation culture that develops the human capacity required for success. Experts participating in ARC'16 largely agreed to the concept that 'excellence breeds excellence', emphasized on the need for having enough high-quality talent to execute innovation that can be transformed into economic value, and stressed on the globalized nature of research and innovation as well as its trans-sectorial and disciplinary nature that requires collaboration and partnership at the local, regional and international levels. ARC'16's audience where representatives from QF member HBKU and its three research institutes namely QBRI, QCRI, and QEERI. They explained the exchange of knowledge can address Qatar's Research Grand Challenges and propel Qatar's knowledge-based economy. The integration of the annual QNRF Forum with ARC'16 crystallized the research funding entity's development and achievements in the 10 years since its establishment and visualized the way ahead for the research that emanates from, and is catalyzed by, QF and Qatar. ARC'16 has manifested an investment in research and innovation that brings the future into ownership. (Qatar Foundation 2016)

7. iCTQatar

The ictQatar Strategy is to actively leverage ICT to support the realization of Qatar's overall national development goals and position Qatar as a leading knowledge economy enabled by ICT by 2015. It has achieved 100% in three objectives; double the ICT Workforce, Double the ICT sector's contribution to GDP and Achieve Wide accessibility and effectiveness of all key government services. Qatar rank 2 globally after Singapore in government prioritization of ICT and effective use of ICT in government. it has almost reached 100% of households and businesses in broadband penetration, and the telephone fixed line and mobile cellular telephone subscribership and users exceeds 175 telephones per 100 persons. ictQatar has progressed immensely in content digitization and creation by converting printed material to digital content and publish them online and creation and publishing of born-digital content. It has been working on attracting, promoting and exposing of young talent to the digital content realm. ictQatar has also contributed to laws and regulations by initiatives such as ICT Regulatory Framework, Consumer and Digital Rights Laws and Green ICT Policy Instruments & Guidelines. (ictQatar Strategy n.d) in 2016 ictQatar was merged with the Ministry of Transportation to form the Ministry of Transportation and Communications (MOTC). MOTC's main focus was the Qatar Smart Nation program (QSNP), a 5 year USD1.64 billion initiative launched to develop Qatar's ICT infrastructure, and transform Doha into one of most connected cities globally. QSNP aims to harness technology and innovation to improve quality of life and help drive sustainable economic development across five priority sectors: (a) Transportation Objectives: Seamless mobility, searchable city, universal access, and safe journeys, (b) Logistics Objectives: Connected logistics, digital workplace, dynamic delivery, and empowered recipients, (c) Environment Objectives: Sustainable resources, digital urbanization, environment stewardship, and connected farming, (d) Healthcare Objectives: Healthcare on-demand, extended care, seamless hospitals, and connected wellness, and (e) Sports Objectives: Active nation, augmented game experience, competitive athletes, and connected fans. Individual government agencies including the Ministry of Interior, Ministry of Finance, and Ministry of Municipalities and Environment continue their respective "digitization" strategies, as part of Qatar's E-government 2020 objective.

Total ICT spending in Qatar stood at US$1.9 billion in 2016, with expected growth of 10% in 2017,

largely due to increase in the government's requirement for ICT services including Smart City Solutions, Cyber Security, E-commerce, E-Education, E-Health, Financial Technology and E-Government Solutions. (Export.GOV n.d.)

8. Challenges Of Qatar's Knowledge Society

Qatar's transition toward knowledge society is facing grand challenges. In the following paragraphs, the author focuses on key challenges to Qatar knowledge society:

8.1. Education and training

Qatar spends 3.5% of its GDP on education, the Permanent Constitution explicitly emphasize on sound education and innovation in research, and the National Vision 2030 deals with education as power and the prime drive for human capital building and future prosperity. However, there are numerous challenges that face Qatar's endeavors to achieve world-class education, training and cultural enhancement. Qatar aspires to realize its national vision in full by having its people highly educated and capable of driving the different aspects of life toward knowledge society. The education system has to encourage analytical and critical thinking, as well as creativity and innovation. It has to promote social cohesion and respect for Qatari society's values and heritage, and advocate for constructive interaction with other nations. The Qataris need to put more efforts in knowledge application to Qatar society, and knowledge production particularly innovative research that is needed for the economy. The unsustainable population growth, which is principally caused by the influx of migrant workers and their families and children, requires offering quality education opportunities and services and the necessary funds, human resources, and infrastructures. One of the challenges which is related to this, is preserving the native language in all skills as Arabic is the official language of instruction at public schools and universities. However, English language use is growing and it is a requirement for some courses of study. While textbooks are written in modern standard Arabic, most teachers in Qatar speak an Arabic dialect such as Egyptian and Syrian. This has affected the Qatari student language abilities and perhaps created more burden in speaking and using the standard Arabic language in knowledge acquisition, production and dissemination. The declining interest in mathematics and science in Qatar's schools and colleges and the low graduation rates and decline in enrolment in science and engineering based specialties in the universities lead to severe shortage of highly skilled Qataris is also a challenge for the transition to knowledge society. Moreover, there is a challenge in providing the necessary communication, coordination, exchange, and synergetic relationships among the between the higher education institutions because they work independently without strong coordination and there are no mechanisms of collaboration to improve the quality in educational programs, research and other areas in addition to the absence of accurate data and information on education and training. This has created duplication of efforts and has reduced the effectiveness in education businesses. Furthermore, Qatar has invested billions of dollars in attracting worldly renowned universities to open branches in Doha and prepare the Qataris for the job market as well as for being global citizens. There are some challenges in this regards including Qatar's ability to combine or integrate the IBCs and the national higher education institutions to make it a successful and sustainable path for the future of higher education and science in Qatar. This challenge has much to do with removing the attitudinal and structural barriers before education and knowledge management. Another challenge is also the accessibility of IBCs higher education especially for members of migrant families, taking into consideration some gender related issues and sensitivity, and the tenuous roles assumed and fixed-term contracts provided to expatriate university professors and researchers. Supporting the IBCs to establish a robust scientific environment in their niche area of expertise for the future wealth and well-being of Qatar society is also one of the significant challenges. Creating a break in the casual link between work and reward where students expect reward without necessarily having to work hard to attain it is a challenge especially in view of the fact that expatriate teachers and university professors might compromise the academic standards and tolerate such attitude because of fear from bad feedback from students which could potentially lead to nonrenewal of contracts. Qatar spent enormous amount of money on the education infrastructure such as new university and school buildings, libraries and laboratories but the challenge now is to spend more on teachers professional development and welfare. Qatar is investing remarkably in training programs to the extent that almost all government employees are required to attend training, professional development programs, workshops, seminars, and short courses. These training programs are narrowed in their scope to cover very specific skills instead of a long-term apprenticeships that qualify the trainees for the knowledge society. (Ministry of Development Planning and Statistics 2018, 173-174; General Secretariat for Development Planning 2008, 13-16; Weber 2014, 64-77; Powell 2014, 256-266)

8.2. Economy diversification

Oil and gas are obviously depleted resources and their prices have been sharply declining in recent years inflicting heavy losses of revenues and consequently crippling the government capability in funding projects and creating uncertainties for national planning since the economy is essentially fuelled by hydrocarbon wealth. These two factors urged Qatar leaders to plan for developing the infrastructure by using the most

advanced technology and production methods in the existing oil and gas fields, creating new sources of renewable energy, diversification of economy, and encouraging recycling projects and systems to gradually reduce the dependency on hydrocarbon recourses. Moreover, Qatar lacks crude natural resources that are used in construction such as building roads, bridges, airports, and ports which absorb substantial portion of its budget to import them. For example, in April and May 2016, Qatar spent more than QR436 million (approximately US$120 million) on import of construction material. As it has been explained above, Qatar spends over US$2 billion on consuming ICT goods and services, however producing the required ICT that provide all what the economy needs in general remain one of the challenges. The private sector is also facing some challenges such as lack of policies that limit its ability of to enter the domestic market and compete and grow in it efficiently and effectively. Besides, while there are numerous numbers of banks and financial institutions in Qatar, entrepreneurs and small and medium business projects are facing difficulties and obstacles in securing finance for their new projects and economic activities. Moreover, the work environment, business and investment opportunities are dominated and monopolized by the public sector, giant companies, and business tycoons. Therefore, this unhealthy situation needs to be changed to enable the private sector and SMEs to play an essential role in contributing to the economy and achieving sustainable development. It is also important to highlight the lack of regional coordination and the state of competition between the GCC countries in the activities of organizing international exhibitions, civil and commercial air transport, aluminum production, iron, basic petrochemical products, and plastics. These challenges have become so complex because of the recent GCC crisis. (Ministry of Development Planning and Statistics 2018, 81-122; Secretariat for Development Planning 2008, 24-29; Weber 2014, 67-68)

8.3. Expatriates and workforce issues

Qatar's population is rapidly growing due to a sharp rise in the number of expatriate workers in the local labor market. These migrant short-term contract workers are critically needed for the immense urban development, and large-scale investment projects. This situation has led to a large increase in the ratio of expatriates to locals in the labor force, and a particularly sharp and unanticipated rise in the numbers of low and unskilled workers. More than 95% of these expatriates are concentrated in the private sector. The state is the primary employer of Qataris and only 0.5% of them work in the private sector. This situation made Qatar unique in the world in that over 86% of its population consists of foreigners and fostered institutional disorganization, lack of employee commitment, and the continual loss of the country's specific knowledge. It is obvious that the imbalanced composition of the population and in the disequilibrium in the structure and force of the labor market is affecting Qatar's transition toward knowledge society. Consequently, Qatar must determine a suitable size and quality of its expatriate labor force. It must weigh the consequences of recruiting expatriate workers particularly the potential negative impact on national identity, against the anticipated economic benefits that accrue from an increase in the numbers of foreign workers in the total labor force. Hence, the challenge here is how to choose a development path that is compatible with the targeted size and quality of expatriate labor that are determined by Qatar's leadership and people. The other challenge is how to up skill the Qataris in general and the females in particularly and develop their capabilities to engage in the labor market especially in the private sector in addition to linking education to training. Preparing sufficient numbers of qualified Qataris to meet the demands of the job market particularly in the private sector remain a challenge. (General Secretariat for Development Planning 2008, 7, 18; Ministry of Development Planning and Statistics 2018, 193-195; Weber 2014, 64-74)

8.4. Growth and uncontrolled expansion management

Qatar is moving in rapidity toward creating a solid ground for knowledge society. It has expanded immensely in economic activities and development projects. However, on one hand there are speed limits and on the other expansion has been described as uncontrolled. The over speed and uncontrolled expansion is potentially depleting the resources and burdening the economy particularly in view of the sharp decline in oil and gas revenues, the increase in the budget deficit, and the current Saudi-Led blockade since June 2017. These factors are derailing the country from achieving its targeted objectives and potentially lead to severe problems such as rapidly rising prices of goods and commodities, financial vulnerabilities, low and stagnant labor productivity, deterioration in project quality and completion, and environmental damage. Therefore, the challenge is how to develop and grow at a pace that is consistent with the realistic expectations of sustainable improvements in livelihoods and in the quality of life. It must target growth rates that are compatible with its capacity for real economic expansion. (General Secretariat for Development and Planning 2008, 6)

8.5. Good governance

While investigating the major challenges that face Qatar's transition toward knowledge society one can conclude that the weak governance system is the most challenging as it is almost seen in public and private sectors, and across areas and development projects. Good governance requires building strong and efficient administration and organizations, clarity and accuracy of roles and obligations, recruitment of qualified

employees who possess the right skills to provide excellent services and use the infrastructure efficiently. It also entails amendments of existing acts, legislation and enactment of new modern laws in different fields such as labor, immigration, private sector, environment, business and investment, and education, and patent. Providing relevant and accurate statistics and information databases in all fields are extreme importance to any planning, policy making, research and development efforts. Enhancing transparency in all affairs and the culture of continuous evaluation and improvement is also critical to moving toward knowledge society. (Ministry of Development Planning and Statistics 2018, 81-102; 173-251)

8.6. Balancing modernization and preservation of traditions

Preservation of cultural traditions is a major challenge that confronts Qatar knowledge society in a rapidly globalized and increasingly interconnected world. The rapid economic and population growth have created intense strains between the traditional and contemporary features of Qatari life. Current professional work patterns and pressures of competitiveness sometimes clash with traditional relationships that are based on traditional values such as trust and loyalty to kinship and friendship ties. Furthermore, the deep-rooted social values highly cherished by society, such as generosity, and tolerance, have been challenged by the globalization of greater freedoms, wider choices and advancing individualism and personal interests that accompany economic and social progress in the modern world. For instance the American branch universities in Qatar brought their culture and educational methods and exert a strong cultural impact on the country through their graduates who are very competent in entering the work force. Yet the challenge is how to be faithful to the QNV and balance between, or possibly integrate, the qualities of modern life with the country's values and culture to ensure smooth transition toward knowledge society. Should Qatar respond positively to this challenge, its modernization approach could be an exemplary model for other societies to follow particularly in the GCC region. (General Secretariat for Development Planning 2008, 4; Weber 2014, 63)

8.7. Balancing the needs of this generation and the needs of future generations

Qatar's sustainable move toward knowledge society requires a process to meet the needs of this present generation without compromising the needs of future generations. Compromising or threatening the rights of future generation to enjoy the natural resources is injustice. Therefore, the challenge is how to avoid the depletion of non-renewable and create new sources of renewable wealth. There are some sub-challenges related to this challenge most importantly the ineffective use of financial returns from hydrocarbon revenues especially that they are declining due to drop off in oil and gas prices. In addition, the overly aggressive economic development that could lead to economic overstress and risk, tipping the environmental scales irreversibly. Hence, the major challenge here is choosing the development path that carefully balances the interests of the current generation with the interests of future generations. (General Secretariat for Development and Planning 2008, 5)

8.8. Environmental sustainability

The population rise, urban expansion, and industrial activities in hydrocarbon and petrochemicals are the main factors that affect the environmental biodiversity and cause depletion and waste of natural resources, and climate change. Qatar is world's highest per capita CO2 emissions for its energy production over population reaching 40.46 tons per capita per year. It is generally admitted that any sustainable development approaches should not sacrifice the protection of environment on the account of the economic development. Development models often have negative effects on the natural environment. Environmental degradation can be reduced through investment in advanced technologies designed to minimize the damage caused by economic projects. Monitoring the sources of pollution such as the emission of carbon dioxide coming from the hydrocarbon and petrochemical industries, the huge number of means of transports, and dust coming from the construction projects as well as from the desert. Even with Qatar's best efforts, it is impossible to entirely avoid harming the environment, given a development model that primarily depends on hydrocarbon, petrochemicals and heavy industries. Qatar is already committed to enforcing international standards for environmental protection when designing and implementing its industrial projects. It is also committed to making its future path of development compatible with the environmental protection and conservation requirements and best practice. However, Qatar's efforts in protecting the environment is insufficient because it is a part of the Gulf region, which somehow forms one ecological system that is affected by the practices and activities of every country in the region. Thus, the challenge is how Qatar can do more and put better efforts to preserve the environment and encourage all of the Gulf States to make the environment paramount and effectively collaborate in protecting and conserving it. Qatar has also to address the challenges related to sustainable management of the natural resources particularly water and the sources of renewable energy such as the solar energy. (General Secretariat for Development Planning 2008, 8-9, 30-33; Ministry of Development Planning and Statistics 2018, 122, 282-283)

Conclusions

Qatar is a small country in geographical and population size but it is centrally located and equidistant from Europe, Africa and Asia. Despite its small size, Qatar enjoying a good position world's politics, media, economy and is steadily becoming a hub for quality education and international conferences. The discovery of oil and gas fields, together with the quality of leadership especially since the post-independence era have immense impact on the transition from traditional Bedouin tribal community to modern society. The late H.H Sheikh Khalifa Bin Hamad Al-Thani, the Father Emir H.H Sheikh Hamad Bin Khalifa Al-Thani and the present Emir of the State H.H Sheikh Tamim Bin Hamad Al-Thani will be remembered for their immense contributions to Qatar's development and prosperity. The ratification of the Permanent Constitution in 2004 and the launch of National Vision 2030 in 2008 have laid the foundation for Qatar's transition toward knowledge society. They have also mandated the government agencies, education and research institutions to be the engine that creates and drives the change. Qatar University, which is the national university of the country, is promoting excellence in education and scientific development of the Qatari society. It is steadily becoming a hub of modern education with excellent teaching and research records, highly qualified local and international staff, and graduates. Qatar Foundation for Education Science and Community Development is the largest organization in Qatar with a higher objective of 'Unlocking Human Potential'. The large scale investment in knowledge production and dissemination positioned QF to be a globally leading organization for excellence and innovation in research and development that brings enduring benefit to people that transcends sectarian and geographical boundaries. QF has proven its potential as the key driver of research, development and innovation through its large number of entities namely HBKU which offers diverse modern interdisciplinary programs. The IBCs of worldly renowned universities which are producing highly qualified graduates. The QSTP and QNRF that stand at the heart of knowledge production. In addition ARC, WISE and WISH which are very important platforms for knowledge dissemination locally and internationally. Besides, ictQatar made enormous efforts toward Qatar's transition toward knowledge society particularly through digital inclusion, digital content ICT human capital, modernization of the legal and regulatory framework and telecommunications infrastructure. The construction of knowledge society obviously takes time but what could expedite the transition is the ability to identify at least the main challenges and take the appropriate action to overcome them. This research has identified eight major challenges. These challenges relate to reform and development of education and training, diversification of the economy, resolve the expatriate and workforce issues, and efficient management of growth and uncontrolled expansion. Another set of challenges lays in good governance, balancing between modernization and preservation of traditions, balancing the needs of current generation and the needs of future generations, and sustain the environment. The possible impacts of this research is the value that it could bring in exploring Qatar's development from traditional to modern knowledge society. It also provides the most up-to-date data and information about Qatar's knowledge society constituents and their role and contributions. The analysis of the specific key challenges could also be of great value to political leaders and policy makers in Qatar. Besides, the research could potentially contribute to the study of knowledge societies cases and challenges especially in the GCC and Middle East region. This research is an attempt to explore the case of Qatar within the means, time frame and scope of the research. Therefore, future researches could focus on the systematic evaluation of Qatar's achievements toward becoming knowledge society since the launch of the National Vision 2030. Another study could address Qatar's response to challenges in transitioning toward knowledge society. Other imminent researches could address fundamental questions including how do Qataris acquire information and transform it into knowledge? does ICT empowered the Qataris to enhance their livelihood and contributed to the social and economic development of their community? To what extend has the state guided and coordinated its legislative, executive and judicial branches and empowered businesses, nonprofits, academia, other non-state actors to enhance the knowledge society?

Table 1. Qatar Foundation Key Entities

Entity	Established
Qatar National Research Fund (QNRF)	2006
Qatar Science and Technology Park (QSTP)	2009
World Innovation Summit for Education (WISE)	2009
Annual Research Conference (ARC)	2010
Hamad Bin Khalifa University (HBKU)	2010
World Innovation Summit for Health (WISH)	2013

Source: Qatar Foundation Entities. n.d.

Table 2. International Branch Campuses in Qatar

Institution	Home Campus	Field	Location in Doha	Established
University College London (UCL)	UK	Museum Studies	Education City	2012
HEC Paris	France	Business	Education City	2012
North Western University	Illinois, USA	Journalism	Education City	2008
University of Calgary	Alberta, Canada		Muraykh	2007
Georgetown University School of Foreign Service	Washington DC, USA	Foreign Affairs	Education City	2005
Carnegie Mellon University	Pennsylvania, USA	Computer Science	Education City	2004
Texas A&M University	Texas, USA	Engineering	Education City	2003
Weill Cornell Medical College	New York, USA	Medicine	Education City	2001
College of the North Atlantic	Newfoundland & Labrador, Canada	Applied Sciences	West Bay	2001
Stenden University	The Netherlands	Tourism and Hospitality	Al Rumaila West	2000
Virginia Commonwealth University	Virginia, USA	Design	Education City	1998

Source: Ministry of Education and Higher Education n.d.; Powell 2014, 256.

References

- Almeezan Qatar Legal Portal. n.d. "The Permanent Constitution of the State of Qatar." Retrieved January 11, 2018. www.almeezan.qa/LocalPdfLaw.aspx?Target=2284&language=en
- Al-Sharqawi, Ahmad. 2013. *Estratijiyat Al-Tanmiya fi Qatar(The Development Strategy in Qatar).* Cairo: Al-Raya Center for Publishing and Information
- Central Intelligence Agency. n.d. "World Factbook: Qatar." Last updated March 14, 2018. https://www.cia.gov/library/publications/the-world-factbook/geos/qa.html
- Export GOV. n.d. "Qatar Information and Communication Technology." Accessed January 13, 2018. https://www.export.gov/article?id=Qatar-Information-and-Communication-Technology
- General Secretariat for Development Planning. 2008. *Qatar National Vision 2030*. Doha: General Secretariat for Development Planning
- Hamad Bin Khalifa University. n.d. "About Hamad Bin Khalifa University." Accessed March 8, 2018. https://hbku.edu.qa/en/about-hamad-bin-khalifa-university
- Hamad Bin Khalifa University. n.d. "Academics." Accessed March 8, 2018. https://hbku.edu.qa/en/academics
- Hamad Bin Khalifa University. n.d. "Research." Accessed March 8, 2018. www.hbku.edu.qa/research
- Hamdan, Mohammed. 2012. *Judhur Qatar Al-Tarikhiya (Historical Roots of Qatar).*Cairo: Al-Raya Center for Publishing and Information
- Hukoomi, Qatar E-Government. n.d. "About Qatar." Accessed March 8, 2018. http://portal.www.gov.qa/wps/portal/about-qatar
- ict Qatar. n.d. "Transforming the State of Qatar Toward a Knowledge Base Economy." Retrieved January 13, 2018. https://www.mdps.gov.qa/en/media/events/Documents/ictQATAR.pdf.
- *International Monetary Fund. n.d. "Qatar." Accessed March 20, 2018.* http://www.imf.org/en/Countries/QAT#countrydata
- *Ministry of Development Planning and Statistics. n.d. "Qatar in Figures 2017." Retrieved March 10, 2018.* https://www.mdps.gov.qa/en/statistics/Statistical%20Releases/General/QIF/Qatar_in_Figures_32_2017_EN.pdf
- *Ministry of Development Planning and Statistics. (2018). Estratijiyat Al-Tanmiya Al-Wataniya Al-Thaniya Li-Dawlat Qatar 2018-2022 (Qatar Second National Development Strategy 2018-2022). Doha: Gulf Publishing and Printing Company*
- *Ministry of Development Planning and Statistics. n.d. "The Population Policy of the State of Qatar 2017-2022." Retrieved March 10, 2018.* https://www.mdps.gov.qa/en/statistics/ Statistical%20Releases/ Population/ Population/2017/population_policy_2017_EN.pdf
- Ministry of Education and Higher Education. n.d. "List of Higher Education Institutions in the State of Qatar." Retrieved March 10, 2018.http://www.edu.gov.qa/En/ structure/HigherEducation/ Universities _doc_En/HigherEducationInstitutionsInTheStateOf Qatar.pdf

- Powell, Justin J. W. 2014. "University Roots and Branches between 'Glocalization' and 'Mondialization': Qatar (Inter)national Universities." In *Education for a Knowledge Society in Arabian Gulf Countries*, edited by Alexander W. Wiseman, Naif H. Alromi and Saleh Alshumrani, 253-276. United Kingdom: Emerald Book
- Qatar Central Bank. n.d. "Central Bank Report 2016." Retrieved March 7, 2018. http://www.qcb.gov.qa/English/Publications/ReportsAndStatements/AnnualReports/QCB%20Annual%20Report%202016_EN.pdf
- Qatar Foundation Annual Research Conference. n.d. "About ARC." Accessed March 15, 2018. https://www.qf-arc.org/en-us/About_ARC
- Qatar Foundation Annual Research Conference. n.d. "Past Conferences." Accessed March 15, 2018. https://www.qf-arc.org/en-us/ARC-18/Past-Conferences
- Qatar Foundation Telegraph. 2014. "QScience.com Journals Primed For World Stage." QF Telegraph, March 24, 2014. https://www.qf.org.qa/content/qf-telegraph/issue-107/qscience-journals-primed-for-world-stage
- Qatar Foundation. 2016. "Advancing Qatar's Ambitions." Accessed December 13, 2017. https://www.qf.org.qa/content/the-foundation/issue-88/advancing-qatar-ambitions
- Qatar Foundation. n.d. "About Qatar Foundation." Accessed March 11, 2018. https://www.qf.org.qa/about/about
- Qatar Foundation. n.d. "H.H Sheikha Moza Attends ARC'18." Accessed March 19, 2018. https://www.qf.org.qa/news/sheikha-moza-attends-arc18
- Qatar Foundation. n.d. "Qatar Foundation Entities." Accessed March 11, 2018. https://www.qf.org.qa/qf-entities/qf-entities
- Qatar National Research Fund. n.d. "About Us." Accessed March 15, 2018. https://www.qnrf.org/en-us/About-Us/Vision-Mission
- Qatar National Research Fund. n.d. "Outcomes." Accessed March 15, 2018. https://www.qnrf.org/en-us/Outcomes/Success-Stories
- *Qatar Science and Technology Park. n.d. "About QSTP." Accessed January 13, 2018.* https://qstp.org.qa/about/
- *Qatar Science and Technology Park. n.d. "Innovation & Incubation, Funds, Park & Free Zone." Accessed March 26, 2018.* https://qstp.org.qa/
- Qatar University. n.d. "About Qatar University." Accessed March 5, 2018. http://www.qu.edu.qa/about
- Qatar University. n.d. "Colleges." Accessed March 5, 2018. http://www.qu.edu.qa/about/colleges
- Qatar University. n.d. "Research Centers." Accessed March 5, 2018. http://www.qu.edu.qa/about/research-centers
- Qatar University. n.d. "Vision and Mission." Accessed March 5, 2018. http://www.qu.edu.qa/about/vision-and-mission
- QScience.com n.d. "Our Journals." Accessed March 26, 2018. http://www.qscience.com/page/author_ services_journals
- QScience.com. n.d. "About Us." Accessed March 26, 2018. http://www.qscience.com/page/about.
- Varghese, Joseph. 2017. "WISE Summit 2017 to Focus on Three Pillar Programme." *Gulf Times*, September 4, 2017. http://www.gulf-times.com/story/562670/WISE-summit-2017-to-focus-on-three-pillar-programm
- Weber, Alan S. 2014. "Education, Development and Sustainability in Qatar: A Case Study of Economic and Knowledge Transformation in the Arab Gulf." In *Education for a Knowledge Society in Arabian Gulf Countries*, edited by Alexander W. Wiseman, Naif H. Alromi and Saleh Alshumrani, 59-82. United Kingdom: Emerald Books
- WISE. n.d. "Who we are." and "What we do." Accessed March 7, 2018. https://www.wise-qatar.org/
- WISE. n.d. "WISE Reports." Accessed March 7, 2018. https://www.wise-qatar.org/reports
- World Economic Forum. n.d. "Human Capital Report 2016." Retrieved March 8, 2018. http://reports.weforum.org/human-capital-report-2016/files/2016/06/QAT.pdf
- World Innovation Summit for Education. n.d. "Research Report." Accessed March 7, 2018. https://www.wise-qatar.org/reports
- World Innovation Summit for Education. n.d. "Who we are" and "What we do." Accessed March 7, 2018. https://www.wise-qatar.org/
- World Innovation Summit for Health. n.d. "About WISH." Accessed March 25, 2018. http://www.wish.org.qa/about-wish/wish/
- World Intellectual Property Organization. n.d. "Qatar." Accessed March 26, 2018. http://www.wipo.int/ipstats/en/statistics/country_profile/profile.jsp?code=QA

THE WEST AND THE LIMITATIONS OF LIBERAL INTERNATIONAL ORDER IN THE POST-CRISIS ERA

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Abstract

Recent geopolitical and economic pressures are putting into question the sustainability of the post-1945 liberal international order, as currently conceived. These turns of world politics have vanished the dreams of the liberal international order's regulating and integrating the entire world economically and politically. Instead, we find ourselves in a moment of transition, and if the leading countries of the existing order do not remedy this, we are moving towards a new order that might not be based on the set of western interests and values that shaped the international order in 1945 and 1990.

This article aims to analyze the evolution of two elements. Firstly, it examines some of the pillars on which the international liberal order was built and how their erosion, in the post-Cold War years, has conditioned the future of the liberal international order. Secondly, it explores the impact of the assumption of two false premises since the end of the Cold War until now: the existence of a unique (and American) interpretation of political liberalism for the 21st century and the indissolubleness of the economic and political sides of liberalism.

Keywords: *liberal international order, post-Cold War politics, U.S. foreign policy, transatlantic relations.*

1. Introduction: The Cold War context of the liberal international order

"The United States has the opportunity and, I would argue, the solemn responsibility to shape a more peaceful, prosperous, democratic world in the 21st century. The story of the 21st century can be quite a wonderful story. But we have to write the first chapter."[1]

W. J. Clinton.

Since 1945, the United States and its allies have exported their values and interests through the formation and preservation of a liberal international order. There is a consensus around the idea that although the United States and the countries of the West have sometimes taken incoherent actions, their values have prevailed as the dominant global regulatory principles for decades.

This article argues that the postwar order is under significant stress from a geopolitical and an economic perspective, owing to western countries' miscalculations in their strategic policies.

First of all, the construction of a minimum conceptual framework is certainly required. In principle, an international order is defined by a set of rules and institutions that regulate the actions of the key actor in the international system. Ikenberry defines it as a set of "governing arrangements between states, including its fundamental rules, principles, and institutions" (Ikenberry 2001,23).

Post-1945 liberal international order constitutes a complex mix of multilateral institutions and a global trading system, both governed by western values. Understanding 'liberal' in its philosophical sense, coming from the conception of the political theory of Hobbes and Locke, the order includes free market and fundamental individual political rights. According to these liberal norms, sovereign states could resolve their political and economic differences and enjoy a shared prosperity. Institutions such as the United Nations, the World Bank, the International Monetary Fund or the World Trade Organization, as well as many regional organizations like the ASEAN or NATO, were designed to guarantee the western actions and principles' leadership. The logic behind this system was that openness, through economies, societies and open policies defended by a collective security network, would contain the Soviet Union. The ideologists of this system of containment hoped that when the ideological dichotomy of the Cold War ceased, these principles could be extended to the whole world.

While the Cold War as a global system did not determine, even in its heyday, everything that was happening in international relations, it did influence most of the global issues. At its core, there was an ideological competition between capitalism and socialism, with each side dedicated to sustaining and expanding its socio-economic system through certain forms of political and economic governance. It was a bipolar system of zero-sum, in which none of the main protagonists foresaw a lasting commitment with the other and whose intensity transformed its nature into dangerous, given the intention of both parties to destroy the opponent (Wright 2017, 4). With the end of this conflict and the dissolution of the Soviet bloc, an almost euphoric wave of optimism swept over the western political world. Shawcross described the triumph of politics and reason as: "There was a belief

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[1] William J. Clinton, "Remarks on Foreign Policy". Speech given by President Clinton in San Francisco, February 26 1999.

that […] much of the world could be put to right […], [and] reason, not politics, might prevail" (Shawcross 2000, 31). In relation to the consolidation of the liberal international order, there was a consensus, certainly naive, both in conservative and progressive positions, that peace could reign in a "new world order" based on Western values (Hyland 1999).

2. Post-Cold War and the management of hegemony

Inspired by a Wilsonian fervor and seeking to end civil wars and to put limits on governments that massively violated the most basic rights of their citizens, a new policy was adopted. This was reflected in the early nineties' U.S. national security strategies and in the European Union first Common Foreign and Security Policy, and publicly expressed by the U.N. Secretary-General, who declared the triumph of morality: "We are clearly witnessing what is probably an irresistible shift in public attitudes toward the belief that the defense of the oppressed in the name of morality should prevail over frontiers and legal documents" (Scheffer 1992, 4).

Concentrated on a Kantian peace, the United States, and its allies, consolidated the post-1945 international relations framework, expanding the core community of liberal democracies and advocating for a free-market system. The members of this core community acted as promoters of democracy, confident in the success of transatlanticism and the globalization of its ideological pillars. An excellent example of western confidence in the transformative capacity of democracy was the management of China's entry into the World Trade Organization. During a turbulent decade regarding intra-state conflicts, the world witnessed the beginning of the implementation of the new world order. It expanded the scope of the liberal international order and ensured the globalization of a set of economic and political values. The optimism of the West about its transformative potential led to expanding the concept of westernness, with the case of Eastern Europe as paradigmatic. Parallelly, concepts such as "transatlantic relations" became key elements for the image of a prosperous West, creative and united. This optimism led countries like the United States to acquire new strategic concepts in their strategies, revaluing Cold War time mechanisms such as NATO or the OSCE.

Academia on both sides of the Atlantic was for more than a decade devoted to explaining the nature of this period. Some scholars described positively how the US-led liberal international order was becoming the basic architecture for international politics, and how its norms gained sympathy around the world. Anti-interventionist scholars, like Bacevich, argued that successive post-Cold War administrations adhered to a well-defined strategy of openness, motivated by the imperative of economic expansionism and fostering an open and integrated international order (Bacevich 2002, 79). Other authors were recurrently accusing this order of being an imperial or unipolar hegemony not capable of replacing the Cold War containment with an effective and attractive new basis for its foreign policy. Todd argued that at a time when the rest of the world was discovering that it could get along without American and western leadership, rising leaders were experiencing a growing sense of accord and becoming more boldly defiant toward unilateralism (Todd 2003).

Whether strategies to maintain U.S. and western hegemony were implemented through unilateralism or re-enforcement of the international order mechanism, the hope of the 1990s that so naively led some to declare the end of history (Fukuyama 1993), rested on two false premises: the existence of a unique (and American) interpretation of political liberalism and the indissolubleness of economic and political liberalism.

2.1. The western vision of the world order

The first false premise lies in the mistaken belief that there was a single vision within the West about the management of global issues, in terms of both values and objectives. The culminating moment in which the falsehood of this premise manifested was 9/11. With the adoption of a global anti-terrorism policy, the Bush administration found itself in a situation into a situation famously described by Robert Kagan. He described how Western nations no longer shared a common vision of the world. Especially, he argued, regarding the utility of power and the morality associated with its use. Kagan argued that Europe and the U.S., as major elements of what we call the West, had developed fundamentally different views about what the world was like and how it should be (Kagan 2004).

It is true that for a decade, this emerging division in the interpretation of the present and future of the liberal international order was seen by many as an opportunity to debate and confront opinions and policies. Behind that discussion, there was confidence that emanated from a common concept of the West and trust on the transatlantic bridge firmness. Nevertheless, the end of the Cold War clearly marked the beginning of a transatlantic discussion. Some opted to live by values expressed through norms, and some others by a chaotic unilateral use of what Nye called hard power (Nye, 2005). The political expression of this duality was the division over the intervention in Iraq, decided by President Bush and supported by Prime Minister Blair and President Aznar.

More than a decade after the implosion of the western solid cohesion, the relationships between Europe, the United States and other western allies, such as India or Japan, are now turning more unfriendly and distrustful than ever. Low-level politics, the disappearance of the ideological debate, the substitution of political deliberation for populism, and the absence of strategic priorities are leading towards an erosion and a possible dissolution of the post-war consensus that globalized in the nineties and made the

idea of a worldwide extension of the liberal international order possible.

Western governments, which have led the international order for seven decades, have been clumsy or reluctant to recognize this. As Thomas Wright expressed it, "the world had become much more nationalist and competitive" (Wright 2017), and divided westerners have turned their attention to this change. For some scholars and policy-makers, the conclusion is even worse. Despite disagreements between the United States and its allies for decades on how best to support liberal democracy abroad, the idea of permanent engagement as the only possibility for the liberal international order has remained alive. Nevertheless, many argue that this is no longer an undiscussed truth for leading western countries.

One of the consequences of this lack of commitment is the loss of leverage over the rest of the international system actors. As a result of abandoning a common set of priorities, some of the basic political foundations have been put at stake, resting undefended. Liberal democracy, probably one of the most fundamental principles of the international order exported by the West, is facing its most serious crisis in decades. A recent report produced by Freedom House explains how democratic basic tenets, such as guarantees of free and fair elections, the rights of minorities, freedom of the press and the rule of law, are at risk around the world. The report shows how non-western regional powers have taken advantage of the retreat of leading democracies to escalate repression at home and to export their anti-western influence abroad, compromising the future credibility of multilateral institutions and the commitment of western countries to defend their order.

On top of that, from trade or security disputes to climate change, national interests have re-captured primacy. We can provide some examples of this as the Brexit assaults a pure western macro-project: the EU; the triumphant populisms in the European and American elections, which make us wonder whether the democratic nature of our system is no longer un-mutable; the rejection of the TTIP and TPP and the attempt to revert NAFTA, which separates the political and economic faces of liberalism; and finally, yet importantly, the United States opening a selfish and short-minded rationale of why it should remain the global stability provider if the costs of maintaining that order are much larger than the benefits.

Some authors, such as Legvold, explain how, on one the hand, the negative perception of the globalization by the constituencies of the western liberal democracies have paved the way for public lack of commitment for the liberal international order (Legvold 2016). On the other hand, the possibility of challenging the status quo without facing the consequences has created a vacuum of power exploited by others. Conley has recently edited a good collective work describing how the Obama administration projected globally after the 2008 crisis, through a perhaps diffident and excessively multilateral foreign policy agenda, which Trump is minimizing. He refers to the existing situation as a new Cold War, with the participation of Russia, but also China, Iran, North Korea, etc. (Conley 2018). Others, like Westad, claim that while current international affairs continue being challenging, "they are a far cry from Cold War absolutes" (Westad 2018). It is true that frequent Cold War parallels come to our minds and remnants of the bipolar period are familiar to us, but the bases of international affairs have changed. If we want to draw parallelisms, we are much closer to 1871 than to 1963. What we are witnessing is probably a collective dereliction that falls as part of an end of an interregnum.

Trying to identify concrete expressions of how the West is facing consequences in the form of challenges to its dominant position, Grygiel and Mitchell have worked with the term "probes". These are described as aggressive measures against "the frontiers of the rival power's influence, where its interests are less pronounced, its power is at its farthest projection and its political clout at its weakest" (Grygiel and Mitchell 2016). Some examples of probes are the Russian intervention in Ukraine, the Chinese actions to expand its control over the South China Sea, the North Korean missile tests or the Iranian support to its proxies in Iraq, Syria, Lebanon or Yemen. The intention of these probes is to test the power and resolution of the United States (and Western allies like the EU or Japan). These movements have created conflictive situations that avoid direct military clashes, but ultimately seek the revision of the existing regional order.

In the case of China or Russia, although the motivation is shared, not all of these probes share the same strategy. On the one hand, Chellaney accurately identifies China's unilateral attempts to alter the regional *status quo* as an undisputable large threat to the international order (Chellaney 2018). What China has achieved in the South China Sea, says the author, "has significantly more far-reaching and longer-term strategic implications than, say, Russia's annexation of Crimea" if we analyze it in relation to its presence in Djibouti, Gwadar or the Maldives, examples of the effort to project Chinese blue-water components, clearly antagonistic to the US Navy traditional hegemonic role (Poulin 2016). On the other hand, Russian actions, while interfering in Western-dominated areas such as Crimea, are not only about territory, as they primarily pursue to contest the existing order. Putin observes the West-dominated set of rules and power distribution as a challenge to a self-perceived Russian role in the world. The interference in the US 2016 elections, the violation of fundamental principles of international law, the use of military and covert actions in Ukraine or Georgia, or its massive involvement in the Syrian war to uphold Bashar al-Assad's regime have clearly qualified Russia as a revisionist country, a large-enough actor, in the words of Haass, with "few if any qualms about overturning the status-quo" by whatever means it judges necessary

(Haass 2018). Notwithstanding the difference, these and other decisions, are sending the message that defiant unilateralism does not necessarily meet with strong reactions from the Western powers.

As these regional strategies are turning successful, the capacity of the West to maintain control of the international order reduces, and with it, the applicability of the values and norms that the US and its allies have traditionally protected.

2.2. Political and economic convergence

The second wrong premise behind western assumptions at the end of the Cold War was the assumption that economic integration would also stimulate political convergence globally. Thirty years after the instauration of the "new world order", economic and political liberalism have not proven to be indissolubly linked. Indeed, today rising powers in regions that were primarily targeted by western economic policies are actively seeking to review the distribution of power in their respective regions, trying to impose themselves by weakening the United States and its western allies.

Instead of contributing to consolidating the post-1945 liberal international order, the inclusion of non-western countries in in the order's economic mechanisms created the opposite result. New economic mechanisms, inspired by the ones consolidated by the western bloc before, were featured, this time characterized by an anti-western character. Again, the undisputable examples of this are Russia and China.

On the one hand, after the U.S. won the Cold War, attention on Russia dropped and the United States and its allies continued engaged and vigilant, but they lost an opportunity throughout the period that Russia needed to overcome the enormous economic challenges of transforming itself in a market economy. The call for a Russian economic integration and dependence, such as in the field of energy production and distribution, did not bring Russia closer to the international economic mechanisms, but instead, it created a regulatory vacuum that was very soon identified by Vladimir Putin, who utilized it to lead the Russians back to the old days.

On the other hand, Chinese billionaire initiative "Belt Road Initiative" (BRI), presented as the Chinese Marshall Plan, seeks to connect Asia, Europe and Africa by forming a complex network, using roads, harbors, railways, airports, transnational electric grids and pipelines. It constitutes an alternative investment solution that challenges the existing hegemony of the liberal western financial institutions, such as the World Bank or the Asian Development Bank. By promoting infrastructures, trade and new alliances at different levels, it develops a powerful parallel mechanism, outside the western orbit of control.

Luft brilliantly explains how for more than a century, the West has been trying to open China to the rest of the world and to integrate it with the global economy. For most of this time, China "held the door tightly closed, resisting foreign influence. The roles are now reversed as China attempts to mesh its economy and culture with the rest of the world". The BRI is China's mechanism for "withdrawing from its role as the United States' banker, shifting its capital expenditures from bonds to bridges, from IOUs to BTUs" (Luft 2017). By succeeding in this initiative, the BRI could stand firm as the organizing principle of a new Chinese grand strategy for the 21st century.

In face of these realities, leading western governments, and specifically the United States, are not responding by rethinking the initial strategy of economic liberalism inspiring political liberalism. Instead, confused by internal opposition and lack of strategic leadership, they are proposing counterproductive protectionist measures, like the ones being adopted by the Trump administration. This lack of American engagement will essentially allow others to disrupt the liberal international order, politically and economically, and to shape the future of global governance in ways that may be detrimental to western interests.

Conclusions

It is very likely that the United States and its allies will remain the most powerful countries for coming decades, but the electoral and political polarization may cause significant stress on the U.S.-led liberal international order. This order has survived important challenges over the past half-century without fatal damage, but now we are witnessing the unfolding of the consequences of two wrong premises of the 1990s. On the one hand, the emerging powers, mainly Russia and China, have provoked tensions in the international order getting ready to occupy the political and economic spaces that traditionally stronger states have abandoned or neglected.

While further analysis should be focused on foreseen Russian and Chinese actions' catalytic potential to accelerate the collapse of the order, it is required to continue evaluating the extension and the long-term effects for the members of the combined West, because of their important policy implications. The US traditional allies, like Germany, Japan and Australia, crucial pillars of the liberal international order, are confused and make their own calculations about how long they can count on the United States for political and military support. Parallel to the lack of internal coherence and reliance, an increasing number of non-western governments have lost confidence in the western rules-based system, drawing up their own containment plans.

Attempting to minimize or temporarily neutralize any challenge requires a radical turn from current trends of western disengagement. Coalitions' pooling resources to confront common adversaries is probably the only way to keep the balance of power and maintain the basics of nowadays international order for at least a couple of decades. It seems eminently feasible as

European countries feel overwhelmed and exposed to Russia's aggressive national security policy implementation. Same in Asia, where most of the former allies, and not only Japan or Korea, feel equally intimidated by China. Even in the Middle East, taking into account the complexity of the Iranian-Saudi power battle, a Western joint venture would clearly improve, at least, the stabilization of the region.

Precisely because the future of the liberal international order is unclear, the United States and its allies have a strategic decision to make about committing the resources and running the risks. Both are required to confront the revisionism of the liberal international order.

The U.S.-created system of alliances has been the cornerstone of the order for seventy years, but the attitude and nature of U.S. and western leadership will have to change to prolong the current order, developing strategies for future shared engagements and the enforcement of rules, while creating fair mechanisms to accommodate the rising powers, is the only possibility.

References

- Bacevich, Andrew J.. 2002. American Empire: The Realities and Consequences of U.S. Diplomacy. Cambridge: Harvard University Press
- Chellaney, Brahma. 2018. "A New Order for the Indo-Pacific". Project Syndicate. Mar 9, 2018. Accessed April 5, 2018. https://www.project-syndicate.org/commentary/china-indo-pacific-security-framework-by-brahma-chellaney-2018-03
- Collins, Gabriel. 2017. Russia's Use of the "Energy Weapon" in Europe. Issue Brief. Baker Institute for Public Policy. Accessed April 5, 2018. https://www.bakerinstitute.org/media/files/files/ac785a2b/BI-Brief-071817-CES_Russia1.pdf
- Conley, Richard S. (ed.). 2018. Presidential Leadership and National Security. New York: Routledge
- Executive Office of the President of the United States. 2017. America First: A Budget Blueprint to Make America Great Again. Accessed April 5, 2018. https://www.whitehouse.gov/sites/ whitehouse.gov /files/omb/budget/fy2018/2018_blueprint.pdf
- Freedom House. 2018. Freedom in the World: Democracy in Crisis. Accessed April 5, 2018. https://freedomhouse.org/sites/default/files/01042018_FINAL_PressRelease_FIW2018.pdf
- Fukuyama, Francis. 1993. The End of History and the Last Man. New York: Free Press
- Gaddis, John L. 2005. The Cold War. A New History. New York: Penguin Books
- Grygiel, Jakub J. and Mitchell, A. Wess. 2016. The Unquiet Frontier. Princeton: Princeton University Press
- Haass, Richard. 2017. A World in Disarray: American Foreign Policy and the Crisis of the Old Order. London: Penguin
- Haass, Richard. 2018. "Cold War II". Project Syndicate. Feb 23, 2018. Accessed April 5, 2018. https://www.project-syndicate.org/commentary/new-cold-war-mainly-russia-s-fault-by-richard-n--haass-2018-02
- Hillman, Jonathan E. 2018. China's Belt and Road Initiative: Five Years Later. January 25, 2018. Accessed April 5, 2018. https://www.csis.org/analysis/chinas-belt-and-road-initiative-five-years-later-0
- Hyland, William G. 1999. Clinton's World. Remaking American Foreign Policy. London: Praeger. Scheffer
- Ikenberry, G. J. 2009. The crisis of American foreign policy: Wilsonianism in the twenty-first century. Princeton: Princeton University Press
- Ikenberry, G. John. 2001. After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order After Major Wars. Princeton: Princeton University Press
- Kagan, Robert. 2002. Of Paradise and Power: America and Europe in the New World Order. New York: Vintage Books
- Legvold, Robert. 2016. Return to Cold War. Cambridge: Polity Press
- Lind, Michael 2006. After the Empire. The Breakdown of the American Order. New York: Columbia University Press
- Luft, Gal. 2017. "Silk Road 2.0: US Strategy toward China's Belt and Road Initiative". Atlantic Council Strategic Papers. Washington DC: Atlantic Council
- Mandelbaum, Michael. 2017. Mission Failure: America and the World in the Post-Cold War Era. New York: Oxford University Press
- Mandelbaum, Michael. 2018. "America's Global Role in Question". The American Interest. March, 6. 2018. Accessed April 5, 2018. https://www.the-american-interest.com/2018/03/26/americas-global-role-question/
- Matthew Wallin. 2017. "U.S. Foreign Policy Toward Russia An Overview of Strategy and Considerations". American Security Project. November, 2017. Accessed April 5, 2018. https://www.americansecurityproject.org/wp-content/uploads/2017/11/Ref-0207-US-Foreign-Policy-Toward-Russia.pdf
- Mazarr, Michael J. e.a. 2017. Measuring the Health of the Liberal International Order. Santa Monica: Rand Corporation
- Nye, Joseph S. 1991. Bound to lead: The changing nature of American power. New York: Basic Books
- Nye, Joseph S. 2015. "Is the American century over?" Political Science Quarterly. vol. 130, num. 3. (Autumn): 393–400

- Nye, Joseph. 2005. Soft Power: The Means To Success In World Politics. New York: Public Affairs
- Nye, Joseph. 2009. "Get smart: Combining hard and soft power". Foreign Affairs. Num. 88(4):160-163
- Poulin, Andrew. 2016. "Going Blue: The Transformation of China's Navy". The Diplomat. April,15
- Scheffer, David J. 1992. "Challenges Confronting Collective Security: Humanitarian Intervention" in Post-Gulf War Challenges to the U.N. Collective Security System: Three Views on the Issue of Humanitarian Intervention. Washington DC: United States Institute of Peace
- Shawcross, William. 2000. Deliver Us From Evil, Warlords and Peacekeepers in a World of Endless Conflict. London: Bloomsbury
- Todd, Emmanuel. 2003. After the Empire. The Breakdown of the American Order. New York: Columbia University Press
- Westad, Odd Arne. "Has a New Cold War Really Begun?" Foreign Affairs. March, 7. 2018. Accessed April 5, 2018. https://www.foreignaffairs.com/articles/china/2018-03-27/has-new-cold-war-really-begun?cid=int-fls&pgtype=hpg
- Wright, Robert. 2017. All Measures Short of War. New Haven: Yale University Press

THE AZERBAIJANI OFFICIAL State DISCOURSE ON THE ARMENIAN-AZERBAIjANI CONFLICT: BLOCKAGES TO PEACE

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Abstract

The intractable conflict between Armenia and Azerbaijan, the first in a series of inter-ethnic wars to arise in the final years of the Soviet Union, has lasted for three decades and has gone through several violent episodes inflicting widespread death and destruction. Against the background of a long period of tried-and-failed resolution attempts, the conflict has led to the fostering of grievances, prejudice, long-lasting societal trauma and victimhood. Starting from these considerations, this paper seeks to emphasize the way in which, in the official state discourse, the Azerbaijani leaders concentrate mainly on their own traumas and victim status. This type of discourse sets off a unilateral solution to the conflict, considered the only right option, thus preventing any dialogue with the Armenian side, and implicitly any resolution of the conflict. From a methodological perspective, I have selected several official speeches belonging to the Azerbaijani leaders between 1994-2016 and held at various national and international forums. The content analysis of the Azerbaijani official speeches will be complemented by the data collected through semi-structured interviews with Azerbaijani experts in the field of International Relations during a field research to Azerbaijan. The paper concludes that trauma and victimhood as reflected in the official Azerbaijani state discourse function as blockages to peace and hinder any changes in the way Azerbaijani leaders represent the conflict and its resolution.

Keywords: *the Armenian-Azerbaijani conflict over Nagorno-Karabakh, intractability, trauma, victimhood, peace.*

1. Introduction

The Armenian-Azerbaijani conflict over Nagorno-Karabakh (NK) is an intractable conflict that has been lasting for three decades despite the various peace-making attempts undertaking by the international community for its resolution. Amidst occasional and violent flare-ups, this conflict represents a constant threat to the security of the state actors involved, of the encompassing regions and of the international system.

The specialized literature on the Armenian-Azerbaijani conflict abounds in political and legal explanations for its intractability as distinct from the psycho-social ones which have been less an object of scrutiny. Notwithstanding, this conflict contains a great share of psycho-social motivations[1] among which collective trauma and victimhood considered by scholars as having the potential to revive ancient animosities and to make the emotional issues in a conflict become as important as the real issues as stake.[2] Within the framework of an intractable conflict both sides seek to demonstrate that they are the only legitimate victim and suffered more. Thus a sense of collective trauma and victimhood is an inseparable part of the official discourse of the conflicting parties.[3] This paper seeks on the one hand to emphasize the way in which, in the official state discourse, the Azerbaijani leaders concentrates mainly on their own traumas and victim status, and on the other to point out the implications of such a discourse on the peace attempts. For this purpose I have selected the following 17 official speeches belonging to the Azerbaijani leaders between 1994-2016 and held at various national and international forums: President Heydar Aliyev's speeches at the United Nations General Assembly (UNGA) 22/10/1995 and at the Millennium summit 7/09/2000; Heydar Aliyev 's appeal to the Azerbaijani nation on the occasion of the third anniversary of the Khojaly "genocide", 25/02/1995, and the speeches held at the commemoration ceremonies dedicated to the victims of Khojaly, 26/02/1995 and 26/02/2002; President Ilham Aliyev's inaugural speeches from 2003, 2008 and 2013; President Ilham Aliyev's speeches at the official opening of Crans Montana Forum 23/06/2011, at the opening of the Guba genocide memorial established with the support of the Heydar Aliyev Foundation 18/09/2013, at the opening of a new settlement for 632 displaced families in Agdam 6/08/2014, at the opening ceremony of the 3rd Global Baku Forum 28/04/2015, and at the opening

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[1] Rauf Garagozov, Rena Kadyrova, "Memory, Emotions, and Behavior of the Masses in an Ethnopolitical conflict: Nagorno-Karabakh," *The Caucasus & Globalization* 5, issue 3-4 (2011): 77.

[2] Vamik Volkan, "Transgenerational Transmissions and Chosen Traumas: An Aspect of Large-Group Identity," *Group Analysis* 34, no.1 (2001); Masi Noor, Nuit Shnabel, Samer Halabi, and Arie Nadler, "When Suffering Begets Suffering. The Psychology of Competitive Victimhood Between Adversarial Groups in Violent Conflicts," *Personality and Social Psychology Review* 16, issue 4 (2012).

[3] Noa Schori-Eyal, Eran Halperin, and Daniel Bar-Tal, "Three layers of collective victimhood: effects of multileveled victimhood on intergroup conflicts in the Israeli–Arab context," *Journal of Applied Social Psychology* 44 (2014): 778; Daniel Bar-Tal, *Intractable conflicts: Socio-psychological foundations and dynamics* (Cambridge: Cambridge University Press, 2013).

ceremonies of the Baku International Humanitarian Forum 4/10/2012 and 29/09/2016; President Ilham Aliyev's speeches at the official receptions on the occasion of the Republic Day 27/05/2015 and 27/05/2016, at the reception of the heads of diplomatic missions and international organizations of Muslim countries in Azerbaijan on the occasion of the holy month of Ramadan 8/06/2016 and at the meeting of the Security Council under the President of Azerbaijan, 2/04/2016. The content analysis of the selected official speeches will be complemented by the data collected through semi-structured interviews with Azerbaijani experts.

1.1. Brief overview of the Armenian-Azerbaijani conflict over NK

NK region - lying within Azerbaijan's borders, and mainly inhabited by ethnic Armenians - received the status of an autonomous oblast (NKAO) within Azerbaijan Soviet Socialist Republic (SSR) in 1923. On February 20, 1988, the governing body of NKAO voted in favor of the region's unification with the Armenian SSR. This attempt at secession was rejected by Azerbaijan and further led to a war that had devastating material and human consequences. More than 20.000-30.000 lost their lives and hundreds of thousands of others became refugees and internally displaced persons. Furthermore, during the conflict, grave human rights violations and destructions occurred, which left the societies traumatized. The full-scale war between Armenians and Azerbaijanis ended in 1994 with the signing of a ceasefire agreement in Bishkek when Armenia had full control not only over the NK region, but also over seven adjacent regions such as Agdham, Qubadli, Jabrayl, Zangilan, Kalbajar, Lachin and Fizuli. At present, there are no diplomatic relations between Armenia and Azerbaijan, while the NK, together with the seven adjacent regions are under Armenian control.

Since the signing of the ceasefire agreement, the two countries have embarked on a long peace process for finding a solution to the conflict, but without any positive results. The Organization for Security and Cooperation in Europe's Minsk Group (OSCE MG), co-chaired by France, the Russian Federation and the United States, has been mediating the conflict between Armenia and Azerbaijan since its creation in 1994. However, all their proposals have been rejected one by one by the parties.

The most significant achievement of the peace process are the so-called Madrid principles introduced by the OSCE MG at the 2007 OSCE Madrid summit. They contain: (a) the return of the territories surrounding NK to Azerbaijani control; (b) an interim status for NK providing guarantees for security and self-governance; (c) a corridor linking Armenia to NK; (d) future determination of the final legal status of NK through a legally binding referendum; (e) the right of all internally displaced persons and refugees to return to their former places of residence and (f) international security guarantees, including a peacekeeping operation.[4] Although under discussion since 2007, Armenia and Azerbaijan have not yet signed them.

Against a backdrop of more than two decades of tried-and-failed attempts at resolution, the violations of the ceasefire agreement gradually intensified, and the conflict embarked on an escalation phase. Although there have always been ceasefire violations, these started to be more prominently reported as from 2014. For instance, in early August 2014, deadly clashes took place along the Line of Contact (LOC) described at the time as being the bloodiest episode since the signing of the ceasefire in 1994[5]. The situation escalated again in November 2014, when an Armenian Mi-24 military helicopter was shot down by Azerbaijani armed forces[6], a novelty for the way in which skirmishes used to take place along the LOC. The ceasefire violations continued in 2015 as well, starting with January. These resulted in 12 victims and 18 injured and were catalogued by the OSCE MG as recording "the highest number of confirmed victims in the first month of a year from the 1994 ceasefire agreement."[7] In the context of increased violent incidents, the co-chairs of the OSCE MG emitted several declarations throughout the first months of 2015, soliciting the parties to respect the terms of the 1994 ceasefire agreement and restart the official peace talks for solving the conflict. They also recognized the deterioration of the military situation on the LOC and the violent trend that continued simultaneous with the 2014 deadly clashes. Nevertheless, April 2016 marked the most serious escalation of the conflict, which "brought Azerbaijan and Armenia the closest they have been to all-out war in NK since the 1994 truce[8]." Although this episode might be included in the cycle of occasional flare-ups characterizing the conflict, it was unprecedented in its intensity, the type of armament used and the human loss[9]. The OSCE MG strongly condemned the outbreak

[4] Kamer Kasim, "The Nagorno-Karabakh conflict: Regional implications and the peace process", *Caucasus International* 2, no. 1 (Spring 2012): 106.

[5] Joshua Kucera, "At Least Ten Killed In Karabakh's Worst Fighting In 20 Years", *Eurasianet,* August 1, 2014, https://eurasianet.org/node/69321.

[6] "Armenian military helicopter shot down by Azerbaijani forces, killing three", *The Guardian,* November 12, 2014, https://www.theguardian.com/world/2014/nov/12/azerbaijani-forces-shoot-down-armenian-military-helicopter

[7] "Statement by OSCE Chairperson-in-Office and Co-Chairs of the OSCE Minsk Group on latest developments in the Nagorno-Karabakh peace process", OSCE, February 7, 2015, https://www.osce.org/cio/139411

[8] Zaur Shiriyev, "The 'Four-Day War': Changing Paradigms In The Nagorno-Karabakh Conflict", in *Trapped Between War and Peace: The Case of Nagorno-Karabakh,* ed. Gulshan Pashayeva and Fuad Chiragov (Baku: Center for Strategic Studies under the President of the Republic of Azerbaijan, 2018), 121.

[9] "Nagorno-Karabakh's war. A frozen conflict explodes", *The Economist,* April 9, 2016, https://www.economist.com/news/europe/21696563-after-facing-decades-armenia-and-azerbaijan-start-shooting-frozen-conflict-explodes

of this unprecedented violence and called Armenia and Azerbaijan to resume negotiations for peacefully settling the conflict[10]. Currently the peace process is stalled and there are no new changes in the way the two countries got used to handle the conflict or their adversarial relationship.

2. The Azerbaijani official state discourse

The Azerbaijani leaders represent the conflict with Armenia in terms of "invasion", "aggression", "occupation of Azerbaijani territories" and of the number of "internally displaced persons/refugees" resulted from the "ethnic cleansing" perpetrated by Armenia:

*"For more than seven years now the **aggression** of the Republic of Armenia against Azerbaijan has been going on, with the aim of annexing the Nagorny Karabakh region of our country. Armed formations belonging to Armenia **have occupied more than 20 per cent of the territory of Azerbaijan.** More than 1 million citizens of our country, who are now **refugees**, have been evicted from the **occupied territories** and are now living in tent camps in the most difficult circumstances" (Heydar Aliyev, UNGA, 50th session, 22/10/1995);*

*"Armenia's **aggression** against Azerbaijan, **the aggression** which brought countless calamities to millions of people is the main destabilizing factor in the Southern Caucasus. During this **aggression**, the Armenian armed forces **have occupied 20 percent of the territories of Azerbaijan,** conducted **ethnic cleansing** and forced **one million Azerbaijanis** to leave their native homes" (Heydar Aliyev, Millennium summit, 7/09/2000);*

*"Armenia continues its **aggressive** policy against Azerbaijan. As a result of this policy and the policy of **ethnic purge**, 20 percent of our l**ands are still under occupation. One million Azerbaijanis suffering from the policy of ethnic cleansing** cannot yet return to their lands" (Ilham Aliyev, inaugural speech, 24/10/2008).*

Moreover, in the official Azerbaijani state discourse, the conflict with Armenia is put forward as being "the most painful problem" and "a severe blow" that ever happened to Azerbaijan in its history. In his inaugural speech from 2003, President Aliyev stated that *"The conflict with Armenia is the most painful problem of our country"* whereas in his speech at the official opening of Crans Montana Forum in Brussels on 29 June 2012, he emphasized that:

"One of the main problems after the restoration of independence was the occupation of our lands by Armenia. This dealt a severe blow to us. This dealt a severe blow to the security and cooperation in the entire region. Nagorno-Karabakh is internationally recognized historical territory of Azerbaijan which Armenia has occupied. Armenia has conducted a policy of ethnic cleansing on these Azerbaijani lands. In general, 20 per cent of our land is currently under Armenian occupation."

As resulted from the above-mentioned excerpts, Azerbaijani leaders have built a victim-type discourse centred mainly on the Armenian "aggression" and "occupation" of Azerbaijani territories and the human consequences it caused among a significant category of Azerbaijani people labelled as refugees and internally displaced persons. Thus, Azerbaijani leaders' representations of the conflict are made through the victim status perspective they claim directly. Azerbaijanis consider themselves victims of both a policy of occupation and ethnic cleansing committed by Armenia. Furthermore, Azerbaijani leaders attribute the causes of their people suffering exclusively to the *Armenian enemy*. This essentialist view encountered in the official Azerbaijani discourse assign all the blame on Armenia and excludes any situational factors.[11] Thus the Armenian side becomes the main guilty and solely responsible for the situation Azerbaijan is confronted with. This type of discourse serves as the basis for building a common reality in which the victim status is attributed solely to the Azerbaijani side which considers itself as having suffered the most. The same way of representing the conflict with Armenia centred on the victim status of Azerbaijan was also noted in the semi-structured interviews I applied to several Azerbaijani experts. The interviewees constantly resorted to formulations such as "we are the victims", "Armenians have occupied our territories" or "we still suffer because of the occupation."

The victimhood experiences of Azerbaijanis are connected to the traumas they suffered during the conflict and which are always inserted in the official discourse. Among these, Azerbaijani leaders refer mainly to one particular episode which took place in Khojaly on the night between 25-26 February 1992. This is described by Thomas de Wall in his book *Black Garden. Armenia and Azerbaijan through Peace and War* as being the most violent and bloodiest during the active phase of the conflict causing a great number of civilian deaths.[12] The Khojaly episode is represented by the Azerbaijani leaders as being a "genocide", "a crime against humanity", and "a massacre." For highlighting the gravity of this traumatic experience, the pain and injustice it entails among Azerbaijanis, but also the evil nature of the *Armenian enemy*, Azerbaijani leaders use superlatives among which "the bloodiest page of our history", "the most horrible act of savagery", "one of the most brutal terror acts" and detail the "Armenian atrocities":

"Three years have passed since the genocide in Khojaly which is the bloodiest page of our history. This genocide is the most horrible act of savagery and a

[10] "Statement by Representatives of the OSCE Minsk Group countries", OSCE, April 5, 2016, https://www.osce.org/mg/231386

[11] Maria Hadjipavlou, "The Cyprus Conflict: Root Causes and Implications for Peacebuilding," *Journal of Peace Research* 44, no. 3 (2007): 350.

[12] Thomas de Wall, *Black Garden. Armenia and Azerbaijan through Peace and War* (New York: University Press, 2003), 170-172.

*crime not only against the Azerbaijani nation, but also against the whole humanity" (*Heydar Aliyev to the Azerbaijani nation on the occasion of the third anniversary of the Khojaly "genocide", 25/2/1995*);*

*"The Khojali massacre is a tragic page of our history as well as one of the most brutal terror acts in the history of mankind ... The Khojali tragedy is a bloody page of the Armenian policy of ethnic cleansing and genocide against the Azerbaijani people ... The Azerbaijani government, citizens and diaspora abroad take a lot of measures for informing the world community about the massacre: books are being written, research is being made, the massacre is being discussed in the parliaments of different countries and international organizations ..." (*Heydar Aliyev, ceremony dedicated to the third anniversary of the Khojali victims, 26/02/2002*);*

*"I would like our guests to know that our country and people have also been faced with a major humanitarian catastrophe. In the early 1990s, as a result of Armenia's military aggression against Azerbaijan, 20 per cent of our land was under occupation. As a result of this occupation and the policy of ethnic cleansing, more than one million Azerbaijanis became refugees and IDPs in their own land ... Innocent people were killed. A war crime was committed against our people – the Khojaly genocide. As a result of genocide in the town of Khojaly, 613 civilians were killed, including 106 women and 63 children. All these Armenian atrocities have been documented" (*Ilham Aliyev, opening of the Fifth Baku International Humanitarian Forum, 29/09/2016*).*

The official discourse surrounding the Khojaly trauma is characterized by an emotional style that includes feelings of pain, injustice, sorrow linked with Azerbaijani collective memory of past trauma and negative representations of Armenians. This specific trauma is evoked not only at the national anniversaries commemorating this event, but also in every official speech of the Azerbaijani leaders on the Armenian-Azerbaijani conflict and its resolution where it is presented as the most important traumatic event in the history of Azerbaijan's history, beyond any comparison with any other violent event, and which has created immeasurable suffering still with an impact on the lives of today's Azerbaijanis. The memory of this past trauma and the experience of loss triggers strong emotions and its successive reply in the official Azerbaijani discourse reactivates and reinforces the pain associated with it. The following speech of President Heydar Aliyev encompasses these elements:

*"Throughout its history the Azerbaijani people faced a lot of tragedies. One of them is the Armenian aggression lasting for six years, which caused a lot of losses, including victims and occupation of our territories. But the Khojaly massacre is the most tragic of all. The Khojaly genocide committed by the Armenian aggressors is one of the most brutal events ... one of the most cruel tragedies in the history of the mankind ... We suffered a lot. However, the murder of the innocent people, including women, children, the old and the sick was the most tragic event of the six-year war. The Khojaly tragedy demonstrated the real ambitions of the Armenian aggressors. The Azerbaijani people was stabbed in the heart in that horrific night. It still hurts us ... The Khojaly tragedy is a source of sorrow for us" (*Heydar Aliyev, ceremony dedicated to the third anniversary of the Khojaly "massacre" 26/02/1995*).*

From the above-mentioned excerpt, it can be seen how the Khojaly trauma is transformed in a symbol of national pain. Furthermore, to stress the national pain associated with this traumatic experience, the Azerbaijani leaders always insert in their speeches the sudden and unexpected uprooting of those who have become displaced and who are called "refugees on their own lands." Thus, the plight of Azerbaijani displaced people represents for Azerbaijani leaders a living proof of the suffering of their nation:

*"Speaking about humanitarian issues, I want to say a few words about our most disturbing problem of course. Azerbaijan has been faced with a humanitarian catastrophe for 20 years. For 20 years, the internationally recognized ancestral lands of Azerbaijan in Nagorno-Karabakh and surrounding seven districts have been under Armenian occupation. This occupation continues. Azerbaijanis have been subjected to a policy of ethnic cleansing. All the Azerbaijanis have been driven out of Nagorno-Karabakh and surrounding districts. Currently, the world's biggest number of refugees per capita is registered in Azerbaijan. We have over a million refugees and IDPs who can't return to their homes because of the ongoing Armenian aggression" (*Ilham Aliyev, opening of the Second Baku International Humanitarian Forum, 4/10/2012*);*

*"We suffered from occupation as almost 20 percent of our territories is still under occupation and more than one million Azerbaijanis became refugees and internally displaced on their own lands. We suffered from ethnic cleansing, from Khojaly genocide, which is recognized already by more than 10 countries, and this process continues" (*Ilham Aliyev, opening ceremony of the 3rd Global Baku Forum, 28/04/201*);*

*„We have been subjected to an injustice. About 20 per cent of our land is under occupation. More than a million refugees and displaced persons are suffering from this conflict. Armenia has conducted a policy of ethnic cleansing against us and committed the Khojaly genocide" (*Ilham Aliyev, reception of the heads of diplomatic missions and international organizations of Muslim countries in Azerbaijan on the occasion of the holy month of Ramadan, 8/06/2016*).*

The plight of the Azerbaijani displaced persons was also highlighted by the Azerbaijani experts I interviewed. The majority shared that the most disappointing aspect of the Armenian-Azerbaijani conflict was the situation of the displaced who have

been banished from NK and the surrounding regions and who can't return there thirty years later. One example of latent solidarity sensed among the interviewees is the following:

*"I have never been in Nagorno-Karabakh, but I know people from there and I have this connection with them. If they are suffering, I am suffering too. They are my compatriots. They suffer … how could I be happy with this? (*R.G., November 2012, Baku*).*

The Khojaly trauma has been reproduced through discursive and commemorative practices throughout generations and transformed into a central collective trauma with repercussions on the daily lives of Azerbaijani people. This past trauma falls into the category of "chosen" traumas, a term originally coined by Vamik Volkan to refer to the shared mental representations of past traumatic events that have caused a large group to face serious assault, suffer loss and experience helplessness, shame and humiliation at the hands of a group. According to the author, the term "chosen" reflects "a large group's unconscious choice to add a past generations' mental representations of an event to its own identity."[13] Also, the "chosen" trauma is encoded in the collective memory of the victimized group who remains with psychological wounds that they transmit over generations as it is the case of Azerbaijanis and the Khojaly trauma. Furthermore, as evidenced by the above-mentioned excerpts of speeches, the Azerbaijani leaders choose to remember and emphasize only their own trauma, with little regard towards Armenians' own suffering, thus reproducing the "egoism of victimization."[14] This tendency has further led to competitive victimhood claims, that it is the assertion of a group that it has been subjected to greater suffering than the adversarial group.[15] Bearing on the severity of their respective sufferings, Azerbaijanis claim that they have endured more harm and injustice than Armenians as well as minimize and even question Armenians' past traumas:

*"The Khojaly tragedy occurred in front of the whole world. In other words, we are seeing it not as some sort of a myth, such as the totally unfounded myth of the "Armenian genocide", but on the basis of real facts. Videos, photos and testimonies of eye-witnesses – this is the truth and reality. But for some reason certain people don't want to see this, while others try to portray Armenians as victims" (*Ilham Aliyev, the opening of the Guba genocide memorial established with the support of the Heydar Aliyev Foundation, 18/09/2013*).*

This conflict-supporting discourse centred on trauma and victimhood shape at its turn the way in which Azerbaijani leaders envision the resolution of the conflict. They endorse a solution of the conflict that takes into account the "unjust" situation the Azerbaijani state is confronted with due to the "occupation" of its territories and the displacement of a large category of its population. According to President Ilham Aliyev:

*"From the perspective of international law, Nagorno-Karabakh is an integral part of Azerbaijan … we want our lands back. We want the lands of our ancestors back. We are right in our wish. Justice and international law support our position. Therefore, the situation of neither peace nor war cannot last any longer" (*Speech at the opening of a new settlement for 632 IDP families in Agdam, 6/08/2014*);*

*"I have repeatedly expressed my thoughts on this matter. There is no change in our position, and the people support and endorse this position. This conflict must be resolved within the framework of Azerbaijan's territorial integrity. There is no other way … We want the issue to be resolved so that our lands could be freed from occupation and Azerbaijani displaced persons could return to their ancestral lands" (*Speech at the official reception on the occasion of the Republic Day, 27/05/2016*).*

Thus, the Azerbaijani leaders support "only" a solution based on the territorial integrity of Azerbaijan while other options are out of the question. From an Azerbaijani perspective, the resolution of the Armenian-Azerbaijani conflict "must" start from the following considerations: the illegal occupation of Azerbaijani territories and the necessity of respecting the rules of international law. The official discourse on this topic sets off a unilateral solution to the conflict, considered the only right option, thus revealing inflexibility and lack of compromise as shown by the way the Azerbaijani leaders formulate their arguments:

*"Nagorno-Karabakh is native Azerbaijani land, an integral part of Azerbaijan. The whole world recognizes Nagorno-Karabakh as an integral part of Azerbaijan. Azerbaijan's position is unambiguous, based on justice and historical truth. Our historical land of Nagorno-Karabakh is an integral part of Azerbaijan from both political and legal points of view. Any concessions on the issue of territorial integrity are out of the question … Azerbaijan's territorial integrity is not in any doubt and the conflict must be resolved only within the framework of territorial integrity … the truth, justice and international law are on our side" (*Ilham Aliyev, inaugural speech, 19/10/2013*);*

"For a peaceful solution to the issue Armenia must vacate the occupied lands. There is no other option … Our territorial integrity is not, never has been

[13] Vamik Volkan, "Transgenerational Transmissions and Chosen Traumas: An Aspect to Large-Group Identity," *Group Analysis* 34, no.1 (2001): 88.

[14] According to John Mack, "the egoism of victimization" refers to the tendency of an ethno-national group, as a direct result of its own historical trauma, to exclusively concentrate on its own sufferings and to not show any empathy towards the sufferings of another group. For further details see John Mack, "The Enemy System" in *The Psychodynamics of International Relationships. Vol. I: Concepts and Theories*, ed. Vamik D. Volkan, Julius A. Demetrios and Joseph V. Montville (Lexington, MA: Lexington Books, 1990), 83-95.

[15] Masl Noor, Rupert Brown, Roberto Gonzalez, Jorge Manzi, Christopher Alan Lewis, "On Positive Psychological Outcomes: What Helps Groups With a History of Conflict to Forgive and Reconcile With Each Other", *Personality and Social Psychology Bulletin* 34, no. 6 (2008 June): 821.

*and never will be the subject of negotiations. This conflict must be resolved within the territorial integrity of our country. There is no other option" (*Ilham Aliyev at the meeting of the Security Council under the President of Azerbaijan, 2/04/2016*).*

The same idea of justice associated with the resolution of the Armenian-Azerbaijani conflict has been noticed during the interviews with Azerbaijani experts. The interviewees have constantly resorted to formulations such as: "the situation is unjust", "the situation is unacceptable", "we want justice" or "we will never accept our territories to remain in Armenia's possession." Furthermore, they underlined that "Azerbaijan is the victim country because its territories are occupied" and therefore, from this perspective, "Armenia must do the first step in the peace negotiations and show good will in solving the conflict by liberating the occupied territories." The Azerbaijani experts also underscored that "Azerbaijan, even from the position of a victim country, was able to compromise and offer to NK the highest level of autonomy within the territorial integrity of Azerbaijan." This would imply that "Azerbaijan reached its compromise limits and now it's time for Armenia to show the same compromise capacity so as to achieve a symmetry in the mediation process." In this sense, the interviewees proposed that "a good start would be the withdrawal of Armenian troops from two or three occupied territories, if not from the all seven." This perspective appears also in the official Azerbaijani state discourse:

*"The Armenian armed forces must first withdraw from Nagorno-Karabakh and other occupied lands. The most acceptable option here is a phased settlement. We have repeatedly spoken about that. Only a gradual settlement can bring about a solution to the issue" (*Ilham Aliyev at the official reception on the occasion of the Republic Day, 27/05/2015*).*

The official Azerbaijani discourse directs the public towards a very specific set of emotions such as anger, pain, fear, bitterness, injustice which constitutes the dominant emotional style for representing the Armenian-Azerbaijani conflict and its resolution. From an Azerbaijani perspective, it seems unfair for the country which sees itself as the unjustly harmed party to make any further concessions that would benefit Armenia. This is a typical reaction employed in cases of intractable conflicts where making concessions is viewed as unbearable on the one hand because of the ongoing sense of victimhood and on the other because the negotiation partner is perceived as responsible for the unjustified suffering and pain within the current conflict.[16] Hence, reaching a negotiated solution against the backdrop of such a reaction becomes difficult to conclude. Azerbaijan's self-presentation as the only legitimate victim, with focus on the unjust harm and atrocities perpetrated by the *Armenian enemy* seen as an illegitimate perpetrator, leads to the shaping of an official Azerbaijani discourse of victimhood which supports the deepening of division and mistrust between the conflicting parties, the fostering of negative intergroup attitudes and contributes to the continuation of the conflict. In turn such an official discourse trapped in a circle of collective past trauma and victimhood creates a barrier to the development of a constructive dialogue with the opponent and to the peaceful resolution of the conflict since it sustains the dynamic of confrontation and the promotion of escalation.

3. Conclusions

The Armenian-Azerbaijani conflict over NK is an intractable conflict that has been lasting for three decades entailing long-lasting societal trauma, widespread death, destruction and victimhood. The Armenian "occupation" of NK and the seven surrounding regions, which make up some 20% of the country, together with the mass population displacement it has caused represent a traumatic experience for Azerbaijanis as reflected in the official Azerbaijani state discourse. The Azerbaijani leaders choose to concentrate in their speeches only on their own traumas and victimhood status, showing no regard towards what the *Armenian enemy* has suffered at its turn in the past. Among the traumas remembered, the 1992 Khojaly episode with its "open wounds" plays a central role. The constant reprisals of the traumatic experiences lived in the past at the hands of the *Armenian enemy* reinforces a deep sense of victimhood among Azerbaijanis. As shown by the official selected speeches and the semi-structured interviews, Azerbaijanis claim their own group as being the only legitimate victim of the conflict. This understanding serves as the basis for building a common reality where the attribution of the victim status exclusively to one sole party, to the one which considers itself as having suffered the most, is done by negating the losses the *Armenian enemy* has registered in the past and minimizing its suffering. This type of discourse sets off a unilateral solution to the conflict based on the territorial integrity of Azerbaijan and considered as the only right option, thus showing reduced willingness for compromise. Hence, trauma and victimhood as reflected in the official Azerbaijani state discourse hinder any changes in the way Azerbaijani leaders represent the conflict and its resolution and serve as a blockage to peace, thus contributing to the protraction of the conflict.

[16] Noa Schori-Eyal, Eran Halperin, Daniel Bar-Tal, "Three layers of collective victimhood: effects of multileveled victimhood on intergroup conflicts in the Israeli–Arab context", *Journal of Applied Social Psychology* 44, (2014):782.

References

- "Armenian military helicopter shot down by Azerbaijani forces, killing three." *The Guardian*, November 12, 2014. https://www.theguardian.com/world/2014/nov/12/azerbaijani-forces-shoot-down-armenian-military-helicopter
- "Nagorno-Karabakh's war. A frozen conflict explodes." *The Economist*, April 9, 2016. https://www.economist.com/news/europe/21696563-after-facing-decades-armenia-and-azerbaijan-start-shooting-frozen-conflict-explodes
- "Statement by OSCE Chairperson-in-Office and Co-Chairs of the OSCE Minsk Group on latest developments in the Nagorno-Karabakh peace process." *OSCE*, February 7, 2015. https://www.osce.org/cio/139411
- "Statement by Representatives of the OSCE Minsk Group countries." *OSCE*, April 5, 2016. https://www.osce.org/mg/231386
- Bar-Tal, Daniel. Intractable conflicts: Socio-psychological foundations and dynamics. Cambridge: Cambridge University Press, 2013.
- de Wall, Thomas. Black Garden. Armenia and Azerbaijan through Peace and War. New York: University Press, 2003.
- Garagozov, Rauf, Rena Kadyrova. "Memory, Emotions, and Behavior of the Masses in an Ethnopolitical conflict: Nagorno-Karabakh." *The Caucasus & Globalization* 5, issue 3-4 (2011): 77-89.
- Hadjipavlou, Maria. "The Cyprus Conflict: Root Causes and Implications for Peacebuilding." *Journal of Peace Research* 44, no. 3 (2007): 349-365.
- Heydar Aliyev, Address to the Azerbaijani people on the tenth anniversary of the Khojali "genocide", 25/02/2002, http://lib.aliyev-heritage.org/en/537598.html
- Heydar Aliyev, Appeal to the Azerbaijani nation on the occasion of the third anniversary of the Khojaly "genocide", 25/02/1995, http://lib.aliyev-heritage.org/en/5247305.html
- Heydar Aliyev, Speech at the ceremony dedicated to the third anniversary of the Khojali "massacre" held in the Tazapir Mosque, 26/02/1995, http://lib.aliyev-heritage.org/en/4139052.html
- Heydar Aliyev, Speech at the Millennium summit in New York, 7/09/2000, http://lib.aliyev-heritage.org/en/4303106.html
- Heydar Aliyev, Speech at the UNGA, 50th session, 22/10/1995, http://www.un.org/ga/search/view_doc.asp?symbol=A/50/PV.36
- Ilham Aliyev, at the official reception on the occasion of the Republic Day, 27/05/2015, http://en.president.az/articles/15557
- Ilham Aliyev, Inaugural speech, 19/10/2013, http://en.president.az/articles/9667
- Ilham Aliyev, Inaugural Speech, 24/10/2008, https://azertag.az/en/xeber/INAUGURATION_CEREMONY_OF_PRESIDENT_OF_AZERBAIJAN_REPUBLIC_ILHAM_HEYDAR_OGLU_ALIYEV_HELD-578275
- Ilham Aliyev, Inaugural Speech, 31/10/2003, http://garabagh.net/content_179_en.html
- Ilham Aliyev, Speech at the meeting of the Security Council under the President of Azerbaijan, 2/04/2016, http://en.president.az/articles/19323
- Ilham Aliyev, Speech at the official opening ceremony of the Crans Montana Forum, 29/06/2012, http://en.president.az/articles/5307
- Ilham Aliyev, Speech at the official reception on the occasion of the Republic Day, 27/05/2016, http://en.president.az/articles/19986
- Ilham Aliyev, Speech at the opening ceremony of the 3rd Global Baku Forum, 28/04/2015, http://en.president.az/articles/15251
- Ilham Aliyev, Speech at the opening of a new settlement for 632 IDP families in Agdam, 6/08/2014, http://en.president.az/articles/12512
- Ilham Aliyev, Speech at the opening of the Fifth Baku International Humanitarian Forum, 29/09/2016, http://en.president.az/articles/21234
- Ilham Aliyev, Speech at the opening of the Guba genocide memorial established with the support of the Heydar Aliyev Foundation, 18/09/2013, http://en.president.az/articles/9397
- Ilham Aliyev, Speech at the opening of the Second Baku International Humanitarian Forum, 4/10/2012, http://en.president.az/articles/6390
- Ilham Aliyev, Speech at the reception of the heads of diplomatic missions and international organizations of Muslim countries in Azerbaijan on the occasion of the holy month of Ramadan, 8/06/2016, http://en.president.az/articles/20241
- Kasim, Kamer. "The Nagorno-Karabakh conflict: Regional implications and the peace process." Caucasus International 2, no. 1 (Spring 2012): 93-110
- Kucera, Joshua. "At Least Ten Killed In Karabakh's Worst Fighting In 20 Years." Eurasianet, August 1, 2014. https://eurasianet.org/node/69321
- Mack, John. "The Enemy System." In *The Psychodynamics of International Relationships. Vol. I: Concepts and Theories*, edited by Vamik D. Volkan, Julius A. Demetrios and Joseph V. Montville, 83-95. Lexington, MA: Lexington Books, 1990

- Noor, Maasi, Nuit Shnabel, Samer Halabi, and Arie Nadler. "When Suffering Begets Suffering. The Psychology of Competitive Victimhood Between Adversarial Groups in Violent Conflicts." *Personality and Social Psychology Review* 16, issue 4 (2012): 351-374
- Noor, Masl, Rupert Brown, Roberto Gonzalez, Jorge Manzi, Christopher Alan Lewis. "On Positive Psychological Outcomes: What Helps Groups With a History of Conflict to Forgive and Reconcile With Each Other." *Personality and Social Psychology Bulletin* 34, no. 6 (2008 June): 819-832
- Schori-Eyal, Noa, Eran Halperin, and Daniel Bar-Tal. "Three layers of collective victimhood: effects of multileveled victimhood on intergroup conflicts in the Israeli–Arab context." *Journal of Applied Social Psychology* 44, issue 12 (2014): 778-794
- Shiriyev, Zaur. "The 'Four-Day War': Changing Paradigms In The Nagorno-Karabakh Conflict." In *Trapped Between War and Peace: The Case of Nagorno-Karabakh*, edited by Gulshan Pashayeva and Fuad Chiragov, 121-133. Baku: Center for Strategic Studies under the President of the Republic of Azerbaijan, 2018
- Volkan, Vamik. "Transgenerational Transmissions and Chosen Traumas: An Aspect of Large-Group Identity." *Group Analysis* 34, no.1 (2001): 79-97

ISSUES AND ACHIEVEMENTS REGARDING THE STRATEGY OF INCREASING THE PROCESS OF LOCAL ECONOMIC DEVELOPMENT

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Abstract

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 controlated by a local, regional, or national administration.The entire post-revolution and post-accesion experience, cumulate with good policy making transfered by Romania to European Union, proves that private public partnership is a viable solution for successfully solving some communitary problems, public interests starting with social services and complex social-economic development projects including infrastructure projects.

The present paper focuses on sustainable development and the specific objectives that Romania intends to achieve in order to reach a new model of development that is capable of generating high value added, is interested in knowledge and innovation, and aims to improve the quality of life in harmony with the natural environment.

The paper also analyzes the process of local development that Romania started in 2000 with the financial support of United Nations Development Programme - "Romania within the framework of Local Agenda 21" and continued within Regional Operational Programme 2007-2013 and now,2020-2030.

Keywords: *local communities, environment, PPP, sustainable development, European Union, Regional Operational Programme.*

Introduction

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 powerfull 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. The introduction of the concept of sustainable development in recent policy-making has been a major turning point for our societies over the last two decades. Given the complexity of the concept of sustainable development, my intention in writing this paper was measuring what counts for the well-being of both present and future generations. I was inspired in treating this matter by the importance of the global need to identify the most suitable solutions and strategies in order to mantain life on this planet, by promoting human well-being through managing natural resources without hurting biodiversity. Decisions human made that influence biodiversity affect the well-being of themselves and other. We only have one planet it's not like we have a spare one in the backyard! In the past decades there was written a lot of specialized literature regarding conservation and sustainable use of diversity of species, habitats and ecosystems on the planet. Therefore I have related my paper to some of them in order to improve my study on sustainable development through conserving environment and socioeconomic development. Official statistics are well equipped because of both the commitment to impartiality and the diversity of the available expertise to provide the robust statistical tools – and in particular statistical indicators – which are required to adequately assess the implementation of current policies. Even if the current set of EU sustainable development indicators is still largely imperfect, a proactive approach like the one followed by Eurostat has increased the profile of official statistics and may help to shape future policies on the basis of a more rigorous assessment of the current situation.

1. Sustainable development. Definition. The EU Strategy for Sustainable Development (SDS)

Sustainable development has been defined in many ways, but the most frequently quoted definition is from *Our Common Future*, also known as the Brundtland Report[1]:

"Sustainable development is development that meets the needs of the present without compromising

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[1] World Commission on Environment and Development (WCED). *Our common future.* Oxford: Oxford University Press, 1987 p. 43

the ability of future generations to meet their own needs. It contains within it two key concepts:

- *the concept of **needs**, in particular the essential needs of the world's poor, to which overriding priority should be given; and*
- *the idea of **limitations** imposed by the state of technology and social organization on the environment's ability to meet present and future needs."*

1.1. Issues and concerns specific to Romania

A series of aspects of the implementation of sustainable development principles are not featured by the Strategy for Sustainable Development of the European Union: problems that have been overcome by the countries at the core of the EU many decades ago and thus are no longer object of priority concerns. In Romania's case, certain indicators (e.g. the structure of property in agriculture, access to drinking water and sewage networks, energy efficiency and resource consumption per value unit of final product, the quality o professional training, etc.) are still only slightly over the average level of developing countries. This section is dedicated to clarify such problems that must be solved in parallel and simultaneously with the effort to meet the norms and standards of the European Union.

Meeting the objectives of the Romanian National Strategy for Sustainable Development could be affected negatively by the interference of internal and external factors. Some of them can be foreseen, although their impact is difficult to evaluate and predicted quantitatively or placed in time.

However, prospecting the causes that could generate such issues and the solutions to diminish their effects is absolutely necessary. The following can be regarded as main endogenous risk factors:

- incoherence and inconsistence in economic policies caused by political instability and/or by ignoring the principles of sustainable development, independently of the composition of the parliamentary majority or the doctrines of political parties;
- delays in the implementation of an improved decision-making system and failure to induce responsibility within the public institutions for the results of the policies promoted by them, failure to improve the efficiency of impact assessment and of the use of monitoring and evaluation techniques;
- formalist, inefficient cooperation of public institutions with the private sector (patronates), professional associations and social partners in the elaboration and implementation of public policies and the measures for increasing competitiveness based on the rise of labour productivity and the productivity of resources, or the promotion of export activities to insure macroeconomic equilibrium;
- clientelistic selection of priorities in the allocation of public funds away from projects with potential for major, long-term, positive socio-economic impact and positive, neutral or at most minimal impact on the environment, based on competent evaluation of the report between financial effort and effects, on medium-long term;
- delaying efforts for a substantial increase of administrative capacity, of the potential to generate projects eligible for financing from the point of view of economic, social and economic efficiency, and to execute such projects within established terms through feasibility studies; delaying such measures could reduce the degree of access to EU funds and the possibility to cover the current account deficit;
- inconsistency and limited efficiency of policies oriented towards the continuation of the dis-inflation process, which could have a serious negative effect on macroeconomic equilibriums and sustainable economic growth;
- the lack of capacity to anticipate extreme weather phenomena resulting from climate change (prolonged periods of drought, floods) and to take measures to limit their potential effects on agriculture and on food prices;
- the tendency for increase of consumer debt and of imports for current consumption;
- the increase of income decoupled from productivity growth as a result of populist policies exercised during pre-electoral periods;
- delaying the implementation of adequate measures to reduce energy intensity significantly and to tap alternative sources of oil and gas supply, which could put under risk economic activities and private consumption;
- inefficient use of public funds destined to primary and continued human resource formation and to stimulate R&D activities which represent key areas for sustainable development. Among the external risk factors to be taken into account are:
- the amplification of upward trends in oil, natural gas and uranium prices, that can generate serious effects on inflation and energy security;
- uncertainties regarding foreign investors on emerging markets that could be caused mainly by the increase of the foreign deficit and the unpredictability of the fiscal policy, with negative effects on the volume and quality of investment in the productive sectors of the economy, and on the coverage from this source of the current account deficit;
- increasing the cost of foreign financing as an effect of the possible decrease of the country rating, which may have undesirable effects on the exchange rate of the national currency and on the inflation rate; Regarding the precise identification of risk factors and for the management of crisis events, we recommend:
- the formation of a roster of risk evaluators and specialists in crisis management to be inserted in decision support structures,
- the development, through foresight exercises, of instruments for the prevention, management and dilution of crisis effects;
- integrating, on the basis of professional competency, of Romanian specialists in EU expert networks for crisis management;
- preparing contingence plans and portfolios of solutions in anticipation of system vulnerabilities and

their potential effects in crisis situations.

2. Sustainable growth: structural change and macroeconomic balance

The current strategy starts with the premises that the achievement of accelerated growth in the long run in all three essential components (economic, social and environmental) is not just one of options possible, but the essential condition for the gradual reduction of the gaps between the levels of quality of life in Romania and the EU within the shortest possible timeframe, and for the insurance of real cohesion at national and EU levels.

Entering the common market of the European Union, the improvement of the business environment and of 53 the conditions for competition, the consolidation of the private sector and its contribution to the formation of the gross domestic product, the rise of the rate and quality of investment are encouraging factors that favour the continuation of growth. Annual GDP growth rate of 5.6-5.8% between 2007-2013, of 4.8-5% between 2015-2020 and 3.8-4.3% in the 2021-2030 period constitute feasible operational targets, close to the estimated GDP levels for each period.

Insuring long-term performance for the Romanian economy imposes, in consequence, the adoption and implementation of active, coherent policies and of effective instruments that shall allow substantial improvements in the administration and valorisation of current potential in certain key domains that determine sustainable development in conditions of market competition. Without substituting the existing development programmes of Romania, the current Strategy proposes a focalized vision towards attaining long-term objectives that transcend current timeframes through the perspective of sustainability principles stipulated by the Directives of the European Union and the main tendencies observed at the global level.

Insuring the sustainability of energy and material resource consumption in the long run, based on the realistic evaluation of the support capacity of natural capital. It follows that there is significant potential for the reduction of energy consumption, mainly through the rise of energy efficiency in the manufacturing and service sectors, and the reduction of the considerable technical losses in the residential sector. According to the national Programmes regarding energy efficiency, it is foreseen that primary energy intensity could be reduced by 2020 at 0.26 TOE/1000 Euro GDP relative to 2013 (0 .34 TOE / 1000 Euro of GDP). It is foreseen that relevant primary and secondary EU legislation will evolve towards setting more ambitious objectives and more strict regulations, in conformity with the Lisbon Agenda.

From the analysis of the evolution of the Romanian manufacturing industry in recent years, it results that in energy- and materials intensive sectors (steel industry, oil refinement, chemicals, building materials – typically polluting industries which provide around 25% of total production) resource productivity is in decline as a result of increased intermediary consumption. Compared to the year 2000, the total resource consumption in the steel industry increased by 48% while value added decreased by 2.6%. In the oil industry, a 12.4% increase in value added demanded a 50% increase in resource consumption. In 2005, total resource productivity in the steel industry was of only 0.18, in the downstream oil industries of 0.34, and of 0.55 over the entire manufacturing industry. Similar examples of decreasing resource productivity relative to value added can be found in agriculture and forestry. In this cases also, it can be assumed that significant improvements can be obtained within a reasonable timeframe by promoting policies to stimulate technological modernization and the increase of the share of products with high processing levels destined both to local consumption and for export. Perfecting, in a first stage, a series of voluntary agreements with the patronates (as it is already in practice in some EU countries) and adopting regulation that will shift some of the labour tax burden on the consumption of material resources and energy, could motivate economic actors to take measures for the increase of resource productivity, which would result in a positive impact on costs, competitiveness and the sustainability of resource use. Taking into account a considerable future increase in the import of primary energy and materials resources, it is necessary to elaborate a specialized strategy for the diversification of supply sources as well as for insuring their security through longterm agreements.

The gradual modernization of the macro-structure of the economy in correspondence with social and environmental needs The increase of services share in the formation of the Gross Domestic Product from 48.8% in 2006 to 58-60% in 2013 and 70% in 2020 (the current average level of EU-25) and the qualitative upgrade of services, will also determine the increase of economic efficiency and of competitiveness in the other sectors of the economy, with positive social effects on the vertical mobility of the workforce and of the level of qualification and compensation in domains such as R&D, financial services, computer science, management training, consultancy and expertise, etc. This will contribute directly to the growth of total productivity of resources used by the economy as a whole, considering that the services sector shows a typically higher ration of gross vale added over intermediary consumption, then those typical for agriculture, manufacturing or building. The adjustment of inter-sartorial structures will take pace particularly through the stimulation of priority development of those sub-structures that realize high value 55 added with lower resource consumption, especially through the use of renewable or recycled resources. In industry, the accent will fall on the endowment with technologies of high and medium complexity and on the introduction in own production of technologies with an high synergy

that could bring a significant contribution to the growth of the volume and value concentration of exports. Eco-efficiency and the use of the best available technologies (BAT) will become, in a higher measure, essential criteria in investment decisions, especially for public procurement. The most profound changes will probably take place in rural areas through the replacement of archaic structure, of the production practices and the appearance of the Romanian village, while preserving its local identity and specific culture. The development of the organic agro-industry, engaging local communities in activities of environmental rehabilitation and conservation, their direct partnership in the preservation of monuments and historic and cultural sights, insuring access to basic social and community services, the reduction and elimination of poverty, the improvement of communications and of market relations, will contribute to the gradual relief of urban-rural disparities in the quality of life. Considering the demand for development preserving regional profiles, of the need for optimum absorption of co-financing resources from EU sources and of the need to attract supplementary investment particularly for the modernization infrastructure for the provision of urban services, for the support of agriculture activities and for transport, increased effort is critical for the creation and permanent update of a portfolio of viable projects accompanied by professional pre-feasibility studies, that benefit from the active support from all decision factors and the local communities.

3. Raising labour productivity and the occupation rate

The level of labour productivity over the entire economy (GDP/employed person) as well as at sector and enterprise levels (gross value added/employee) is still vastly inferior in Romania compared to EU levels. The relatively low level of Romanian wages, particularly in the lower end of the scale, is explained precisely by this productivity gap reflected, in approximately the same rapport, in the quality of employment and the volume of taxable income. The slow renewal of the technology base, the low quality of infrastructure, chronic under-financing, the weak contribution of local R&D, the low performance of products and services offered on the market, the insufficient capacity for adaptation to the global market, were the main causes that hinder not just labour productivity but also the productivity of resources in monetary terms. Although in recent years the rhythm of labour productivity growth in Romania, especially in he processing and building industries, has been higher then the average EU rate, the difference of levels remains very high. Since resource productivity (the productivity of resources in monetary terms) and labour productivity are the main factors of efficiency and competitiveness and, implicitly, of the sustainability of economic and social development, significant administrative and financial efforts must be undertaken to remedy the present situation and attain the current benchmark of the EU. the urgency of such measures 56 is underscored by the unfavourable demographic developments, worsening in the case of Romania. In the same time, it is necessary to improve the rate of occupation of the potentially active population that, between 2002 and 2006 was of 57.9% only in Romania compared to the EU-27 average of 63.1% for the same period. Through investment in human capital, an occupation rate of over 62% is estimated for 2013, with the tendency of constant improvement for the following periods (up to 64-65% in 2020).

4. Improving the quality of micro and macroeconomic management

In the following period, a qualitative improvement of economic management will be necessary at all levels - from regional to enterprise level, to insure the efficient, complete use of capital resources available and to attract new, supplementary financing sources for investment in the endowment with modern technology, in the formation and superior qualification of the labour force, in scientific research, in technological development and innovation. In as much as the sustainable growth of the gross domestic product is determined by the evolution of value added achieved by economic agents, the extension of effective management is crucial for all key points of activity in each unit producing goods and services: administrative, technical, technological, financier, logistic, commercial, and the administration of human resources. In this respect, the establishment of specific performance criteria for public sector managers is essential, along with encouraging the application of exacting standards in the private sector through engaging the responsibility of stockholders and administration councils in monitoring management performance in conformity with the minimum standards established for the increase of value added, competitiveness and profit. It is also envisaged to re-evaluate the policies for the amortization of physical assets in correlation with technological progress in each domain of activity, in order to prevent technical depreciation of the capital that typically generates major consumption of energy, materials and labour resources, with negative effects on competitiveness. The implementation of multi-annual, medium-term budgets as standard practice for firms is necessary to insure the existence of a long-term vision regarding the development perspective and the formulation of efficient investment policies, and the adaptation of the production volume and structure to anticipated market trends.

5. The government is promoting public-private partnerships (PPPs)

As a new channel for attracting foreign investments to Romania, which last year reached a post-crisis high of EUR 4 billion. The new PPP law comes roughly seven years after the private sector and public authorities struggled with different, flawed legislation.

Investors are waiting for the publication of the implementation rules for the new PPP law no 233/2016, which was approved at the end of 2016. Legal experts said that the new rules should promote functional partnerships between public bodies and private players, and it might take additional time for the authorities to learn the ropes when dealing with such initiatives. Representatives of foreign investors in Romania suggested that pilot PPP projects should be launched first. The government has not yet announced any such projects.

The new legislation can accommodate various PPP structures without overregulation and provides clear separation from the scope of the new concession and public acquisitions legislation.Going deeper into the provisions that interest investors, the new PPP law includes two structures for project development.

There are PPPs of a purely contractual nature, where the PPP agreement is concluded between the public partner, the private partner and the project company, which is wholly owned by the private partner. And there are the PPPs of an institutional nature that involve cooperation between the private and public partner within the project company, which is held jointly by the public and private sector, and becomes party to the PPP agreement after its registration.

Although the current center-left government claims that major PPP projects will be financed from Romania's planned wealth fund, it is still too early to say if this initiative is feasible considering that the fund is still in the design stage. Public authorities aim to turn the Sovereign Fund for Development and Investments (FSDI) into the main financing engine for the construction of roads, hospitals and industrial assets. The fund should reach EUR 10 billion in size, according to recent statements by policymakers.

Legal experts say the new law is more versatile because it provides more financing mechanisms for public and private partners involved in such projects.

Under the new law, the investment costs of the project can be funded entirely by the private partner, or by both partners. For the public partner, the source of funding is, however, limited to EU grants consisting of post-accession non-reimbursable funds and the related national contribution. The public partner may also choose to provide contingent mechanisms, for example guarantees to the project lenders, or to grant various rights to the project company, such as the right to collect user payments, as well as concession, superficies or use rights over the assets used for the project.

Foreign investors are waiting for the application norms of the new PPP law before starting to think about projects that could be developed in partnership with the state. However, the state will have to provide clear guarantees that it will fully comply with the requirements of such contracts, as financial risks could emerge, for instance in the case of projects that run for decades.

Madeline Alexander, chair of AmCham Romania's EU funds, public procurement and PPP committee ,said that the application norms of the new law should allow the local authorities to use PPPs for local infrastructure development as well as to expand on the regulatory framework concerning treatment and management of PPP fiscal risks.

AmCham Romania represents over 400 American, international and Romanian companies that have invested over USD 20 billion and created around 250,000 jobs locally.

Meanwhile, French investors have identified several public sector infrastructure sectors, including roads and hospitals, as fields in which PPPs could work.

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 deficitary legislation who doesn't oficialy sustain the fundamentation of PPP. Another fundamental proposal in what regards local development aims the establishment of an interior rulment 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 analisys of documentation to send for note, transmiting 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.

Conclusions

Current developments are in many respects 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 mission.s 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 labour 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 hit 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 labour 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 incoordination withother 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 behaviour, 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.

References

- The National Sustainable Development Strategy - Romania 2013-2020-2030
- *United Nations Development Programme Romania* - Expanded Implementation of Local Agenda 21 in Romania

- http://ec.europa.eu
- http://epp.eurostat.ec.europa.eu
- http://www.inforegio.ro
- www.fonduristructurale.ro
- https://pppknowledgelab.org/countries/romania

COMMUNICATION COMPETENCE IN ROMANIAN AND A MODERN FOREIGN LANGUAGE IN THE ROMANIAN PRIMARY EDUCATION CURRICULUM: SIMILARITIES AND DIFFERENCES

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Abstract

The communication competence is essential to any human activity or interaction and, consequently, it represents a priority for any educational activity. The Romanian National Curriculum is focused on developing key competences for lifelong learning (LLL), and, thus, the communication competence, which is circumscribed to the curricular area Language and Communication, is given paramount importance as it covers both Romanian (as mother tongue for most of the students) and one (two) modern foreign language(s). Our paper aims at analyzing the official curricular documents which regulate the development of the communication competence in primary school, both in Romanian and one modern foreign language (English in our case, as it statistically covers most of the Romanian student population), as, during this stage, the foundations for LLL key competences are being laid. By means of our analysis, we expect to point out to how similarities and/or differences in syllabi for Romanian and for the modern foreign language, respectively, interact positively, and thus contribute to developing effective communication competence, or negatively, by following parallel paths, disregarding the supposedly common goal. The results of our documentary analysis are accompanied by qualitative research (interviews with practitioners at this level), so as to identify continuity/ lack of continuity between the objectives listed in the official documents and the teaching practice. Our conclusions point to the fact that, if methodological suggestions in the syllabi were followed and if both primary school teachers and foreign language teachers were aware of the similarities and differences between learning the mother language and a modern foreign language and explicitly or implicitly acted so that they raise their pupils' awereness, then both communication competences could be successfully acquired.

Keywords: *communication competence, communication competence in Romanian, communication competence in a modern foreign language.*

1. Introduction

Curricular documents are meant to ensure equality of chances for the students enrolled in any educational system. The quality of these documents, as well as other important variables such as the teachers' competence and experience, the availability of necessary resources, class size etc. influence the achievements to be attained by the students at the end of each grade or at the end of each curricular stage. As compared to the variables aforementioned, the syllabi are standardized, usually being drafted at central level, by national authorities in charge with regulating compulsory education and this is also the case for Romania.

Since the 2012-2013 school year, in Romania, the enforcement of the legal provisions included in the 2011 National Education Act have led to multiple changes that affected all educational levels. As a consequence, the preparatory grade became part of the Romanian compulsory education period, being included in the primary school education, and the syllabi covering this stage became competence oriented, attuning to the 8 key competences recommended by the European Parliament and the Council of the European Union (2006/962/EC). This reform has been progressively introduced and, in June 2017, the first generation of students benefiting from these curricular improvements graduated primary school education.

So as to offer a multidisciplinary and/or interdisciplinary perspective on education (there are subjects that share certain formative objectives), the subjects to be studied in the Romanian primary education, as well as those making up the lower and higher secondary education curricula, formally belong to seven curricular areas: Language and Communication, Mathematics and Natural Sciences, Man and Society, Arts, Physical Education and Sports, Technologies and Counselling and Guidance. As far as primary education is concerned, the curricular area *Language and Communication* may comprise the following subjects: Romanian language and literature, mother tongue for minorities, one modern foreign language and one optional subject. Moreover, considering the 2006 Recommendation of the European Parliament and the Council of the European Union, the curricular area *Language and Communication* in the Romanian primary curriculum encompasses 2 key competences: communication in the mother tongue and communication in foreign languages. The EU

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document (2006, p. 5) specifically points to the close relationship between the skills necessary to communicate in the mother tongue and those necessary to communicate in a foreign language: 'Communication in foreign languages broadly shares the main skill dimensions of communication in the mother tongue: it is based on the ability to understand, express and interpret concepts, thoughts, feelings, facts and opinions in both oral and written form (listening, speaking, reading and writing) in an appropriate range of societal and cultural contexts (in education and training, work, home and leisure) according to one's wants or needs.'

In Romania, minorities are permitted to study in their mother tongue (e.g. Hungarian, German, Ukrainian, Slovakian etc.), and the optional subject included in this curricular area at this educational level is allotted 0-1 hour per week (an optional subject belonging to a different curricular area might be preferred), so, given the wide range of possibilities, it is worth mentioning at this point that our comparative analysis will focus on Romanian, as mother tongue, and English, as foreign language, because this combination is the most likely to occur according to current statistics (Romanian Statistical Yearbook, 2016, pp. 316-318). Therefore, our paper will closely examine the official curricular documents which regulate the communication competence in Romanian and communication competence in a modern foreign language (English), respectively, so as to point out to similarities and/or differences. In part one, we briefly outline the main theoretical approaches to first language acquisition and learning a foreign language, emphasising the common ground and the particularities related to young learners. Then, the second part deals with methodology and research findings, and the final part presents the conclusions of our investigation, introducing possible solutions for the problems that have been identified.

2. First Language Acquisition vs Learning a Foreign Language. The Young Learner

Does first language acquision resemble learning a foreign language? Although we might be tempted to give a simple 'yes' to this question, individual characteristics (e.g. age, motivation, the learning context etc.) represent important variables, which need to be taken into account. Thus, the question may change into a complex equation, whose result is influenced by the values acquired by the variables.

Diachronically, several theoretical perspectives have attempted to shed light on how human beings acquire their mother tongue and subsequently learn a foreign language (Cameron, 2001; Lightbown&Spada, 2006; Pinter, 2006; Brewster, Ellis & Girard, 2010). Thus, we have various views arising from different schools of psychology (behaviourist, innatist, cognitive-developmental, social-interactionist, connectionist) offering insight on the process of first language acquisition, which have directly influenced the theory of foreign language teaching and learning. For behaviourists, language development is closely related to the formation of habits: one acquires habits of correct language use in the first language through imitation, positive reinforcement and practice, and we transfer these abilities into the second language, using mimicry and memorisation. The innatist perspective explains language acquisition starting from the assumptions that the same universal principles (Universal Grammar) underlie all human languages and that, since birth, human beings are equipped with the ability to discover and correctly apply language rules. In line with Piaget's theory, the cognitive-developmental view emphasises 'the close relationship between children's cognitive development and their acquisition of language' (Lightbown&Spada, 2006, p. 19), thus pointing to the graduality of the process of first language acquisition and foreign language learning, respectively. The importance of human social interactions is underlined in the social-interactionist approach, focusing especially on 'the way language is modified to suit the level of the learner' (Brewster, Ellis & Girard, 2010, p. 18); accordingly, the adult/teacher is able to devise tasks which would both support and challenge the learner to advance to the next stage. Connectionists consider that human beings are born with the ability to learn and argue that exposure to language help learners develop 'connections', which favour generalizations and learning.

Research into first language acquisition and learning a foreign language has demonstrated that language proficiency is gradually achieved, in four stages: (1) working out the rules about how the language works; (2) generalising these rules across a group of similar instances; (3) overgeneralising – using rules where they are not appropriate; (4) using language items correctly. Simply put, the processes characterising language acquisition in one's mother tongue and a foreign language are very similar, whereas the learning conditions are very different (Brewster, Ellis & Girard, 2010, pp. 19-20). Thus, when acquiring our first language we 'are literally bombarded with language all the time' (House, 1997, p.7), whereas when learning a foreign language the context is formal in most situations and the learners are already equipped with language learning skills, building upon their own experience in language learning: less one-to-one interaction is received; the input may be from a much reduced number of sources; there might be a different motivation for learning etc. Consequently, the amount of effort and time we spent on acquiring the communication competence in our mother tongue and a foreign language is not similar, leading to a gap, which is eventually predictable.

Therefore the real challenge when learning and teaching a foreign language is to be aware of both the similarities and differences that exist between the students' mother tongue and the target foreign

language, so that the best possible level of proficiency could be achieved.

Due to the special focus of this paper on the primary curriculum, the age variable should be given some consideration. If for first language acquisition, there seems to be a critical or sensitive age for learning one's mother tongue (cases such Genie and Victor of Aveyron might support this conclusion), as far as second language acquisition is concerned, more conclusive evidence is necessary, since both advantages and disadvantages may be identified when the age factor is at stake (Marinova-Todd, Marshall and Snow, 2000; Scovel, 2000; Shrum and Glisan, 2000; Singleton, 2001; Singleton and Ryan, 2004; Ioup, 2005; Dewaele, 2009; Singleton and Muñoz, 2011). On the one hand, researchers agree that it is easy for those who start studying a foreign language in secondary school to catch up with those who do this in primary school, because the former use more efficient learning strategies, are based on complex conceptual knowledge and are more aware of the importance of foreign language proficiency. On the other hand, those who benefit from an early start could exhibit better phonological skills, be more positive about learning a foreign language, multilingualism and interculturality, have better literacy skills in one's mother tongue and foreign language(s) (Johnstone, 2001), provided a foreign language curriculum is developed and human and material resources are allotted.

By becoming aware of the similarities and/or differences that exist between the mother tongue and the foreign language, both the primary school teachers and the language teachers might get valuable insight, and, as a result, be able to improve the efficiency of the classroom activities. Competence in one's mother tongue and competence in a foreign language share the same receptive and productive skills: listening, reading, speaking and writing. They differ only in complexity as young learners are in the process of acquiring formal literacy skills in their mother tongue and these skills are to develop throughout the early school years.

3. Methodology

Our research is both quantitative and qualitative. Quantitatively, we perform a documentary analysis of the official curricular documents in force for Romanian, as mother tongue, and for the modern foreign language in primary education (English, in particular), trying to identify similarities and differences in point of structure and content. The qualitative part of our paper is made up of interviews with practitioners teaching at this curricular stage, as we attempt to identify whether there is continuity/ lack of continuity between the objectives listed in the official documents and the teaching practice. Specifically, we used a biographical-narrative inquiry, conducted by semi-directive interviews, comprising 4 questions: *(1) Based on your own experience, to what extent does communication competence in Romanian influence the development of the communication competence in English with students in primary education? (2a) (for English teachers) What are the difficulties that you face most often in teaching English to primary school students / primary school students face when learning English? How can we overcome these difficulties? (2b) (for primary education teachers) What are the difficulties faced most often by the teachers who teach English at primary school level/ by the students learning English in primary school? How can we overcome these difficulties? (3) Given the small number of classes allotted in the primary education curriculum (1 class per week for the preparatory, 1st and 2nd grades, 2 classes per week in 3rd and 4th grades, respectively), can the specific competences listed in the syllabi be successfully acquired? (4) What similarities / differences could you identify in the way students learn to communicate in Romanian or in a foreign language / English?* Eight subjects (4 primary school teachers and 4 English teachers), from Prahova County and Bucharest participated in the interviews. Primary school teachers have between 14 and 31 years' experience in teaching at this school level, whereas the English teachers have between 13 and 17 years' experience of teaching this subject in secondary education, and between 5 and 8 years' experience of teaching English to primary school students. They are either certified teachers level 2 or level 1, the highest possible qualifications for teachers in Romania at this moment. Therefore, both their experience and qualifications recommend them, as they could provide an informed opinion on the topic of our research. The interviews were conducted in Octomber- November 2017.

Although our paper employs both quantitative and qualitative instruments, it is necessary to acknowledge the limits of our research, as, in order to get more weight, the interviews could have been accompanied by a questionnaire-based survey. Nevertheless we had neither the time nor the material resources to do it.

3. Research Findings

Documentary analysis. The syllabi for primary education have a unitary structure. Developed to comply with the curriculum design centered on competences, they include: a short introduction; general competences further divided into specific competences, progressively developed for each curricular cycle, accompanied by examples for learning activities; learning content and methodological suggestions.

Obviously, this structure is used for Communication in Romanian (CR) for preparatory, 1st and 2nd grades, Romanian Language and Literature (RLL) for 3rd and 4th grades, respectively, as well as for the Communication in a Modern Foreign Language (CMFL), for preparatory, 1st and 2nd grades, and a Modern Foreign Language (MFL), for 3rd and 4th

grades, respectively, all the syllabi targeting the formation and development of communicative competence. Our comparative analysis focuses on the structural elements of the syllabi.

The short introduction represents a mission statement, as:

- it focuses on developing communication competences, by reference to European recommendations for learning the mother tongue / the modern foreign language, with an extra detail for CMFL / MFL (a unique sylabus regardless of the foreign language chosen, thus emphasizing the focus on communication skills);
- it refers to the achievement profile of the primary school students, correlating cognitive aspects with communication skills and attitudes, by turning to its best account the experience of primary school students;
- it points to the flexibility of the syllabi, embodied in the freedom given to teachers to adapt their approach and activities to the characteristics of their students;
- it emphasizes that learning is a personal experience of the student (the constructivist approach to learning).

The general competences (GCs) (four general competences corresponding to the number of key skills – listening, reading, speaking and writing) are designed so as to represent milestones of the students' achievements. In the syllabi for the two disciplines, GCs are described very much in tune with the approach used in the mission statement:

- GC 1 – reception of oral messages in *familiar* (CR) or *various* (RLL) communication contexts; reception of oral messages in *simple* communication contexts (CMFL / MFL); for CR and RLL, the progression of the competences is achieved by extending the areas of the communication contexts;
- GC 2 – expression of oral messages in *various* communication situations (CR / RLL) and in *common* communication situations (CMFL / MFL);
- GC 3 – reception of written messages in *familiar* (CR) or *various* communication contexts (RLL); reception of written messages in *simple* communication contexts (CMFL / MFL);
- GC 4 – writing messages in *various* communication situations (CR / RLL); writing *simple* messages in *common* communication situations (CMFL / MFL).

One could easily notice that the the GCs are more complex for the mother tongue as compared to the modern foreign language, and this is a perfectly normal situation (see section 2 of this paper). GCs are allotted more or less specific competences (SCs) as we can see in the table bellow:

Table 1. Number of specific competences coresponding to general competences

GC	**CRL**			**RLL**		**CMFL**			**MFL**	
	PG	1st grade	2nd grade	3rd grade	4th grade	PG	1st grade	2nd grade	3rd grade	4th grade
1	4	4	4	5	5	3	3	3	3	3
2	4	4	4	5	5	3	4	4	3	3
3	4	4	4	6	6	1	1	1	3	3
4	3	3	3	5	5	1	1	1	2	2

The same different degree of complexity could be identified when comparatively analysing the **specific competences** for the two disciplines**.** Moreover, the complexity gradually increases from the basic acquisitions stage (preparatory, 1st and 2nd grades) to the development stage (3rd and 4th grades), which does not necessarily materializes in the number of SCs, but in the content provided. For example, GC 2 for the CMFL / MFL (expression of oral messages in common communication situations): although the number of specific competences to be achieved is smaller (3) for the 3rd and the 4th grades as compared to 1st and 2nd grades (4), the learning objectives become more complicated, progressing from reproducing and participating in games, expressing simple requests / offering short and simple information (CMFL) to requesting/ offering information about various, but familiar contexts (e.g. numbers, prices, expressing time, home, family, people, customs), participating and presentating activities in interactions, as well as describing characters, objects, home etc.

Learning activities serve as examples, teachers having the freedom to develop their own activities, more tailored to the specific conditions (particularities of the students, school, existing resources etc.). These activities are designed to help teachers create tasks so that specific competences could be developed, the students' experience could be exploited and appropriate teaching approaches that would create meaningful contexts for students could be integrated. Following the ascending trend identified earlier, the learning activities examples in the syllabi increase in complexity progressively, from one stage to the other, from one grade to the next one.

The contents are presented as suggestions of topics representing a pool of resources, a list of possible skills that could help develop SCs. For CR, the contents are grouped by areas: oral communication (listening, speaking, interaction), reading, writing, building blocks for communication, with increasing complexity from one grade to the next. The content areas proposed for CR / RLL / CMFL / MFL represent a selection of the items listed for achieving communicative competence in the mother tongue / a foreign language in the European Parliament recommendation on the reference

framework for key competences for lifelong learning. For example:

- in the CR syllabus, for the oral communication area, the content *Word. Sentence / Utterance* materializes as follows: using new words in the appropriate utterances (preparatory grade), to using new words in appropriate contexts (1st grade), introducing new words in one's own vocabulary (2nd grade);
- RLL groups the suggestions refering to content in the following areas: language functions, text, language variability and communication in various contexts;
- CMFL labels as contents *speech acts*, from the simplest ones in the preparatory grade (e.g. greeting acquaintances), to more complex speech acts (simply introducing oneself) in the second grade and *suggestions of contexts*, from the most familiar ones in preparatory grade to more and more complex and comprehensive in next grades;
- MFLM divides the contents into the following areas: suggestions of communication contexts / vocabulary, functional grammar, variability and regularities of language.

The avoidance of metalanguage is mentioned in all the syllabi, thus emphasizing the ultimate goal, which is the development of communication competence.

A strength of the syllabi is the existence of consistent **methodological suggestions**, whose main objective is to support and guide teachers in their practice. Thus these methodological suggestions provide hints as how to approach the disciplines in question in order to:

- develop the communication competence, first by structuring it during the fundamental acquisitions stage and subsequently consolidating it;
- maximize interdisciplinarity, by making connections between all disciplines present in the curriculum framework (especially between CR / RLL and CMFL / MFL, since both are part of the same subject area);
- create authentic contexts for communication that would entail reflection and learning, contexts that would make students explore real communication situations.

A special place is dedicated to assessment suggestions, which should be performed in such a way so as to allow the teacher to obtain information about the progress of each student, in relation to specific competencies, as a reference point for adjusting teaching strategies.

The syllabi we examined also include:

- examples for using an integrated approach (CMFL);
- a list of authors (as suggestions for textbook authors) and examples of successful activities (RLL);
- methodological guidelines comprising real examples, structured to suit the targeted competences (listening, speaking, writing) (CMFL);
- specific sugestions for the various modern foreign languages (English, French, Italian, Spanish) that can be studied, comprising examples of best practices and lists of useful resources (websites, songs, stories), recommended topics (MFL).

Interviews. The first question highlights the common opinion that all those who were interviewed share (both the primary school and English teachers). Thus, they agree that the communication competence in Romanian influence to a large / very large extent the communication competence in English, identifying intuitively that a high level of the skills acquired in the students' mother tongue enhances the skills they acquire in a foreign language, especially for primary school students, as *'the communication competence is, at this age, a form of networking and is mainly about producing and interpreting messages. The two competences definitely influence each other'* (primary school teacher, 31 years' experience).

The second question shows that teachers face a lot of difficulties:

- insufficient material resources – 6 responses (varied teaching materials are necessary, and teachers usually end up paying for them out of their own pocket, the school does not provide anything – primary school teacher, 30 years' experience; technology is badly needed to be able to do listening or other actities that require a computer and a video projector – English teacher, 17 years' general experience in teaching English, 6 years' experience in teaching English in primary education; I noticed that listening activities keep students' interest up – primary school teacher, 25 years' experience) ;
- textbooks are not age appropriate and contain insufficient activities (3 responses);
- lack of continuity of English textbooks from one school year to the next (2 responses)[1];
- the high number of students per class, which does not favour working in groups / teams (5 responses);
- insufficient number of classes per week for the fundamental acquisitions stage (1 class per week) (2 responses);
- sometimes lack of discipline in the preparatory grade (1 response): the young students are not used to the school rules and routines – English teacher, 17 years' general experience in teaching English, 6 years' experience in teaching English in primary education;
- introducing grammar concepts in English before they are taught in Romanian (4 responses); apparently, our respondents blame it on the disparity between the syllaby of the two disciplines: *"the English teacher teaches the verb 'to be' when the student has no idea of the concept of verb or its inflectionary forms"* – primary school teacher, 30 years' experience;

[1] In Romania, textbooks are free for students aged 6-16. The teachers are expected to choose the textbooks and the school is supposed to provide them. Nevertheless, this is partially true, because teachers have to choose from the textbooks available in the school (students return the textbooks every year so that the next generation should use them).

"grammar concepts are first studied in English" – English teacher, 13 years' general experience, 5 years' experience in primary education; *"I had to teach the noun in English and the students didn't know what a noun is in Romanian"* – English teacher, 14 years' general experience, 8 years' experience in primary education.

Only two of the teachers we interviewed (both primary school teachers) suggested solutions to overcome the difficulties they identified, both of them emphasizing basically the same point: "*English could be better taught by the primary school teacher in charge of the respective class"* – primary school teacher 25 years' experience; "*the English teacher should attune activities to young learners' characteristics and thus be able to capture and maintain their attention during activities, mainly using game based methods"* – primary school teacher, 31 years' experience. These opinions suggest the importance of the age factor, which seems to be especially taken into consideration by primary school teachers with a lot of experience in working with students at this level. Similar problems and solutions have been identified in previous research (Singer&Sarivan, 2010; Bucur&Popa, 2013). As these problems have arisen in our research, we assume that practitioners find it difficult to adhere to the philosophy of the Romanian curriculum, even if its basic principles are included in the syllabi in force. Maybe some prefer to stick to traditional teaching, disregarding the methodological guidelines and examples in the syllabi, continuing to negatively influence learning.

The teachers who were interviewed were skeptical about the young learners' possibility to successfully acquire the specific competences listed in the syllabi for CMFL / MFL by reference to number of hours allocated. There was one totally affirmative answer to this question, the rest of the answers were only partially affirmative or negative: "*Yes, but with difficulty*" – English teacher, 13 years' general experience in teaching English, 5 years' experience in teaching English in primary education; "*It's difficult in the first three school years, as there isn't enough time to cover the items in the syllabi. If parents don't help young learners at home, they forget what they learn till the following week, and I have to do a lot of revision every time.*" – English teacher, 17 years' general experience in teaching, 6 years' experience in teaching English in primary education; *"Yes, but it's really difficult. We need 2 hours per week from the very beginning"* – English teacher, 14 years' general experience, 8 years' experience in primary education; "*Yes, but only for the specific competences comprised in the syllabus for CMFL, which basically focus on getting familiar with the foreign language*" – primary school teacher, 25 years' experience; "*They cannot be achieved because English is perceived as a less important discipline due to the number of hours allocated"*- primary school teacher, 31 years'experience). One answer definitely points to the teacher: "*Yes, if the teacher is well prepared. Thus the optional class could easily be allocated to the foreign language."* (primary school teacher, 30 years' experience). To a certain extent, the general opinion is that the number of English classes per week should increase, especially for the fundamental acquisitions stage, from 1 hour to 2 hours per week, so that the young learners could be given the possibility to acquire the specific competences listed in the syllabi. This opinion may be justified, given the fact that the communication competence in a foreign language is one of the key competences, and the appropriate approach should be selected so that success could be guaranteed. Nevertheless, due to the limits of our research, we cannot tell whether the solution to this problem is to increase the number of classes per week or to change the teaching approach.

It was not really simple for the teachers we interviewed to point immediately to the similarities and differences on how young learners learn to communicate in Romanian or English. They gave it some thought and they provided the following answers in reference to the similarities:

- young learners are better at oral than written communication in both languages;
- both types of competence focus on achieving elementary communication skills;
- both can be developed through constant exposure as well trained receptive skills can trigger better productive skills in the future*;*
- texts are followed by the same types of exercise for both disciplines.

As for the differences, they mentioned the learning context (informal for Romanian, formal for English) and the active vocabulary ("*the Romanian vocabulary items are more related to everyday life, the young learner's everyday experience, whereas English vocabulary topics serve didactical purposes, to some extent disregarding common communication needs"* – primary school teacher, 31 years' experience).

4. Conclusions

As the findings of our documentary analysis show, we could say that the syllabi we examined are drafted according to European recommendations and recent theoretical approaches, structured so as to support the development of effective communication competences. Both syllabi for Romanian as a mother tongue and those for the modern foreign language share a common ground so that they could interact positively, and thus maximize the achievements of primary school students, as far as their communication competences are concerned. The higher degree of complexity for CR and RLL as compared to CMFL and MFL is perfectly understandable, as learning a mother tongue differs from learning a foreign language from many points of view, as we could see in the second section of this paper.

Nevertheless, there is a long way from intention to implementation. Some of the teachers we interviewed describe a different reality, which seems to have a life of its own, somehow independent, parallel with the intentions set out in the syllabi. From the list of problems identified during the interview, the most worrying seems to be the so called 'mismatch' between the grammar concepts to be taught. According to the results of our documentary analysis, the two disciplines are correlated if we take into consideration their common goal – developing the communication competence. Furthermore, the syllabi explicitly mention that metalanguage should be avoided. We could only conclude that either teachers do not know the contents of the syllabi or they ignore them, using more or less valuable materials as reference points to design their teaching activities.

As for the difficulties faced by the young learners during English classes, the answers qiven by our interviewees indirectly point to teachers' activity. Thus, the young learners' low interest in class activities could not only be explained by the large number of students in a classroom, but also by the teacher's using inadequate ways of organizing students. On the other hand, some teachers even suggest that there is need for extra-curricular activities to complement compulsory English classes, which prove to be insufficient. However, this insufficiency may not be strictly related to the lack of proper resources, but also to the rigid way, strictly traditional approach to teaching that some English teachers still use.

Consequently, as we indicated in a previous paper (Bucur&Popa, 2013), methodology still has the main role to play and can tip the scales in favour of successful / unsuccessful teaching / learning. The syllabi we analysed comprise methodological suggestions, which, if closely followed, could possibly result in young learners' being able to reach the competence levels set for the end of the 2nd and the 4th grade, respectively. So, hypothetically, the methodology-related problems could be easily solved, if teachers carefully read the syllabi and became aware of the needs and particularities of young learners. Nevertheless, the other problems are more complicated as they are directly linked to the availability of material resources. The weaknesses of the Romanian primary education system (and not only) are well known: large number of pupils per class, the overused and outdated textbooks, the lack of audio-video devices in classrooms, no available funds for realia, posters and other useful teaching materials, and the list could continue.

To conclude with, the primary education syllabi for Romanian as a mother tongue and the modern foreign language could mutually give support to one another. It is up to the teachers involved in teaching these disciplines to fully benefit of the advantages that arise and turn them to the best account for the sake of their pupils.

References

- Brewster, J.; Ellis, G.; Girard, D. (2002). *The Primary English Teacher's Guide* (2nd. ed.). Harlow: Pearson Education Ltd
- Bucur, N.F., Popa, O.R. (2013). Teaching English as a foreign language in Romanian primary education. *Procedia - Social and Behavioral Sciences*, nr. 78, 31 – 35
- Cameron, L. (2001). *Teaching Languages to Young Learners.* Cambridge: Cambridge University Press
- Dewaele, J. (2009). The cognitive perspective: Age effects and/or critical periods? In K. Knapp, B. Seidlhofer (eds.), *Handbook of Foreign Language Communication and Learning*, 279-306. Berlin: Mouton de Gruyter
- House, S. (1997). *An Introduction to Teaching English to Children*. London: Richmond Publishing
- Ioup, G. (2005). Age in second language development. In E. Hinkel (ed.), Handbook *of Research in Second Language Teaching and Learning* – Volume I, 419-436. New Jersey: Lawrence Erlbaum Associates, Inc;
- Johnstone, R. M. (2001). Addressing "the age factor": Some implications for languages policy. *Guide for the development of language education policies in Europe - From linguistic diversity to plurilingual education*. Council of Europe, Strasbourg
- Lightbown, P., Spada, N. *How Languages are Learned.* Oxford: Oxford University Press
- Marinova-Todd, S. F.; Marshall, D. B.; Snow, C. (2000). Three misconceptions about age and L2 learning. *TESOL Quarterly, 34* (1), 9-31
- Ministerul Educației Naționale, Programa școlară pentru disciplina COMUNICARE ÎN LIMBA ROMÂNĂ. Clasa pregătitoare, clasa I şi clasa a II-a, Anexa nr. 2 la ordinul ministrului educației naționale nr. 3418/19.03.2013, http://programe.ise.ro/Portals/1/2013_CP_I_II/01_CLR_CP_II_OMEN.pdf
- Ministerul Educației Naționale, Programa școlară pentru disciplina LIMBA ŞI LITERATURA ROMÂNĂ. CLASELE a III-a – a IV-a, Anexa nr. 2 la ordinul ministrului educaţiei naţionale nr. 5003 /02.12.2014, http://programe.ise.ro/Portals/1/Curriculum/2014-12/01-Limba%20si%20literatura%20romana_clasele%20a%20III-a%20-%20a%20IV-a.pdf
- Ministerul Educației Naționale, Programa școlară pentru disciplina *COMUNICARE ÎN LIMBA MODERNA 1. Clasa pregătitoare, clasa I şi clasa a II-a*, Anexa nr. 2 la ordinul ministrului educației naționale nr. 3418/19.03.2013, http://programe.ise.ro/Portals/ 1/2013_CP_I_II/24_CL_moderna_ CP_II_ OMEN. pdf
- Ministerul Educației Naționale, Programa școlară pentru disciplina LIMBA MODERNĂ CLASELE a III-a – a IV-a, Anexa nr. 2 la ordinul ministrului educației naționale nr. 5003 / 02.12.2014,

http://programe.ise.ro/Portals/1/Curriculum/2014-12/20-Limba%20moderna_clasele%20a%20III-a%20-%20a%20IV-a.pdf

- Pinter, A. (2006). *Teaching Young Language Leaners.* Oxford: Oxford University Press
- Recommendation *2006/962/EC* of the European Parliament and of the Council of 18 December 2006 on key competences for lifelong learning *OJ L 394*, 30.12.2006, 10-18
- Romanian Statistical Yearbook, 2016, http://www.insse.ro/cms/en/content/romanian-statistical-yearbook-book-format-1
- Scovel, T. (2000). A Critical Review of the Critical Period Research. *Annual Review of Applied Linguistics* (20), 213-223
- Shrum, J.; Glisan, E. W. (2000). *Teacher's Handbook. Contextualised Language Instruction* (2nd ed.). Boston: Heinle&Heinle
- Singer, M.F., Sarivan, L. (2010). The basics of non-learning: are they set in elementary grades? *Buletinul Universităţii Petrol – Gaze din Ploieşti, Seria Ştiinţele Educaţiei*, Vol. LXII, Nr. 2, 68-77
- Singleton, D. (2001). Age and Second Language Acquisition. *Annual Review of Applied Linguistics* (21), 77-89
- Singleton, D.; Muñoz, C. (2011). Around and Beyond the Critical Period Hypothesis. In E. Hinkel (ed.), *Handbook of Research in Second Language Teaching and Learning – Volume II*, 407-425. New York: Routledge
- Singleton, D.; Ryan, L. (2004). *Language Acquisition: The Age Factor.* Clevedon: Multilingual Matters Ltd

THE PROCEDURE OF ACTS OF ADMINISTRATIVE LAW

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Abstract

The end of the twentieth century and the beginning of the 3rd millennium is characterized by a comprehensive process of transformation in all fields of human society, and all of these mutations must be subject to specific rules, principle of legality being an essential requirement of the rule of law. National legal order of each country is influenced by international and supranational legal systems, due to the trend of globalization of the world, without necessarily be negated the interdependence, according to national laws in that State, as a signatory of the some international conventions, has met certain obligations, including on the adoption of legal norms corresponding to the commitments. We can say that we are witnessing a process of convergence between administrative law in the Member States of the European Union and european administrative law, to further develop. We appreciate that, given the fact that Romania has taken the Community acquis, it is obliged to implement in national law the General principles of administrative procedure outlined at this level. Starting from the reality that the administrative procedure is vast topic and cannot be analyzed exhaustively in a single work, we try to present further, without going into details, the main topics of our research subject. Thus, we considered that it is necessary to achieve short considerations about the principles, but also administrative proceedings, by analyzing the stages and characters of it. We also reviewed briefly the administrative divorce procedure compared to the notary procedure, two elements of novelty introduced by the new civil code. On the other hand, we have presented arguments supporting the need for codified rules of administrative procedure, systematic methods used, and attempts to achieve this task. Basically, we can say that in our legal system is highly topical theme and presents a particular relevance in the context of attempts made by the legislature, since the year 2000, for the purposes of codification of the rules of administrative procedure.

Keywords: *administrative law; Member States; administrative proceedings; European Union;civil society.*

Introduction

The executive activity carried out by the state administration bodies is, as a whole, a complex activity. For this reason, it represents a true process. The characteristic of a process of this activity is emphasized especially with regard to the administrative acts or decisions, whose formation, application and verification is presented as an ensemble of operations that are in a logical and necessary sequence.

The administrative process can be defined as the ensemble of the activities (acts and deeds) carried out by the state administration in fulfilling its attributions. The administrative procedure is the form or the ensemble of formalities performed by the state administration bodies for the organization of the execution and the concrete execution of the laws and of the acts subordinated to them, acts that may emerge from the state administration or from other subjects of law. On the other hand, the administrative procedure also represents the totality of the legal norms regulating the form in which the executive activity is fulfilled[1].

In the specialized literature[2] the notion of (judicial) procedure receives several meanings. In a broad sense, it includes: norms that show which bodies are called to perform a certain activity (organizational norms); what responsibilities each body has (competence norms); what acts or operations are fulfilled by the bodies or by the persons participating in an activity (procedural norms). This last meaning, narrowed, is also the acception that we understand to use for the notion of administrative procedure.

The administrative procedure characterizes the totality of the concrete forms of the executive activity, because all the volitional activities of the administration have to fulfil a minimum of formalities. It is done in specific and different ways in the case of legal acts, of technical-material operations, deeds, and within it the procedure of the administrative acts or the decisional procedure is the most important category of the administrative procedure. The decisional procedure may be a non-jurisdictional procedure (for instance:invention patent procedure) and also a jurisdictional procedure (for instance, the procedure for resolving pension revision claims).

By analysing the administrative process and procedure, it is necessary to offer more clarifications.

A first clarification is that we have to give the notion of administrative procedure its narrowed meaning, understanding by it all the formalities that can compete in the fulfilment of the executive activity. Indeed, we cannot consider the entire executive activity itself as being the administrative procedure itself, as we would erase any difference between the content of this activity and the formalities to be carried out for its fulfilment.

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[1] Antonie Iorgovan, Tratat de drept administrativ, volumul I, Editia a IV a, Editura All Beck, Bucuresti, 2005, p. 26.

[2] V. Negru, D. Radu, *Drept procesual civil*, EdituraDidactica si Pedagogica, Bucharest, 1973, p. 17

A second clarification refers to the demarcation between the administrative procedure and the administrative procedural law[3]. The procedure is the form of performing the activity and the administrative procedural law represents the ensemble of the norms regulating the form in which the executive activity takes place.

A third clarification refers to the distinction between the material administrative law and the administrative procedural law, in the sense that the former regulates the content of the executive activity and the latter the form of carrying out this activity.

Lastly, it is also mandatory to note that to each concrete form of executive activity corresponds certain procedural form.

The administrative procedure has some characteristics that distinguish it, in particular from the civil procedure, in that:

- the judicial procedure is regulated by law (code), while the administrative procedure can also be regulated by normative acts subordinated to the law, some issued including by the state administration[4];
- the judicial procedure has a less complex character compared to the administrative one, the latter being made up of an ensemble of very different procedures (for instance, in the matter of sanctioning contraventions, patenting inventions, approving projects for normative acts);
- the administrative procedure is triggered most of the time ex officio, whereas the judicial one is triggered only with the notification of the Courts of Law by the parties to the dispute, prosecutor, other bodies provided by law;
- the court orders are not revocable, and by their pronouncement the Court of Law divests itself related to the settlement of the dispute, while the vast majority of the administrative acts are revocable.

By comparing some principles of the administrative procedure with the judicial procedure we note that:

- the principle of non-contradiction is a basic principle of the non-jurisdictional administrative procedure, compared with the principle of contradiction, whichgoverns the activity of the Courts of Law and involves at least two parties with contradictory, butprocedurally equal interests, while the executive activity presupposes subordination;
- the principle of non-publicity consists in the fact that the administrative bodies are not obliged, as well as the courts of law, to act in front of those who want to assist to the performance of their activity or who are interested in issuing the administrative acts;
- the principle of unavailability consists in the fact that the passive subjects of the administrative report cannotbenefit from the creation, modification, abolition and realization of these reports because of their subordination, compared to the civil process in which the parties have the possibility to benefit from the object of the dispute, of its extent and means of defence in the process.

Along with these principles, in the administrative procedure there are some common principles with the judicial procedure, such as the principle of legality, the principle of equality before the administration, the principle of the right to defence, the principle of the active role of the administration. The stages or phases of the administrative procedure are, in general, the stages that are being covered, in their existence, by the administrative acts, namely the preparation, issuance, execution and the control of the administrative acts.

The relation between legality and opportunity of administrative acts is a complex one, the link between them leading to ensure the best conditions for the issue and the accomplishment of an act validly[5]. The best solution is one in which the administrative act is legal and appropriate. Its legality evokes that the Act meets the letter of the law, and the opportunity it represents his conformity with the spirit of the law[6].

1. The decisional administrative procedure

The decisional administrative process can be defined as the totality of the actions required for the preparation, adoption, performance and control of the decisions or of the administrative acts. These actions may consist of prior documentation, debate and deliberation on the decision projects, on the activities of control of the execution, etc. The decisional administrative process comprises the ensemble of the formalities governing the decisional process. The administrative acts, in order to produce valid legal effects, must be issued in compliance with certain forms. The totality of the forms necessary in order for an act of administrative law to produce legal effects represent the procedure of drawing up that precise act[7]. This procedure consists of technical-material operations, also called procedural acts.

The decisional administrative procedure can be simple or complex. It is simple when, in order for the manifestation of the will contained in legal acts to take effect, the law does not require the accomplishment of a special procedure. The procedure is complex when the formalities are special in order for the administrative act to produce valid legal effects.

The notion of simple procedure and complex procedure do not identify with the notion of simple

[3] A. Balogh, „*Reglementareaprocedurii administrative in dreptul socialist comparat"*, in "Studianapocensia", vol. I, Ed. Acad. R.S.R., Bucharest, 1974, p. 84.

[4] For instance, the patent obtaining procedure for the economic agents from the internal commerce, according to the Government's Decision no. 1109/1990

[5] Rozalia Ana Lazăr, Legalitatea actului administrativ, All Beck, București, 2004, p. 166

[6] Verginia Vedinas, Drept administrativ, Editia a IV a, Editura Universul Juridic, Bucuresti, 2009, p.89.

[7] T. Draganu, *Actele de drept administrativ*, Ed. Stiitifica, 1959, Bucuresti, p. 119.

administrative act or complex administrative act. In the case of simple administrative acts, through the mere manifestation of will, valid legal effects occur, regardless of the complexity of the procedural forms. In the case of complex administrative acts, their elaboration procedure does not necessarily imply the contest of special technical-material operations, but the contest of several manifestations of will, which together produce valid legal effects (for instance, the administrative act commonly issued by several administrative bodies is a complex act). Thus, a simple administrative act can be drawn up after a complex procedure, or a complex act can be issued after a simple procedure. Therefore, the notion of "complex administrative act" does not identify with the notion of "complex administrative procedure" of drawing upthe administrative act, the latter notion being more extensive than the former[8].

The procedural forms can be classified according to several criteria[9]. According to their importance for the validity of the act, we distinguish essential and non-essential forms. According tothe exterior form of the procedural forms, we distinguish between written and non-written forms. The breach of the provisions regarding the essential procedural forms draws the sanction of the legal act, but not as an effect of these forms, but as an effect of the law, which aims to guarantee the regularity of the procedural forms in ensuring the validity of the legal acts.

According to the stage when they intervene, related to the moment of the establishment of the legal act, we distinguish procedural forms from the preparation stage (for instance, opinions), from the elaboration stage (motivation), from the execution stage (summons) and from the control stage (the control minute).

Performing an analysis on stages, in terms of legal consecration, of the procedure of the administrative acts or decisions, some clarifications are required regarding the manner of legal regulation. From the start, it should be made clear that the essence of the regulation of the administrative procedure is the administrative act, since it represents the most important concrete form of executive activity.

The preparation stage of the decision did not benefit from unitary regulation at the level of all administrative acts. In general, each issuing body or its hierarchically superior body developed its own methodology concerning the preparation of projects of legal acts, in particular normative ones. However, it was necessary to unify and coordinate the legal regulation of the preparatory stage of the projects of normative legal acts, elaborating in this respect the "General methodology of legislative technique regarding the preparation and systematization of the projects of normative acts" approved by Decree no. 16/1976. This methodology was applicable to the main projects of normative acts of our state and has undergone implicit changes, and also aims the acts of the state administration. The methodology in question also applies to individual acts, as it results from the provisions of art. 111 of the aforementioned Decree, which shows that the technical methods and procedures established for the normative acts are also applicable for the elaboration of the acts, which, without having a normative character, take the form of a decree or a government's decision, "per a contrario", the acts which do not have a normative character can only be individual acts, which, in the given case, are presented in the form of a decree or of a decision. The same decree regulated, at the same time, the operations that make up the decisional process, such as documentation[10], or the procedural formalities, such as the single opinion[11], being repealed by Law no. 24/2000, republished in 2004.

The adoption stage of the administrative decisions has been and is regulated in a different way, usually by the organizational and functioning norms of the respective bodies (thus, for instance, the decisions of the local councils are issued on the basis and in view of the performance of the law, with the vote of the majority of their members, being signed by the counsellorwho leads the meeting and countersigned by the secretary[12].

The regulation is different, since the specificity and the variety of the administrative bodies determine different ways of adopting the decisions, although some general rules may emerge, for instance, in the case of the collegiate bodies, where the principle of collegiate management determines that a decision is always adopted with the majority of the votes cast.

Sometimes, to the general requirements of the organic laws one may add special requirements from these laws or from special laws. Thus, for the category of the county councils, the permanent delegation was established, which decided on the issue of the current activity of the plenum[13], and other regulations establish, for instance, the period of time during which a body is obliged to solve a request addressed to it.

The execution stage is regulated by norms specific to each body, due to the particularity of the activity to be performed. There are also general provisions applicable to the execution in a field or branch, such as the execution of the contravention sanctions[14], or the forced execution procedure,

[8] T. Draganu, Actele administrative şi faptele asimilate lor supuse controlului judecătoresc potrivit Legii nr. 1/1967, p. 96-97.
[9] Idem, op. cit., p. 119-142.
[10] Art. 40 of Decree no. 16/1976, abrogated; art.19 of Law no. 24/2000.
[11] Art. 67 of Decree no. 16/1976, abrogated; the notice of the Legal Council, art.9 of Law no. 24/2000.
[12] Art. 45/1, 42/4 of Law no. 215/2001, republished.
[13] Art. 64 of Law no. 69/1991 (republished in 1996) abrogated by Law no. 215/2001, republished.
[14] Art. 39 of Decision no. 2/2001.

common in the field of material or patrimonial damages[15].

The control stage is differentially regulated by category of bodies and by specific regulations on areas or fields of activity. Thus, local councils monitor and control the activity of counsellors, of the mandated empowered persons of the state. Also, the Mayor guides and controls his own apparatus. In some cases, the hierarchical administrative appeal in the matter of controlling the lawfulness of administrative acts is consecrated. Regarding the specific aspects of the control, special regulations intervene, such as in the case of the Mayor's control over the way of collecting and spending the sums from the local budget of the administrative-territorial units.

In the case of the jurisdictional administrative acts, the regulation of their preparation and issuance framework is made in a thorough manner, as they are aimed at solving a dispute. Thus, the administrative-jurisdictional procedure is complemented with the regulations of the civil procedure code, as it was the case with the activity of the former County Pensions Committee, insofar as they correspond to the objectives of the body's activity.

Sometimes there is the possibility of alternating the administrative procedure with another procedure, for instance the legal one, the body having a right of option, for instance in the case of the evacuation of the persons who occupy without a Lease Agreement an area from the state housing stock (which is in the administration of a company), evacuation that can be ordered either by the decision of the competent local council or based on the decision of the Court of Law.

The administrative procedure, once established, is mandatory, the state body being unable to choose another procedure in the fulfilment of its attributions. Thus, the legal practice decided[16] that it is unacceptable the action by which the local council should also ask the court to oblige the defendant to demolish the construction after issuing a decision ordering the demolition of the built building, without the prior administrative authorization. This is because Decree no. 545/1958 (abrogated) authorized this body, on the basis of its own acts, to proceed to the demolition of the built buildings without prior authorization, and the opposition of the one concerned by this measure was not such as to affect the enforceability of the demolition act.

The decisional administrative process and procedure have a number of principles, among which an important place is represented by the principle of legality in preparing and adopting the decisions. In terms of the decisional process, this principle is based on the provisions according to which the legal norms can be elaborated only by the bodies provided by the law[17] and under the conditions provided by the law.

From a procedural point of view, all bodies must comply with those formalities that ensure the validity of the legal acts.

In the general methodology of the legislative technique it is shown that the elaboration of normative acts by all the state administration bodies is done in compliance with the principle of the supremacy of the law, the normative acts being elaborated only on the basis and in the execution of the laws. The normative acts of the state administration cannot add to or contravene the principles and provisions of the laws, the decisions and ordinances on the basis of which they are adopted.

Of course, some principles of the administrative law, characteristic of the executive activity, are also reflected in the decisional process.

Thus, the principle of collective leadership is illustrated in the decisional activity by the fact that the approval of the projects of normative acts is done by the leadership bodies and through the provisions that specify that the solution of the possible disputes regarding the projects of normative acts is also done by the state bodies' leadership.

Together with the general principles there are also some methodological principles or legislative technique principles. Among them, we mention the principle of mandatory documentation in the case of drawing up projects of normative acts, the principle of the obligatory observance of the stages and their succession in drawing up projects of normative acts, the principle of organizing and coordinating the normative activity by the Legislative Council.

The decisional administrative procedure has also a number of common principles, most of them with the principles of the administrative procedure. The principle of the official procedures, according to which an administrative body self-notices and invests itself in the issuance of legal acts, is illustrated by the fact that the central bodies of the state administration can issue, even in the absence of an express mandate, orders, instructions etc. when a higher-level act (law, decree) denounces inferior acts which would ensure them an uniform application. The principle of non-publicity, according to which the administrative activity is not meant to be publicly known, in respect with some of its aspects, is illustrated by the fact that the activity of preparing the decisions, the projects of normative acts, is secret. It becomes public only by being subjected to the public debate of more important projects of normative acts or by adopting acts, followed by their publication. The phases of the preparatory stage are generally devoid of the principle of publicity.

[15] Art. 26-28 of Decree no. 221/1960.
[16] Civil Decision no. 18/14.01.1974 of the Court of Covasna County, in ROMANIAN JOURNAL OF LAW. no. 10/1974, p. 56.
[17] Art. 4/1 of Law no. 24/2000.

2. The necessity of the codification of the administrative procedure

In the executive activity, together with the material norms, an important role is played by the procedural norms. The procedural norms regulate the various forms of performance of the executive activity, such as legal acts (and in their framework the administrative, civil or labour law ones) as well as the other concrete forms of activity.

The procedural norms to be observed by the administration are contained in the various regulations, either with a general character (such as the General Methodology of Legislative Technique), or in the organic regulations (for instance, Law no. 215/2001) or in special regulations (for instance, Ordinance no. 2/2001, Law no. 554/2004, Ordinance no. 27/2002), without being reunited in a unitary manner. Therefore, in the executive activity one feels the lack of systematization of the legislation, in the sense of a material and procedural codification of the most important norms regulating the content and the form of this activity.

In the specialized literature it has been thought that the impossibility of administrative codification, of a material and procedural nature, is due to the numerous norms governing this activity, to the diversity of legal rules and to their relatively stable character. However, the legislator expressed concern that a series of regulations would make a partial codification of certain aspects of the executive activity, especially through some special laws, which[18] did not eliminate the need to codify all the norms concerning the state administration[19].

With the same acuity, it is also necessary to draw up a code of administrative procedure, similar to those existing in several states. In this sense, we consider that "The General Methodology of Legislative Technique" was a first step in regulating the preparatory phase of the decision, although it has undergone multiple implicit changes, implying however a unified regulation of the other stages of the decisional process. The procedural norms, together with the regulation of the competence, should include rules with a general character related to the organization and functioning for the entire state administration and rules on the formalities of the administrative acts, all put together in a unitary codification.

Our legislation has a number of gaps related to the preparatory procedure; it does not establish as general rules the obligation to hear the parties before issuing the acts, the obligation to motivate the administrative acts and does not regulate strictly the hierarchical administrative appeal, which can be exercised in an unlimited manner at the time being.

A codification would offer many advantages, among which we mention the existence of a unitary concept underlying all regulations, the avoidance of repetitions and contradictions from the administrative regulations, the simplification and reduction of the number of existing procedures, and a stronger defence of the law and of the citizenship rights.

The decisional codification should encompass the most general rules of law applicable to all administrative acts, as well as specific procedural rules applicable to certain administrative acts, such as jurisdictional acts. It should indicate the conditions of validity of the legal acts, as well as the main stages of the decisional process. Within this codification, special rules of procedure, such as those concerning the setting and monitoring of taxes and fees, rules on finding and sanctioning contraventions, receiving and solving claims, complaints, notifications and proposals, currently contained in separate[20]normative acts, might be reunited. The programmed character of a part of the legislative activity implies, among other things, the development of its law and its regulatory technique in the direction of the codification of the administrative procedure[21].

The project ReNEUAL Code of administrative procedure of the European Union, drawn up at the initiative of the network of research on administrative law of the European Union (ReNEUAL), watch to ensure transposition of the constitutional values of the EU European settlement of the administrative procedure relating to the administrative implementation of the Union's legislation and policy. The project was unveiled in front of the European Parliament and the European Parliament Resolution of January 15th, 2013, which require the European Commission to submit a proposal relating to the administrative procedure act of the European Union[2012/2024(INL)]. Therefore, the project has great opportunities to become soon the law of administrative procedure of the EU. From this perspective, its influence over national legal systems will be a remarkable one, at least in procedures involving joint implementation of european law.

For Romania, which unfortunately does not have a law of administrative procedure, the code can be a model of good administrative practice and administrative law principles relevant to public administration and for administrative courts, given the fact that the project is based on these practices and principles at european level.

The Romanian Government approved in a landmark ruling, the theses of the future prior Administrative Code of Romania. Theses issues must indicate issues to be resolved by the future Administrative Code relating to incomplete provisions

[18] Dana Apostol Tofan, Drept administrativ, volumul I, Editia a IV a, Editura C.H. Beck, Bucuresti, 2017, p. 35-37.
[19] M. Anghene, „Necesitatea codificarii normelor privind administratia de stat", in „ROMANIAN JOURNAL OF LAW." nr. 3/1976, p.24.
[20] M. Anghene, op. cit., p. 60; Dana Apostol Tofan, Drept administrativ, volumul I, Editia a IV a, Editura C.H. Beck, Bucuresti, 2017, p. 89.
[21] „Dezvoltarea si perfectionarea activitatii juridice" in „ROMANIAN JOURNAL OF LAW." nr. 12/1974, p.3; I. Alexandru, „Un punct de vedere in conturarea unei conceptii privind elaborarea codului administrativ", in „ROMANIAN JOURNAL OF LAW.", nr. 9/1976, p.13.

and sometimes contradictory, contained in the 18 regulations, which currently covers Central and local administration. By developing such a Code of administrative law of public administration, it will be better understood by officials and citizens. The Romanian Government's intention to unify the legal framework codes in the field of public administration, through the administrative code and the code of administrative procedure, has been wanted since 2001, in the programmes of Government and legislative programmes. Currently, the priority of the Government on the drafting of codes, as the main instrument for the simplification of the legislation, it is reiterated in the strategy for strengthening public administration 2014-20120 approved by HG. 909/2014, and in the strategy for better regulation 2014-2020, which was approved by HG. 1076/2014. In the year 2011, was completed a first draft of the Administrative Code, which, starting in 2014, is updated in terms of taking into account both the legislative changes which have occurred, and the new proposals for the amendment of some normative acts that are in various stages of elaboration.

3. Administrative divorce procedure and the notary procedure

Regulated in art. 375-378 of the New Civil Code, the procedure in question implies that both spouses file application for divorce together at the Registrar, respectively the Notary Public, from the place of marriage or last spouses' common dwelling. At the Notary Public, the application for divorce may also be filed by an Empowered Agent, with an authentic Power of Attorney.

The territorial competence is alternative, being the choice of the spouses. The proof of the last common dwelling of the spouses is done with identity papers, ownership documents or contracts for the handing over of the use or, when this is not possible, by authenticated declarations on their own responsibility, given by both spouses.

The spouses are given a 30-day period of time for reflection and upon the expiration of the deadline the spouses must present themselves personally and the Registrar, respectively the Notary Public, must check if they are divorcing and if their consent is free and willingly.

The 30-day period of time is prohibitive and is calculated on days off. According to art. 5 par. (2) of the Instructions regarding the execution of the divorce proceedings by the Notaries Public, elaborated by the National Union of Notaries Public from Romania, the deadline cannot be extended, but according to par. (4) the Notaries may grant a longer deadline, taking into account the possibility of the spouses to be present and with the consent of the spouses.

It is not expressly provided for, but it results from the provisions of art. 375 par. (2) of the New Civil Code that when there are minor children the Notary will request within the 30-days period of time a social investigation regarding the joint exercise of the parental authority and the establishment of the children's home.

According to art. 229 par. (2) lit. b) of Law 71/2011, the report of the psychosocial investigation is drawn up by the guardianship authority. If from the social investigation report results that the spouses' consent in these two respects is not in the interest of the child, the Notary Public issues a provision of rejecting the application for divorce and guides the spouses to address themselves to the Court of Law (Article 376 paragraph 5 of the New Civil Code).

The question arises whether it is the Notary Public the one who assesses if from the data of the social investigation report results that the consent of the spouses would not be in the best interest of the child or whether this should be determined by the guardianship authority.

The best solution would be for the spouses to specify from the beginning at which of them they have settled the child's home in order for the tutelary authority to indicate in the report's conclusions whether the spouses' consent is in the best interest of the child.

According to art. 264 of the New Civil Code, in the administrative procedures concerning him/her, the hearing of the child who has reached the age of 10 years old is mandatory. The hearing of the child is done within the given period of time.

If, for solid reasons, the psychosocial investigation has not been carried out or the minor who has reached 10 years old has not been heard, the Notary may grant a new deadline, but only with this motivation.

In the case where the spouses insist on divorce, a Divorce Certificate is issued, without making any mentions regarding the spouse's fault.

The spouse's agreement on the surnames to be worn after the divorce, the exercise of the parental authority by both parents, the establishment of the children's home after the divorce, the way of keeping the personal relationships between the separated parent and each of the children, as well as the determination of the parents' contribution to the cost of raising, educating, teaching and professional trening of the children will be authenticated by the Notary and will be mentioned in the Divorce Certificate.

The marriage is considered to have been dissolved at the date of issuance of the Divorce Certificate (Article 382 paragraph (3) of the New Civil Code).

When the application for divorce is filed at the City Hall where the marriage was concluded, the Registrar, after issuing the Divorce Certificate, makes the due mention in the marriage act.

In the case of submitting the application to the City Hall where the spouses had their last common dwelling, the Registrar issues the Divorce Certificate and immediately sends a certified copy thereof to the City Hall where the marriage was concluded, in order to make the mention in the marriage act.

If the divorce is established by the Notary Public, the Notary issues the Divorce Certificate and immediately sends a certified copy of it to the City Hall of the place where the marriage was concluded, in order to be mentioned in the Marriage Act.

A problem related to law interpretation arises if the spouses with minor children reach an agreement on divorce, the name to bear after divorce and joint exercise of the parental authority, but they do not agree on establishing the children's home, how to preserve personal relationships between the separated parent and each of the children, or on the parents' contribution to the costs of raising, educating, teaching and professional training of children.

According to art. 375 par. (2), in conjunction with art. 378 of the New Civil Code, if all these conditions are not met, the application for divorce is rejected. However, from the provisions of art. 376, par. (5) and (6) of the New Civil Code, results that the Notary Public will issue the order to reject the application for divorce and will direct the spouses towards the Court of Law if they do not agree on the name and joint exercise of the parental authority, solving the claims of other effects of the divorce on which the spouses do not agree upon being within the competence of the Court of Law.

Different practices of the Notaries will be outlined.

Some notaries will consider efficient art. 375 par. (2) of the New Civil Code, which provides that the divorce can be established by the Notary if the spouses agree on all the above-mentioned aspects, and the failure to fulfil the conditions leads to the rejection of the request.

Other notaries will proceed to the systematic interpretation of the Code and will establish the divorce also in the absence of the agreement on other matters than those expressly mentioned in art. 376 par. (5), leaving the dispute to be settled by the Court of Law, according to par. (6) (opinion also shared by Professor Flavius Baias in the New Civil Code - Comments on articles, published by C. H. Beck Publishing House).

The rejection of the application for divorce is made by a provision issued by the Notary Public or by the Mayor. Although the Code provides that the Registrar issues the order to reject the application, the Methodology on the unitary application of the provisions on civil status approved by the Government's Decision no. 64/2011 provides, in art. 178, that the Registrar draws up a report proposing the issuance of a rejection proposition by the Mayor.

The provision must be reasoned in the sense of mentioning the reasons for rejection and not the arguments in this respect.

As the rejection provisions are not subject to appeal, it will be difficult to unify the notary practice for situations where the spouses have not reached an agreement on the establishment of the children's home, how to keep personal liaisons between the parent and each of the children, or the parents' contribution to raising, education, studies and professional training of children.

The abusive refusal to establish divorce through the consent of the spouses gives rise to the right to material and moral damages (Article 378 paragraph (3) of the New Civil Code).

Conclusions

In his research on bureaucracy, Max Weber was talking about the depersonalization that must exist in the functioning of the administration. Its tasks must be accomplished with the help of the rules and regulations with which it is endowed. The transmission of orders and the gathering of information take place in a hierarchical way, the intervention of each participant being carried out strictly within the framework that is reserved by the formal arrangements underlying the functioning of the bureaucratic institutions, thus achieving a high degree of efficiency, precision, as well as a great predictability of the results.

Also, in fulfilling its tasks, public administration must demonstrate political neutrality and correctness and impartiality towards citizens.

The features of the administration have the gift of transforming the activity of the public administration into one based on a series of automatisms. In fact, the German sociologist Maw Weber compared the effects of the appearance of bureaucracy on modern societies with the effects produced by the emergence of cars on the economic life. The public administration is, in Weber's opinion, a machine, an efficient tool, without personality, at the service of the society and political leaders.

What are the effects that the existence of these automatisms has on how bureaucracy is fulfilling its task?

We have to mention from the beginning that the state can complete its tasks only to the extent that there are institutions dedicated to them and the related procedures (routines).

We can easily understand that without the existence of the army the state would not be able to protect us from foreign aggressions, as it could not ensure order in the absence of justice and of the police.

The multitude of the other services that the state and other public authorities provide to the population is also based on the existence of specialized institutions.

However, the mere existence of institutions is not enough. It is also necessary to specify the concrete forms through which their tasks are carried out.

First of all, we are talking about the effectiveness of the administrative approach. The situations with which a civil servant or a public institution is confronted in its day-to-day work are numerous and the existence of standard procedures is likely to increase its performance, especially since the cases are often the same. Moreover, sometimes the lack of a methodology may lead to the impossibility of performing administrative tasks. Similarly, the absence of

predetermined procedures by the founding authority or by the hierarchically superior one could lead to some ad-hoc occurrences, which would leave room for arbitrariness in the functioning of the public administration.

Second of all, as mentioned earlier, one of the fundamental principles of a modern public administration is neutrality and impartiality towards customers (citizens). This principle is all the more important because the financing of the administration's activity is made out of public money. From here it results that procedures are necessary in order to ensure that the beneficiaries of the administration are treated equally, impartially.

Last but not least, politicians, as well as civil society, must exercise a certain control over public administration. This would be very difficult if each public institution or each clerk would work according to their own rules and methods.

Also, as every field of social life, public administration also has to improve its functioning, it must progress, keep pace with the evolution of the society, with the evolution of physical or social technologies, in a word of the new needs of the communities which it serves.

It is obvious that, in order to optimize the functioning of an institution, it must first be identified what does not work properly, in the absence of unitary procedures, this arrangement would be equivalent to looking for the needle in the haystack. Moreover, once discovered, new administrative solutions can be implemented more easily in the case of an institution that functions unitarily.

Certain events or historical developments have favoured, in turn, an increased emphasis on the strict statement of the way in which the tasks of public institutions or of those working within them must be carried out.

Towards the end of the nineteenth century in two of the most important European states, namely France and Germany, for different reasons, was developed the issue to exclude the role of rules and procedures from the activity of the administration. In France, this was related to the establishment of the rule of law after the abdication of Emperor Napoleon III. At that time many considered the bureaucracy responsible for the repeated slippages of France towards authoritarian regimes and argued that a more rigorous legislation could eliminate the liking and arbitrariness of the French administration, and the state of law being thus more protected, in Germany the main reason was the mobilization of national energies to meet the great goals that faced the German people: "unifying the country and including it among the great powers."

Everyday life illustrates the widespread trend in the public opinion of using the term "bureaucracy" predominantly with negative connotations.

Thus, the administrative procedures are the first to be accused of all the evils that are attributed to the functioning.

Indeed, the slowness with which certain tasks are accomplished, the obtuseness, the resistance to change and, last but not least, the waste of resources can all be related, in one way or another, to the existence of these routines.

Building a modern and efficient public administration, stable and responsible, is an essential objective for any democratic state.

In a society, such a goal can only be achieved with the help of appropriate administrative institutions and by allocating important resources to this goal.

References

- Antonie Iorgovan, Tratat de drept administrativ, volumul I, Editia a IV a, Editura All Beck, Bucuresti, 2005
- A. Balogh, „Reglementarea procedurii administrative in dreptul socialist comparat", in "Studia napocensia", vol. I, Ed. Acad. R.S.R., Bucuresti, 1974
- Dana Apostol Tofan, Drept administrativ, volumul I, Editura All Beck, Bucuresti, 2004
- Dana Apostol Tofan, Drept administrativ, volumul I, Editia a IV a, Editura C.H. Beck, Bucuresti, 2017
- M., Anghene, Necesitatea codificării normelor de procedură administrativă, în Al. Negoiţă (1977). Consideraţii privind elaborarea Codului administrativ, în Analele Universităţii Bucureşti
- Dezvoltarea si perfectionarea activitatii juridice" in „R.R.D." nr. 12/1974, p.3; I. Alexandru, „Un punct de vedere in conturarea unei conceptii privind elaborarea codului administrativ",in R.R.D.",nr. 9/1976
- Negoiță Alexandru. Drept administrativ. București, 1996 Ed. "Sylvi"
- V. Negru, D. Radu, Drept procesual civil, Editura Didactica si Pedagogica, Bucuresti, 1973
- C. Purcarete, Sistemul informational, Editura Didactica si Pedagogica, Bucuresti, 1972
- Rozalia Ana Lazăr, Legalitatea actului administrativ, All Beck, București, 2004
- Tudor Draganu, Actele de drept administrativ, Editura Stiinfitica, Bucuresti, 1959
- Valentin I. Prisacaru, Tratat de drept administrativ, Partea generala ,Editia a III-a, revazuta si adaugita de autor, Editura Lumina Lex, Bucuresti, 2002
- Verginia Vedinas, Drept administrativ, Editia a IV a, Editura Universul Juridic, Bucuresti, 2009
- Proiectul Codului de procedură administrativa

SOCIAL CONSTRUCTION OF TUBERCULOSIS

Andrei DOBRE[*]

Abstract

A disease caused by a bacteria over 35,000 years old according to paleomicrobiology research, is currently a challenge for all public health systems. Tuberculosis was declared by World Health Organisation one of the world's priorities in a joint effort to eradicate it by 2050. Despite the medical knowledge about the disease, analizing it from a sociological and anthropological point of view could generate a better understating of the disease, it's social factors and the complexity of the context. Being the leading cause of death among the socio-professionally active population, with approximately 2 million deaths annually, prior to the establishment of certain control and surveillance measures, it is necessary to we understand the social factors and the costs of the disease, elements that increase the risk of infection / death, and what are the needs and services to be addressed. Among the "costs" a patient faces, we can list: long-term and many adverse effects, the high risk of abandonment to resume income-generating occupation, the risk of developing antibiotic resistance, lowering family incomes, entering the vicious circle of poverty by lowering family incomes and increasing vulnerability.

In the following, a series of information on national and international contexts, behavioral, sociologycal, antrophologycal and medical therapies and theories of TB are presented, in the desire to identify the main social factors belonging to the universe of the field of study. At the same time, a great emphasis is placed on risk factors, on the needs of TB patients but also on vulnerable groups. By understanding the whole social, economic, cultural and medical context, new directions of study and new recommendations for practitioners in this field can be outlined in the prevention, control and surveillance of a contagious disease.

Keywords: *tuberculosis, anthropology, sociology, Mason model, Romania, health, disease.*

1. Introduction

Although tuberculosis is curable and case management is relatively simple when access to healthcare is easy, often the illness is fatal to poor people in rural and urban environments in developing countries. (Farmer apud Ember, 2004) Beyond the clinical and medical aspects, questions arise about the economic, social, family, organizational aspects of the disease universe. At the same time, an analysis is needed between the aspects of anthropology, medical sociology and other social disciplines in order to explain and identify certain patterns in tuberculosis in Romania.

The sociologist and anthropologist Paul Mason, following several researches conducted between 2010-2015, proposes a dynamic social model, an explanatory model of the descriptive and explicative factors and explanatory elements of the disease, disease which is over 95% in developing countries. This model addresses health problems, taking into account the social, cultural and historical factors to understand human health and disease experiences through an interpretative and critical approach. Although the proposed solutions are at an individual level, they are at the intersection of a cumulus of factors that ultimately lead to the public health system.

1.1. Global TB cotext

Analyzing the "Global TB Report 2016" published by the World Health Organization, based on the data reported by each monitored country as well as estimates of unreported cases, the global situation in 2015 was as follows:

- 10.4 million new cases, (56% men, 34% women and 10% children, with 1.2 million (11%) cases of HIV-TB coinfection;
- 480,000 cases with antibiotic-resistant forms: rifampicin resistance (RR), isoniazid resistance and rifampicin (TB-MDR), and finally resistance to all line I and II drugs, the latter form (TB-XDR);
- 1.4 million deaths due to illness, plus about 0.4 million deaths among HIV-TB people. All these statistics place tuberculosis first in terms of deaths from infectious disease and among the top ten causes of death worldwide.

1.2. Tuberculosis in Romania

Regarding the fight against TB in Romania, progress has been observed over the last few years in terms of country indicators and the infrastructure has developed as a result of international funds for TB issues: Global Fund to Fight HIV, TB and Malaria, EEA and Norwegian Funds, World Bank funds as well as other international donors.

Due to the international support, the PNPSCT has made a remarkable increase in the detection and treatment of the disease with some notable results, such as:

- Increase in detection of cases above international targets of 75%;
- Decrease in population incidence from a historical maximum in 2002 to 142.2 per 100,000

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inhabitants to 79.9 in 2012;

- Increased therapeutic success rates, usually over 80% for all forms of susceptible tuberculosis and implicitly a decrease in the number of deaths caused by the disease. (PNPSCT, 2016)

The World Health Organization, according to its mission, is defined as an international forum for the role of a "guardian" of global public health and working globally to achieve the maximum potential in terms of the safety and health of the population. GLC is a mechanism, a WHO structure, made up of international specialists who oversee the implementation or facilitate the access of troubled countries to TB-MDR case management. GLC, through its missions, provides technical assistance, expertise, assessments of the status of reforms as well as easy financial mechanisms. (WHO, 2000)

According to the report of the last mission to assess the TB-MDR, conducted by the World Health Organization (GLC) in May 2016, tuberculosis remains a public health problem in Romania and continues to be a threat with all the progress has been made in the last 20 years. From the data collected, it can be noticed that during the last decade, the figures have been steadily decreasing. The incidence of TB among the population, at 100.00 inhabitants, decreased from 142.2 (30,985 new and recurrent cases) in 2002 to 71.7 in 2015. Also, the TB mortality rate (excluding HIV-TB coinfections) fell to 5.7% in 2014.

The critical issues raised by the GLC mission are related to the increase in the number of resistant MDRs but also to other challenges, including the lack or reduced number of kits for rapid testing, the incomplete or non-existent treatment for patients with resistant forms, the deficiencies in the system as long-term hospitalization and higher per capita costs, control of ineffective infections at hospitals and laboratories, which increases the risk of infection of healthcare personnel, lack of control over treatment (DOT) in ambulatory, poor medical and social services coverage high risk of non-adherence, lack of prevention and education activities among vulnerable groups, lack or low number of staff and specialized and non-specialized medical personnel.

According to the National Control Strategy TB 2015-2020, in Romania, the categories that are at high risk of developing the disease are LTBI persons, children under 5, HIV-infected persons (especially those untreated), consumers substances (especially drugs) and people suffering from other conditions (silicosis, diabetes, cancer, kidney disease, autoimmune diseases, etc.). There are also certain categories of population with a higher risk for the general population to contact / develop the disease:

- Close contacts of a person with contagious TB;
- People migrating from areas with high levels of TB;
- Groups with high levels of TB transmission: homeless, injecting drug users (IDUs), HIV-infected people (HIV);
- Those working with people at high risk for TB in establishments or institutions: hospitals, shelters for homeless people, correction units, elderly homes, residential homes for HAVs, etc.

In developed countries, even if the number of cases is decreasing, TB directly affects vulnerable groups with low socio-economic status, substance users, people in high-impact regions, the elderly and all those living in institutions: dormitories, asylums, prisons , hospitals, day centers, etc. (Grange apud Ember, 2004)

Considering the contagiousness of the disease but also the increase in the number of patients with antibiotic-resistant forms, the lack of medication needed for them, the lack of psychosocial support and the bureaucratic and inadequate legislation for these cases, tuberculosis remains a threat to public health (both in Romania and international level). As regards the control of bacillus infections, there are a number of universal recommendations that can prevent transmission or infection. One of the most common recommendations is to ventilate the spaces and allow the penetration of ultraviolet rays to penetrate the rooms. Ultraviolet are the most effective form of destruction of these microbes and UV lamps are the most effective equipment for controlling TB infections in the health system.

2.1. Tuberculosis in Antropology

In the fight with the disease / illness, depending on the cultural specificity, at the individual level there may be problems at the somatic, mental and / or suffering level for reasons of "fate" and / or "misfortune". While individuals are confronted with these problems, the medical system has to cope with troubles related to work, finances, etc. All these aspects intervene and can be addressed separately or integrated in their complexity. (Hahn and Ember, 2004)

A common critique of disease / illness dichotomy is that both are localized or experimented on an individual level, but they cannot be analyzed without context. For this reason, researchers make a direct correlation between these individual sufferings and issues related to processes, events, social order, public health issues and / or inefficiency of health systems. (Waitzkin apud Ember, 2004)

As historians have shown that epidemics are social events that beyond the medical aspects require understanding of the social systems through which disease has multiplied, the anthropological studies of emerging infections seek to explain and understand how these epidemics are integrated into economic relationships and anchored in systems social. Social relationships shape exposure to risks, transmission, and susceptibility, which causes epidemics to cause pathogenic social relationships. (Ranger & Slack et al., 2004)

Anthropologist R. Shrestha-Kuwahara dedicates an entire chapter on tuberculosis to the Encyclopedia of Medical Anthropology, in which he reviews the main

studies and researches in the field analizyng the subjects as a whole. Starting from this synthesis, the author tells us that transmission of TB, disease development and treatment take into account many complex factors from the biological and social sphere. By identifying and examining how these factors, anthropologists and sociologists by applying different methods and approaches to disease and their factors, have contributed to understanding correlations in structural, behavioral and socio-cultural TB control. (Shrestha-Kuwahara, 2004)

Historically speaking, Shrestha-Kuwahara has gathered data demonstrating the existence of the disease since antiquity by discovering bacilli in mummies in Egypt dating back to 5,400 years ago. There is also archaeological evidence, through the study of bone DNA, which demonstrates the transmission of disease through migration from one continent to another, a phenomenon also described during the discovery of the American continent of the middle Ages. Anthropologists and sociologists have discovered that over time there have been numerous references to TB through art, thus discovering that the approach has undergone distortions over time: from a romantic way and the copying of paleness by nobility to associating disease with poverty, misery and immorality. From the seventeenth century to the nineteenth century, progress has been done in understanding pathology and clinical manifestations, understanding the social, economic and political context, and improving public policies by stating here the control of eating, improving sanitation and living conditions, patient isolation in the sanatorium and going to pasteurization of milk to avoid the transmission of M. bovis bacilli. (Shrestha-Kuwahara, 2004)

Until recently, the hypothesis of researchers in the field was that tuberculosis occurred 10,000 years ago with the domestication of animals and the occurrence of mutations in M. bovis DNA that could then be transmitted to humans, but with the research of the field of paleomicrobiology M. tuberculosis DNA was found to be more than 35,000 years old, being a much older pathogen than previously believed to have occurred long before the sedentarisation processes of the populations. (Stone Apud Burke, 2011)

Between the late nineteenth and twentieth centuries there have been recorded major advances in TB control. In 1882 Robert Koch discovered M. tuberculosis, the bacillus responsible for the development of the disease, and who will also be called the Koch bacillus. In 1940, streptomycin was discovered, a powerful antibiotic that progressed in treating the disease, but developed very fast resistance. In the 1950s, the principle of a treatment scheme involving the combination of several antibiotics was introduced and a few years later was discovered the isoniazid, the antibiotic "miracle" and very effective when administered in the right schemes. In the presence of streptomycin and isoniazid are still antibiotics basic treatment regimens throughout the world only important findings are antibiotics line II and Group V, antibiotics used for treatment of resistant forms of TB-RR or MDR-TB and have adverse effects for all patients (hearing loss, partial loss of vision, jaundice, liver failure, renal failure, etc.). (Davis and Shrestha-Kuwahara, 2004)

With the discovery of these treatment regimes, social scientists have begun to study other social dimensions, addressing issues of compliance or adherence to treatment, behavioral studies that have shown the importance of patients' rights to be involved in treatment decisions but also causal analyzes, social relationships, or cultural factors. Since 2000, the WHO has introduced a new concept regarding the relationship of TB patients with the community in an attempt to empower local authorities and communities to better respond to patients' needs and to counteract the DOTS strategy of discontinuing treatment. At the same time, there are new directions of study regarding the increase in the number of cases with resistant forms, as well as concerns about opportunistic HIV-TB infections. (Rubel & Moore and Shrestha-Kuwahara, 2004)

In order to see improvements in tuberculosis control, it is necessary to place this disease in the social context and actions should be extended to spheres related to social inequalities, improving education and developing a patient-centered treatment paradigm: are the services necessary for the patient, complementing the medical treatment? The chapter on TB issues in the Encyclopedia of Medical Anthropology makes a review of all social and cultural research into TB control, opening up a series of topics that require further analysis of the search behavior of healthcare, adherence to treatment, stigma, the structure of health programs, and the supplier-beneficiary relationship. (Rober and Buikstra apud Burke 2011) The failure to explain the social context has become the biggest limitation in tuberculosis control as a result of the change in the prevention paradigm of the 1940s, where control means adequate housing, richer nutrition, and living conditions improved and replacing them only with drug treatment with antibiotics has changed reporting mode. (Lonnroth apud Burke, 2011)

According to medical definitions, tuberculosis is a disease that mainly affects the lungs but is not limited to this organ but can also occur in other organs and parts of the body. The route of transmission of the bacillus is the air way and thus through coughing, sneezing, saliva, sang, a contagious person releases through aerosols TB germs that can survive for a few hours if they have a favorable environment. By ingesting these germs a healthy person becomes infected and the human body can respond by encapsulating bacilli and keeping them latent throughout their lives. In the second situation, under conditions of immunosuppression and / or successive infections, the bacillus finds a favorable environment thus developing active tuberculosis. Symptoms of the disease are persistent cough, fever, night sweats and weight loss,

and by being similar to other diseases, the time of diagnosis can be postponed for several months, which can lead to infection of others. WHO estimates that a patient can infect between 10 and 15 people within one year. (WHO, 2017)

Although TB is a contagious disease, it is not easily transmitted. WHO guidelines show that only one-third of people exposed to bacilli become infected over a long period (several hours or days). There is a very high risk of transmitting the infection between the diagnosis and the negative (the patient is no longer contagious), which usually lasts for two weeks. Any person who comes in contact with an infected person by inhalation of bacilli may become infected, but the likelihood of developing the disease varies from person to person and takes into account, first of all, the immunological level of the disease. Infected but not developing disease is called LTBI and is a latent infection with TB that is not symptomatic and is not contagious. WHO estimates that about 20% of the world's population is infected with latent TB and the probability that these people develop lifetime disease is 10% (1 in 10). (WHO, 2017)

Homeless people, drug users, HIV-positive people, vulnerable groups as a whole viewed from a systemic perspective are a consequence of social changes that have dismantled the welfare state, which has contributed to increasing social inequalities and rising poverty . In this way, tuberculosis reappears as a public health problem in developed countries, countries where this problem was believed to have been eradicated. (Draus apud Blake, 2011)

2.2. A new explanatory model - Mason Model

The conceptualization of elements of sociology and medical anthropology offers useful methods in examining the dimensions of public health at the expense of the biomedical paradigm, by recognizing cultural experiences as central forces shaping human interactions. In this way, TB researchers can develop new models of understanding health, illness, treatment, with new skills in understanding the sociocultural dimensions that impact on TB patients, thus contributing to the development of new procedures to reduce diagnostic time, increasing the efficiency of the services offered, and ultimately stopping the contagious disease. (Mason, 2015)

Mason thus presents a model of seven key concepts that highlight the social dimensions of tuberculosis through anthropological and sociological approach, conceptions emerging from the conceptualization of the three levels of analysis: personal, interpersonal, and structural. (Mason, 2015)

As regards the individual level, it is worth noting that illness is not just a diagnosis, but rather a sum of social experiences that the patient faces during the illness. At the conceptual level, the disease can also be seen as an interruption of the biography in the sense that for a period of time the patient is self-employed as a pause, in a difficult moment of life, moment that influences his social relations, the level of income, daily activities and quality of life. (Mason, 2015) The seven key concepts presented by Mason can be summarized as follows:

Stigma. As noted above, TB is a curable disease but in most current societies, simple diagnosis with TB can place patients in a social vulnerability due to stigma towards disease / sickness. Effects are difficult to quantify and foresee but can be manifested by the resilience of certain suspects in going to a medical check or resisting diagnosis, decreasing or lack of adherence to treatment, social isolation, and obviously, in extreme cases, suicide.

Biographical interruption is a concept that explores how patients with chronic (or long-lasting illness such as TB) develop, analyze and reinterpret their past, present, and future in narrative form. This method generates valuable information about the personal, social and adaptive processes through which a person with a chronic illness lives.

Medicalization. In the biomedical paradigm, all social and physical problems are seen as biological in nature, thus there is a medical treatment for any problem that has arisen. With the discovery of antibiotics, anti-TB treatment has changed its approach from treating patients to nursing homes and providing social support by involving the community in patient issues to an individualistic approach where the patient is responsible for healing by self-administering the treatment.

Treatment oversight opens up a new perspective on ethnographic and cultural studies, which are considered to be the best way to measure the quality and effectiveness of the DOT.

Gender is very important in the broad context of tuberculosis discussion because it correlates with the results in terms of active detection, diagnosis, treatment and adherence to it. The link is more to how gender is built socially by virtually influencing lifestyle and behavior in accessing medical services, behaviors that directly influence life expectancy.

The **technological imperative** opens a new subject in the social sciences about the use of technology and how much it helps us. Living in a technology paradigm is often considered to be the most efficient methods, but studies have shown that there are situations where technology is only used for it, even if it does not bring any extra information. This is the case for clinical trials conducted in India, which are still used, although the inefficiency of these technologies has been demonstrated, consuming resources without scientific justification.

The **human body or body in front of TB** refers to the link between the risks of developing tuberculosis and latent TB infection. One third of the population lives with latent TB (LTBI) and public health policies should take into account the reduction in risk factors that can turn the infection into disease.

In outlining this model, Mason also reviews the main theories that can explain the phenomena and

processes in the field of tuberculosis. As far as sociology and health sociology are concerned, the concepts of health and disease terms are related to cultural factors, such as medicalization, dominant discourse, individualism, media, victim's blame, system blame, social control and surveillance. Starting from this conceptualization, it is worth mentioning that it is necessary to understand how general information about disease is built as a constructive social construct based on social, economic, political and cultural interactions. As regards social parks on health and illness, tuberculosis as a field of study has shown close links with topics such as class and social status, social inequality, gender, marginalization, social exclusion or ethnocultural history. (Mason, 2015)

Going into the structuralist and organizational area, studying tuberculosis can not exclude analyzes and research on the way in which health structures are organized and functioning. The organization of systems is directly influenced by social values regarding social and individual responsibility, prevention versus treating a disease but also the way in which the economic environment influences the medical act in practice. From here, complex comparisons or analyzes can be made to demonstrate the links between basic medical coverage and certain indicators such as infant mortality, maternal mortality at birth etc. (Mason, 2015)

The last dimension related to TB is concerning the patient travel and how it addresses the disease, the role of sociologists being to answer a number of questions such as: what is the link between the social class and the health of a person? What are the social forces that predispose some people to develop TB? What is the social response to this disease? But the individual one? Also, answers to other questions regarding patient categories are needed, including diagnosed patients, latent TB patients and also patients with active but non-detectable TB. (Mason, 2015)

3. Conclusions

In order to see improvements in tuberculosis control, it is necessary to place this disease in the social context and actions should be extended to spheres related to social inequalities, improving education and developing a patient-centered treatment paradigm: are the services necessary for the patient, complementing the medical treatment?

The conceptualization of elements of sociology and medical anthropology offers useful methods in examining the dimensions of public health at the expense of the biomedical paradigm, by recognizing cultural experiences as central forces shaping human interactions. In this way, researchers can develop new models of understanding health, illness, treatment, with new skills in understanding the sociocultural dimensions that impact on TB patients, thus contributing to the development of new procedures to reduce diagnostic time, increasing the efficiency of the services offered, and ultimately stopping the contagious disease. (Mason, 2015)

References

- Centrul pentru Politici şi Servicii de Sănătate şi Totem Communication, 2009, *Cunoştinţe, atitudini şi practici referitoare la tuberculoză.* Raport. București
- Dan Adrian, Dan Mariana, 2005, *Persoanele fără adapost din România – O estimare a numărului acestora; CALITATEA VIEŢII*, XVI, nr. 1–2, 2005, p. 101–122; disponibil la http://www.revistacalitateavietii.ro/2005/CV-1-2-05/6.pdf
- Duarte R. et all, 2011, Involving community partners in the management of tuberculosis among drug users. Public Healt, p. 60-62
- Ember R. Carol, Ember Melvin, 2004, Encyclopedia of Medical Anthropology, Health and Illness in the World's Cultures, New York
- Emil Teșliuc, Vlad Grigoraș, Manuela Sofia Stănculescu, 2016, *Atlasul Zonelor Rurale Marginalizate şi al Dezvoltării Umane Locale din România*, București, disponibil la http://documents.worldbank.org/curated/en/237481467118655863/pdf/106653-ROMANIAN-WP-P159257-PUBLIC.pdf
- European Centre for Disease Prevention and Control, 2010, *Progressing towards TB elimination.* Stockholm. ECDC
- European Centre for Disease Prevention and Control, 2010, Technical assistance for Romania to strengthen TB infection control in specialized health facilities. Stockholm. ECDC
- European Centre for Disease Prevention and Control, 2016, *Annual epidemiological report 2015. Tuberculosis.* Stockholm: ECDC
- Furtunescu F., Domnariu C.D., Cioran N. și Mincă D.G., 2011, Improving the TB control in homeless people in Romania - model of partnership among public institutions and civil society. European Journal of Public Health, 21, 1 (S): 142
- Furtunescu, F., Mihăilescu, V., Ștefan, M., Cocei, H., Cioran, N., Ibraim E, 2011, *Increasing Adherence to TB treatment – Pilot Intervention in Two Counties in Romania*. European Respiratory Journal, 38, 55 (S): 484 (s)
- J. M. FitzGerald et all, Use of incentives to increase compliance for TB screening in a population of intravenous drug users, Vancouver, 1999, INT J TUBERC LUNG DIS 3(2):153–155

- Laboratory Network Hidden Health Crisis A Report by the European Roma Rights Centre, 2013, *Health Inequalities and Disaggregated Data*, European Roma Rights Centre
- Lapsley, P., 2013, *Lessons from patients' journeys*, BMJ. 2013 Apr 3; 346:f1988. doi: 10.1136/bmj.f1988.
- Mason P. H., C. Degeling, J. Denholm. *Sociocultural dimensions of tuberculosis: an overview of key Concepts.* INT J TUBERC LUNG DIS 19(10):1135–1143, http://dx.doi.org/10.5588/ijtld.15.0066
- Mason P., Dynamic Systems Modelling of the variable factors that influence the spread and control of Tuberculosis. Prezentare online disponibilă la: https://prezi.com/gg0guuwobojt/tb/
- Mason P., *Seven concepts from the social model*. Prezentare online disponibila la: https://prezi.com/tbdo87o_lfab/tuberculosis/
- Muzafarova, N. and Evans, P., 2013, Report Procurement and Supplement Management in Romania. Bucharest
- Perlman DC, Salomon N, Perkins MP, Yancovitz S, Paone D, Des Jarlais DC, 2005, *Tuberculosis in drug users.* Clin Infect Dis.;21(5):1253–64
- Programul Național de Control al Tuberculozei. (2011) *Raport 2011*. *Nepublicat*
- R. Shrestha-Kuwahara, 2004, Tuberculosis Research and Control in Encyclopedia of Medical Antropology, New York
- RIEDER, H. L., CHONDE, T. M., MYKING, H., URBANCZIK, R., LASZLO A., KIM, S. J., VAN DEUN, A. ,TRÉBUCQ A., 2010, *The Public Health Service National Tuberculosis Reference Laboratory*;
- Salvați Copiii, 2010, Cunoștințele, atitudinile și practicile copiilor și tinerilor străzii privind tuberculoza. Raport. București: Speed Promotion
- Selwyn PA, Hartel D, Lewis VA, Schoenbaum EE, Vermund SH, Klein RS, et all., 1989, A prospective study of the risk of tuberculosis among intravenous drug users with human immunodeficiency virus infection. N Engl J Med. 1989;320(9):545–50
- STACIE D. A. BURKE, 2011, *Tuberculosis: Past and Present, Reviews in Anthropology*, 40:1, 27-52, DOI: 10.1080/00938157.2011.547754
- Stillo, J. 2013, Tuberculosis in Romania: Needs Assessment and Recommendations. March, 2013
- Trebble, T. M. et all, 2010, *Process mapping the patient journey: an introduction*; BMJ. 2010 Aug 13; 341:c4078. doi: 10.1136/bmj.c4078
- TUBIDU 2011–2014: Assessment on HIV and TB knowledge and the barriers related to access to care among vulnerable groups. Report on a cross-sectional study among injecting drug users, Estonia, 2014
- World Health Organization (WHO), 2000, The Stop TB initiative. The economic impacts of tuberculosis, Geneva
- World Health Organization (WHO), 2008, Policy Brief: Policy Guidelines for Collaborative TB and HIV Services for Injecting and Other Drug Users, Geneva
- World Health Organization (WHO), 2011, Fluorescent light-emitting diode (LED) microscopy for diagnosis of tuberculosis policy: Policy statement, Geneva
- World Health Organization (WHO), 2011, Priorities in Operational Research to Improve Tuberculosis Care and Control, Geneva
- World Health Organization (WHO), 2013, Global strategy and targets for tuberculosis, prevention, care and control after 2015, Geneva
- World Health Organization (WHO), 2014, *Models of care for multidrug-resistant tuberculosis, Report of a regional workshop.* WHO Regional Office for Europe Copenhagen, Denmark 17 October 2013
- World Health Organization (WHO), 2017, *Global tuberculosis report 2016*, http://www.who.int/tb/publications/global_report/gtbr2016_executive_summary.pdf?ua=1, Geneva
- World Health Organization (WHO), 2017, *Key facts. Reviewed in March 2017*. Disponibil la http://www.who.int/mediacentre/factsheets/fs104/en/, Geneva
- World Health Organization (WHO, 2006, *The Patient's Charter for Tuberculosis Care. Patient's Rights and Responsibilities*, disponibil la: http://www.who.int/entity/tb/publications/ 2006/patients_ charter.pdf?ua=1
- Zenner. D. et. all, 2013, Active case finding for tuberculosis among high-risk groups in low-incidence countries. INT J TUBERC LUNG DIS 17(5):573–582

IRAN AND INDIA BETWEEN REGIONAL GOVERNANCE AND GLOBAL CHALLENGES

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Abstract

In a intimately interdependent global environment where one's prosperity depends on the contacts realised with others, isolating one government or community is not only improbable but dangerous because the respective government might go rogue and in peril to be colonised by the most radical elements of its own nation. Such might be the case of Iran if US and other important players toss away JPCOA. Instead of playing according to a zero sum antagonistic logic, Washington might find neighbors of Iran and employ them so as to forge a partnership with Tehran. As such, a friendly Islamic Republic could a solution to many of the problems in the Middle East.

Present study focuses hypothesis around a central questions: "Are two civilisational-states such as India and Iran able to start an alliance in order to fill the power void looming across their borders where an unstable Pakistan and a revanchist Afghanistan may very well fail after the pull out of the international peacekeeping force?" subsequently a second question comes to fore: "Why is there no Iranian-Indian alliance up until now?"

This article argues that India may play an appeasing role towards Tehran ambitions due to geographical proximity and civilisational needs. If they establish a common ground, both republics may work together towards shouldering regional evolution in the AfPak cauldron. Furthermore, the article aims to use Robert Keohane's regime theory applied to the area mentioned above.

Keywords: *Iran, India, Afganistan, Pakistan, instability, regional governance, cooperation.*

Introduction

Possessing vast natural riches, an expanding workforce along with a booming market one can bet on, India represents for Iran one of the most viable options in the South-East Asian wider area to initiate mutually beneficial partnerships, on medium and long term.

Present study focuses hypothesis around a central questions: "*Are two civilisational-states such as India and Iran able to start an alliance in order to fill the power void looming across their borders where an unstable Pakistan and a revanchist Afghanistan may very well fail after the pull out of the international peacekeeping force?*" subsequently a second question comes to fore: "*Why is there no Iranian-Indian alliance up until now?*"

Following the post 1990 events and bearing in mind that both states had a similar cultural and civilisational path, our study has the purpose to identify the strategic motivation behind the Indo-Iranian arrangements and take into consideration the constraints as well as the gap between them.

Additionally, despite many diplomatic attempts on different matters, mutual relationships have shown only ad-hoc goodwill; that is why we found it necesary to describe and explain foreign affairs goals of these two nations, in order to better understand the root causes against establishing a full strategic partnership.

Our research interprets the chosen case study in light of Robert Keohane's regime theory. We will examine each country regarding five dimensions, inspired (but not in exactly the same manner) by the Copenhagen School writings on security: politics, military, economy, social, and civilisational. Each dimension is presented in a different order for each of the two countries. We do not follow a rigid template but an natural unfolding of arguments.

The first part of the article is dedicated to theoretical issues. The second one, split in other two subchapters, reveals some mirror-images showing the interest of each side towards the other, while the third offers the conclusions along with the actual phase of bilateral development.

1.1. Globalisation as seen through regime theory

Nowadays, globalization is a proof of modernization and evolution all around the world. Namely that each state becomes closer towards all the others and they return the favor in kind. Which is false! Globalization may set the stage and embolden the actors to get acquainted but just like between individuals, does not say to you whom you should be friend with. When analysts quote Nye and Keohane's collocation <complex interdependence> they seem to

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forget the complex dimension[1]. Those two classical authors position themselves against the statocentrism of neorealism and take into consideration both perspectives: interdependence may ease anarchy, fostering greater cooperation but at the same time, it might also encourage bad activities (banditry, human traffic, prostitution, proliferation of small arms or nuclear technology on the black market). All of the above mentioned compound the illegal side of connectivity[2][3].

Given these arguments, we believe that institutional liberalism possesses the most generous explanatory power. Even if other schools of thought may be more accurate in sectorial domains, liberalism's emphasis on mutual dependence remains today's best guidance in IR.

1.2. An economic-centered view about interdependence between states

Postwar American social sciences were heavily tributary to rational choice theory which postulated that individual actions are motivated by personal interest, always searching for the maximum gain with minimal costs. Their endless pursuit of personal welfare can be pinpointed on a map full of rewards and punishments.

International Relations theory didn't miss such trend. Both realists (who became neorealists) and liberals (having updated their earlier premises) derive from rational choice studies and games. While Kenneth Waltz's pioneering neorealism witnessed a world of egotistic states each fearful of the others, Robert Keohane foresaw a milder approach. Although agreeing to the Waltzian starting point about states wanting to survive above anything else, he considers that such survival is dependent on going beyond 'the jungle of suspicion'(in JFK's words)[4] and learning how to cooperate. Therefore, political groups learn to forge path of dialogue which, in the end is assumed by international regimes, arrangements crafted to mitigate conflict, find common grounds and facilitate the accumulation of prosperity.

Regimes have been defined as : "*a set of mutual expectations, rules and regulations, plans, organizational energies and financial commitments, which have been accepted by a group of states*" by John Gerard Ruggie, credited with having invented the formula, and as "*sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations*" in Stephen Krasner's slightly more elaborate formula[5].

Descending from general towards concrete:

"Principles are beliefs of fact, causation, and rectitude.

Norms are standards of behavior defined in terms of rights and obligations.

Rules are specific prescriptions or proscriptions for action.

Decision-making procedures are prevailing practices for making and implementing collective choice[6]*."*

However, in order to establish such regimes and afterwards to offer principles, rules and decisions, nation-states are poised to find common grounds in what Keohane calls issue-areas ("sets of issues that are in fact dealt with in common negotiations and by the same, or closely coordinated, bureaucracies, as opposed to issues that are dealt with separately and in uncoordinated fashion[7]")

Once established, international regimes may be regarded as institutions in their own right with the role to lower the transaction costs of negotiating shared interests. Here is starting point of Waltzian neorealism. Whereas the former finds cooperation pegged to the wishes of a hegemon, Keohanian institutionalism believes that collective arrangements are the ones which last the most.

From Keohane moderately pessimistic of human affairs, we assert that interdependence is more intense than states or international regimes can contain. Even though governments choose mutual regimes and treaties in order to obtain common goods, their societies have a dynamic of their own and often goes beneath established norms, seldom generating common bads or externalities. Let's take for example weapons transfer. The majority of world states try to exert their needs for profit (if they are sellers) and security (if they are clients) through legal procedures, like UN Arms

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[1] Waheeda Rana, Theory of Complex Interdependence: A Comparative Analysis of Realist and Neoliberal Thoughts, *International Journal of Business and Social Science* Vol. 6, No. 2; February 2015. Annett Bosz,

[2] For a discussion about trade and likelihood of warfare embedded in the literature review see: Derek Braddon, The Role of Economic Interdependence in the Origins and Resolution of Conflict, *Revue d'économie politique*, 122 2 (2012)

[3] Especially in his later work, Robert Keohane, just as Joseph Nye Jr., grappled with what we call the <too much success syndrome>, namely that a much apreciated theory ends up distorted and set against its original message by overuse. To set the records strait and responds to those critiques who painted his liberalism as a naive overoptimistic Hegelian march towards peace, Keohane explained that: „My theory has nothing to do with the view that commerce leads necessarily to peace; that people are basically good; or that progress in human history is inevitable – all propositions sometimes associated with liberalism (..) My liberalism is more pessimistic about human nature and more cautious about causal connections running from economics to politics than some versions of classical liberalism; and I have never been a supporter of the "Washington Consensus" in its strong neo-liberal form." Robert O.Keohane, *Power and Governance in a Partially Globalized World*, (London and New York: Routledge, 2003): 3 For an argument about how realists often misrepresented liberal thinking see Andrew Moravcsick: liberalism and International Relations Theory, Paper no.92-96, p.12, https://www.princeton.edu/~amoravcs/library/liberalism_working.pdf

[4] Inaugural Address of President John F. Kennedy, Washington, D.C., January 20, 1961

[5] Robert Keohane, *After Hegemony. Cooperation and Discord in the World Political Economy*, (Princeton: Princeton University Press, 1984), 57

[6] Robert Keohane, *After Hegemony*, 57

[7] Robert Keohane, *After Hegemony*, 61

Trade Treaty (ATT) signed in 2014[8]; however, in spite of their presumed fair intentions, large quantities of arms and ammunition end up in the hands of guerilla or mafias. The explanations are either governments' inability to control the supply chain, either double-standards[9].

2.1. The worldview of Iran

Being the end point of several factors (ideology, religion and spirituality, perception of warfare and threats, regime survival and the consolidation of its regional posture), Iran's national security strategy has come of age after walking a thorny path, from Ḫomeynī's slogan "Nor East, nor West, only the Islamic Republic" up to the favorite saying of the incumbent Supreme Leader - "Show them death [namely the other nations] and they will settle with a fever!"

Shaped by the policies and actions exacted by other great powers, Iranian diplomacy unfolds on traditional parameters with clear penchant for soft power, employing cultural attitudes and values to achieve its essential goals.

At first sight, Iran seems to have channeled its energy towards Middle East where it finances and provides ideological assistance to all sorts of resistance movements within the Islamic world and also through intensifying efforts on behalf of the Shia minorities across the area; all set-up under the noble banner of protecting <the oppressed> against the <oppressors>.

On the other hand, besides the mentioned actions, the routine of Iranian diplomacy is geared up for defensive, so as to protect the regime against what is perceived to be American&allied endeavours to invade or impair the revolutionary regime, or other objectives related to the prestige of the former Persian Empire.

However, a more profound analysis must go beyond reductionism and take into account the porousness of frontiers, the increased conflicts in the neighbourhood, and last but not least the multiplication of political and socio-economical crises at the global level. With all of these in mind, Iran hopes it will return to international diplomatic society, whereas the latest nuclear agreement might boost Tehran's regional perception.

When the Soviet Union fell apart, Iranian interests created the opportunity to highlight a regional framework based on diverse contacts with states from Caucasus, Central Asia, and South-East Asia, some of them sharing either common threats with Iran: terrorist and extremist Sunni groups; either linguistic, cultural and religious proclivities[10]. More so, the Constitution of the Islamic Republic describes in a crystal clear manner the foreign policy paths in regard to: the neighbors of Iran; those nations with a Muslim majority, as well as towards the third world[11].

At the same time, Iranian strategy towards its closest neighbours, Central Asia and India is nourished by several factors (economic, social, cultural and security), to the extent those just mentioned states are conceived as investment & consumers markets and, most of all, they can alleviate the ring of isolation Trump administration might superpose over Tehran movements.

According to the ancient Persian vision of geography, Iran remains embedded into the Middle East, Central Asia and Caspian area, that is why its foreign policy is always preoccupied to identify opportunities to be a part on the vast chessboard of a multipolar world.

As Iran is engaged in the transition from a rather rigid, fossil-fuel based economy towards a pro-market one, heavily linked to the global capital, Tehran needs to solve its nearby issues in order to further invite other actors.

Within this logic presented above, a state like Afghanistan poses significant problems to the extent it generates instability by being a traditional hub for drug traffic and a meeting point for jihadi fighters coming from everywhere.

From the standpoint of Iran, Afghanistan sends an open invitation to political expansion, given that the latter's official language emerges as a version of *tehrānī* dialect[12].

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[8] About the history of 2014 UN Arms Trade Treaty and its relationship with other norms on the same subject consult: Elli Kytömäki, The Arms Trade Treaty's Interaction with Other Related Agreements, Chatam House, Research Paper, February 2015

[9] Recent theaters of conflict such as Ukraine and Siria-Iraq proved to be very lucrative. For an account about Balkan states selective arms transfers see: Lidia Kurasińska, "Balkan Countries Continue to Cash in on Arms Trade Despite Concerns of Diversion, Balkan Diskurs," July 17th, 2017. For a study about how EU got involved to assure that arms embargo against Zimbabwe was not breach, even European weapons produces see: Lukas Jeuck, Arms Transfers to Zimbabwe: Implications for an arms trade treaty, SIPRI Background Paper, 2011.

Burglary can also be an instrument to acquire small fire arms. Rachel Stohl, "The tangled Web of illicit Arms Trafficking," in Gayle Smith and Peter Ogden (eds), *Terror in the Shadows: Trafficking in Money, Weapons and People*, (Washington, 2004).

Other impediments against better policing arms transfer is due to francization of production. As arms producers build different parts in various countries, oversight of the supply chain becomes supplementary challenging. Denise Garcia, Disarmament Diplomacy and Human Security: Regimes, Norms and Moral Progress in international relations, (Routledge, 2011), Google books.

UN Arms Trade Treaty (2014) does not explicitly prohibit weapons transfers from state towards non-state actors, argues Tamara Enomoto, which could be listed as another example where the meeting point between national goverments and international regimes may cause 'common bads'. Tamara Enomoto, Controlling Arms Transfers to Non-State Actors: From the Emergence of the Sovereign-State System to the Present, History of Global Arms Transfer, 3 (2017: 3-20, http://www.kisc.meiji.ac.jp/~transfer/paper/pdf/03/1_enomoto.pdf

[10] Nikolay A. Kozhanov, "Understanding the revitalization of Russian-Iranian relations". *Carnegie Moscow Center*. (May 2015). http://carnegieendowment.org/files/CP_Kozhanov_web_Eng.pdf

[11] Abbas Maleki, "Iran and Central Asia" Central Asia Caucasus Institute. School for Advanced International Studies Johns Hopkins University. (05.04.2006) https://www.belfercenter.org/sites/default/files/legacy/files/iranandcentralasia.pdf

[12] In Western linguistical and political official documents, darī is held to be "Afghan Persian", a shade of the Persian language but spoken in Afghanistan.

One of the advantages Tehran brings to the fore is its absence from all sorts of alliances and other regional agreements, which provides the former with a certain detachment and neutrality when dealing with the nearby border conflicts.

By and large, the interest showed by the Islamic Republic towards India might be explained through the intention to get closer to governments that have a friendly relationship with the United States and Israel in order to assert its own cause or even determine Pakistan to change its approach towards Tehran.

2.1.1. Political dimension

According to Jalil Roshandel, Iran's rapprochement towards India started to increase since 1990s as a part of the 'Look East policy' promoted by Tehran, underpinned by a mutual desire to initiate a strong connection within the Central Asian and Caspian geographic complex. In order to achieve such a plan, Afghanistan had to be drawn in a 'tripartite strategic partnership' (2003) which would have allowed a transit corridor to Iranian and Indian goods towards Central Asian and Caucasian republics[13]. Furthermore, both Tehran and New Delhi would have a pretext to exert and increase pressure over Kabul and Islamabad.

By identifying three stages in the Indo-Iranian relationship, namely 1947[14] - 1989[15]; 1990 - 2001[16]; 2001 – present day, C.Christine Fair asserts that their bilateralism remains complicated, each side being influenced by different links and entanglements with the wider international system.

Thus, if prior to 1971, when India has won the war with Pakistan, Iranian attitude towards India was rather prudent due to Tehran proclivity in regard to Karachi (Islamabad)[17]; after 1971 Iran changed the agenda and put India up on its list of priorities[18].

The implosion of the Soviet Union has offered both Iran and India the opportunity to cooperate on common projects in Central Asia, as both of them were interested to curtail terrorist activities and organised crime in that geographic area[19].

As such Iran has found in the South Asian nation a partner eager to cooperate and all of that in a testing time when Tehran had just finished a bloody war. The Islamic Republic had few supporters in its struggle to Iraq, which left Iran poorer and more isolated in the end.

On one hand, the beginning of the war against terrorism in 2001 has allowed Iran as well as India to act in a much more organised framework against Sunni militants, creating a manueuver space in Afghanistan. On the other hand, including Iran into the 'Axis of Evil' proved a turning point for Iranian foreign policy, determining Tehran to start persuading different states in order to take it out of isolation, India being one of them[20].

Nevertheless, when it was found out that Iran was developing a secret nuclear program and Tehran started to make certain mistakes in its foreign policy, India – itself once a target of the international forum due to nuclear ambitions- has voted again Iran at the AIEA. New Delhi considered that another nuclear neighbour would not have been in its own interest. Moreover, the previous links between Iranian nuclear scientific community and AQ Khan, the father of Pakistani atomic arsenal, have been a strain to the progress of Indo-Irani relations[21].

Politically speaking, the visit of Iranian president to India (15 to 17 February 2018) has not produced any spectacular results, as India continues to be dependent on the larger strategy announced by Trump administration with regard to JPCOA. Thus, up to this point, any agreement perfect between the two Asian governments are insufficient to take the dialogue to the next level, whereas New Delhi pipes to Washington's tune[22].

All in all, worth mentioning is the fact that after Rouhani's visit, Iran and India have identified several common goals, such as supporting the Palestinian cause. In this regard, Tehran greeted New Delhi's position at UN after United States has declared Jerusalem to be the capital of Israel[23].

2.1.2. Military dimension

The vision of a 'strategic partnership' between Iran and India has been improving since 2003 with the visit of Iranian president Moḥammad Ḫātamī in India. The head of the Islamic Republic has been honored to attend India's Republic Day, event which was labeled to be one of *substance*, according to several pundits. By signing of the 'Delhi Declaration' and 'Roadmap for

[13] Christine Fair, Jalil Roshandel, and Sunil Dasgupta, P.R. Kumaraswamy. "The Strategic Partnership Between India and Iran". *Asia Program Special Report,* No. 120 (April 2004): 1-3. *https://www.wilsoncenter.org/sites/default/files/asia_rpt_120rev_0.pdf*

[14] The year when India gain the Independence from the British Empire.

[15] The closing of the Caold War.

[16] When World Trade Center was Attacked.

[17] Iran has been the first nation to have recognised Pakistan as an independent actor and established diplomatic relations with it. Later on, during the Indo-Pakistani warfare, Iran has encouraged Islamabad, most probably due to sharing common borders and their inner religious structure with a Muslim majority. (C. Christine Fair. "Indo-Iranian Relations: Prospects for Bilateral Cooperation Post-9-11". *Asia Program Special Report*. No. 120. (April 2004): 6-8. https://www.wilsoncenter.org/sites/default/files/asia_rpt_120rev_0.pdf

[18] Fair, "Indo-Iranian", 8-9

[19] *Ibidem*, 9-10

[20] *ibidem*, 11-12

[21] Uma Purushothaman. "The Iran Opportunity for India". *E-International Relations*. 19.08.2015. http://www.e-ir.info/2015/08/19/the-iran-opportunity-for-india/

[22] Sumitha Narayanan Kutty. "Rouhani's visit a reality check for Iran-India relations". *Al-Monitor.* 06.03.2018. http://www.al-monitor.com/pulse/originals/2018/03/iran-india-ties-rouhani-state-visit-chabahar-farzad-jcpoa.html#ixzz5940rE93b

[23] Fazzur Rahman Siddiqui. "India must not forget its historic support for Palestine". *The New Araby*. 15.01.2018. https://www.alaraby.co.uk/english/comment/2018/1/15/india-must-not-forget-its-historic-support-for-palestine

strategic cooperation', were created the premises for a future military synergy mutually and profoundly beneficial as India helped train Iranian navy personnel and afterward performed common exercises while Iranian technicians mended Soviet style military equipment operated by the Indian armed forces[24].

Interested in Indian know-how in military affairs, purchase of weapons and assuring bilateral experience exchange on intelligence, Iran has oriented its strategy in a way to institutionalise a strategic dialogue and create together with India a working group dedicated to combating terrorism and drug traffiking. Tehran has seen in New Delhi a potential provider of conventional military equipment, therefore a MoU (Memorandum of Understanding) appeared in 2001 that offered the legal framework for Iran to buy military telecommunication gear, anti-tank rockets and spare parts. All in all, the military and intelligence coordination is constrained by the pressure from Washington and Tel Aviv, both of them insisting on New Delhi not to sell Tehran maritime hardware which might affect their regional security[25].

In summary, if Iran hopes to have a much closer relationship with India, the latter desires to keep the balance straight, so as not to break the ties either with the United States or Israel. The formality of their relations was revealed when several Israeli diplomats were victims of a terrorist attack in New Delhi (13.02.2012): shortly after Indian diplomacy did not wait too long and launched allegations with regard to a possible Iranian involvement whereas Iran refused to assist the police investigation in finding the perpetrators[26].

2.2.3. The economic dimension

The visit of the Indian prime-minister Narendra Modi (in 2016) in Tehran should be seen as a manner the international community is rediscovering Iran after the latter agreed to sign JPCOA. At first the event seemed, as usually, concerned on bussiness issues. However the bilateral agreements signed showed a desire to deepen economic relations.

As a proof, Iranian media hailed the importance of India on the Asia subcontinent and praised it to be the third economic power of the world in 2030. Some of the most important newspapers in Persian published headlines announcing that Iran and India "*intend to challenge China in Central and South Asia*" through the port Čābahār, set in the Iranian province Sīstān-o-Balūčistān. Also, the two actors made the promise to boost the maritime commerce between Persian Gulf, the Sea of Oman and the Indian Ocean[27].

The Memorandum of Understanding signed between India, Iran and Afghanistan for the development of the mentioned Iranian port along with the operationalisation of a transport and commercial corridor through Afganistan appear to ease the access of Iranian products to the Indian market. As a source of inspiration from what was once known as the 'Silk road,' all three states became aware that a corridor would allow the growth of economic potential and, last but not least, the improvement of political and security links between them.

According to the Iranian perspective, the development of Čābahār bears crucial importance also to India, given the fact that the port should become a direct rival for the Pakistani port of Gwadar, which has already been a beneficiary of Chinese investments. The matter did not escape public analysis, the Iranian news website *Enteḫāb.ir* was highlighting that India needs more than ever energy and connectivity projects with the Persian space, a terrestrial hub for many countries in Central Asia, Russia and Europa[28].

Another Iranian online platform, "Dīplumāsī-ye īrānī" advised India to reconsider the rhetorical tone towards Iran and its neighbors from Middle Eastern, given the former dependence towards fossil fuels and for the Iranian import market[29].

A third opinion, presented by the Iranian news agencies "Irna" and "Fars" have reported this high visit from the mutually beneficial perspective, perceiving India as the second most important client of Iran with regard to oil after China. In this respect, by signing the three party MoU, president Ḥasan Roūḥānī considered it "*more than an economic document*" but a "*message for each of the three countries involved that they may dare to open new international routes*[30]."

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[24] Fair, "Indo-Iranian", 12

[25] Monika Chansoria. "India-Iran Defence Cooperation". *Indian Defence Review*. 17.02.2012. http://www.indiandefencereview.com /interviews/india-iran-defence-cooperation/

[26] Tanvi Madan. "India's Relationship with Iran: It's Complicated". *Brookings Institution*. 28.02.2014. https://www.brookings.edu /blog/markaz/ 2014/02/28/indias-relationship-with-iran-its-complicated/

[27] Moḥsen Ğalālpūr. "Moṭallaṭī bā monāfaᶜ-e moštarak/A trinagle based on common interests". *Īrān*. 03 ḫordād 1395/ 23.05.2016. http://iran-newspaper.com/newspaper/page/6219/1/132778/0/

[28] ***" Safar-e noḫost-e vazir-e Hend be Īrān/Indian primeminister visits Iran". *Entekhab.ir*. 11-12 ordībehešt 1395/ 30.04 – 01.05.2016. http://www.entekhab.ir/fa/news/266035/%D8%B3%D9%81%D8%B1-%D9%86%D8%AE%D8%B3%D8%AA-%D9%88%D8%B2%DB%8C%D8%B1-%D9%87%D9%86%D8%AF-%D8%A8%D9%87-%D8%A7%DB%8C%D8%B1%D8%A7%D9%86

[29] Kadira Pethiyagoda. "Naqšehā-ye monṭaqe-yi dehlī. Mūdī Hend rā be Ḫāvar-e Mīāne nazdīk mīkonad?/ Rolul regional al Indiei. Mudi apropie India de Orientul Mijlociu?" *Dīplumāsī-ye īrānī*. 01 tīr 1394/ 22.06.2015 http://www.irdiplomacy.ir/fa/page/1948780/%D9%85%D9%88%D8%AF%DB%8C%D8%8C+%D9%87%D9%86%D8%AF+%D8%B1%D8%A7+%D8%A8%D9%87+%D8%AE%D8%A7%D9%88%D8%B1%D9%85%DB%8C%D8%A7%D9%86%D9%87+%D9%86%D8%B2%D8%AF%DB%8C%DA%A9+%D9%85%DB%8C%E2%80%8C%DA%A9%D9%86%D8%AF%D8%9F.html.

[30] *** "Dastāvardhā-ye safar-e noḫost-e vazir-e Hend be Īrān/ Cadourile vizitei premierului Indiei în Iran". *Farda News*. 04 ḫordād 1395/ 24.05.2016.
https://www.fardanews.com/fa/news/525983/%D8%AF%D8%B3%D8%AA%D8%A7%D9%88%D8%B1%D8%AF%D9%87%D8%A7%D

Taking into consideration not only financial reasons, but also geopolitics, by getting friendly with India, Iran has the chance to find new investors in infrastructure and outdistance itself from Chinese presence on the Iranian market. Although Tehran posseses unrefined oil, it still needs refineries as those already in function are either technologically outdated either abandoned. In this regard, Indian oil refining infrastructure adapted to a low sulfurous environment might prove attractive. Iran sees India as a partner when comes to exploring and development of oil and gas wells; now in China's upper hand[31].

To conclude, Ḥasan Rūḥānī's visit to India (February 2018) was described in beautiful words about 'historical ties' but without any major contracts signed. Energy was sidelined on the bilateral agenda given Washington's announcement about reinforcing once more sanctions against Tehran. However, a victory concerned the Čābahār with India signing contracts on 18 months[32].

Considering the Peace pipeline Iran-Pakistan-India, Tehran has not abandoned the project which would bring not only financial gains, but also the reputation of having solved through diplomatic means the historical conflicts between the Southasian neighbours. At the time of writing this research, three impediments prevented us to complete the project: 1) the first concerns Tehran's claim to modify the price of oil each three years; [33] 2) American pressure and the perspective to reimpose sanctions; 3) Pakistan not being able to fulfill the agreement signed in 2009 and complete its sector of the pipeline. Thus India backed down and chose to negotiate energy contracts on bilateral basis with Tehran and Islamabad[34].

2.2.4. Social dimension

With regard to the social dimension of security, Iran has identified in India a great provider of pharmaceutical products, which tends to have an edge in comparison to the Western ones[35]. More so, due to geographical shorter distance, medicines can be delivered to Iranian pharmacies much faster[36].

2.2.5. Cultural dimension

Iranian official news agency, 'IRNA' noted that the interest of both states go far beyond political borders, and that Iran treats India as a great 'world civilisation' where the Persian language has been used as official idiom for around 700 years[37].

Sharing a common linguistic DNA, which derive from the Indo-Irani stock, Iran as well as India nurtured vast empires which shaped the culture of a modern nation nowadays.

Experts took notice of a Persian influence upon Indian subcontinent even before the advent of Islam, since the rule of Cyrus the Great. After the Arab conquest, many Zoroastrian worshipers[38] fled to Indian territories to escape the Muslim banishment of their cult[39].

Another cultural meeting point is the *parsi*[40] community in India. By no means large, it represents one of the most important communities there, especially because it succeeded in maintaining vivid contacts with the Zoroastrians[41] in the Iranian cities of Kerman and Yazd. People with Persian origins, Parsis used an archaic language, the Avesta in their religious rituals and continue to cherish the preislamic glory of the Persian dynasties[42].

At the same time, it is important to mention that in India lives a 14 million strong Shia community which can trace the beginning since the first century of the Sunni-Shia schism[43].

In contemporary India, the shia community speaks Urdu with Arabian-Persan alphabet. Its members value formal education and they are fully integrated into the Indian mainstream but at the same time they keep the juridical duodecimanical tradition

B%8C-%D8%B3%D9%81%D8%B1-%D9%86%D8%AE%D8%B3%D8%AA-%D9%88%D8%B2%DB%8C%D8%B1-%D9%87%D9%86%D8%AF-%D8%A8%D9%87-%D8%A7%DB%8C%D8%B1%D8%A7%D9%86/

[31] Under the pretext of having the right to veto at the UN Security Council, China has negotiated few economic contracts with Iran in fairly advantageous terms, especially those dealing with energy issues.

[32] Kutty, "Rouhani's visit"

[33] Abbas Maleki. "Iran-Pakistan-India Pipeline: Is it a Peace Pipeline?" *MIT Center for International Studies.* (September 2007): 2. https://www.files.ethz.ch/isn/39802/Iran%20Pakistan%20India%20Pipeline.pdf

[34] Damir Kaletovic. "Iran May Cancel $7B Pipeline Project With Pakistan". *Oilprice. Com*. 27.01.2017. https://oilprice.com/Latest-Energy-News/World-News/Iran-May-Cancel-7B-Pipeline-Project-With-Pakistan.html

[35] Pharmaceutical products have been under anti-Iranian embargo sanctions, thus affecting the civil population in need.

[36] Purushothaman "The Iran"

[37] *** "Dastāvardhā-ye"

[38] Zoroastrianism has been the state religion of the Sassanid dynasty, the last one which ruled over the Persian Empire before the Arab conquest. - *Cf.* Jesse S Palsetia. *The Parsis of India. Preservation of Identity in Bombay City.* (Leiden. Boston. Koln BRILL, 2001): 2

[39] Palsetia, *The Parsis*, 2

[40] In India Zoroastrians are called <parsi>, while those from Iran are <irani>. Even the dictionary word 'parsi' has an Iranian origin meaning "persian." (Palsetia, *The Parsis,* 3)

[41] Zoroastrian community in India is the most numerous in the world, followed by those from Iran, North American, Australia, and Afghanistan- *Cf.* "Top Countries of the World by Zoroastrian Population." *World Atlas*. 19.09.2017. https://www.worldatlas.com/articles/top-countries-of-the-world-by-zoroastrian-population.html/)

[42] Palsetia, *The Parsis*,5-35

[43] According to John Hollister, the presence of Shias on Indian subcontinent is due to Sunni persecution from the Umayyad and Abbasid periods. Most of them pertaining to Persian aristocracy/elite, Shias fled towards the protection lavishly given by the Indian rulers who have appreciated the refinement and education of the former. Bearing such cherished advantages, Persian language has come to be known as <the language of diplomacy and politeness>. For more information on the topic consult John Norman Hollister. *The Shi'a of India.* (London: Burlligh Press, 1953): 101-102)

regarding the line of ᶜAlī and preserve the right to use and update the sacred text of their cult[44].

Through clerics and seminaries organised in Qom and Mašhad, Tehran maintains a close relationship with Shia community in India. Such cultural practices keep alive the flame of Shiism and strengthens transnational networks so as to connect Shia believers across the map[45].

2.3. Indian worldview with regard to Iran

2.3.1. Cultural dimension

With a history of over a millennium, Indo-Iranian relations have drawn the geography of a common heritage, thus linking South Asia to the Pamir plateau and further on towards larger Eurasia. Their durability predates political relations between the two centers of civilization. Just like in the previous part, Indian interests towards their Iranian counterparts shall be treated on five dimensions: social, political, economic, military and environmental.

According to Jawaharlal Nehru, in his 'Discovery of India':

"Among many peoples and races who have come in contact with and influenced India's life and culture, the oldest and most persistent have been the Iranians. Certainly, the relationship precedes even the beginnings of Indo-Aryan civilization, taking their common roots, that the Indo-Aryans and the ancient Iranians split and took different ways[46]."

The long essay written in prison by India's first prime-minister does not consider Persian influence in South Asia only from ancient times, but acknowledges it to have been continuous and pervading all cultures:

"In India this Iranian influence was continuous, and during the Afghan and Moghul periods in India, the court language of the country was Persian. This lasted right up to the beginning of the British period. All the modern Indian languages are full of Persian words[47'48]*. "*

Further on, between VIII[th] and X[th] century AD Iranian migrants came to India where they became Parsees. With a number of more than 114.000 during the earlier stages of the XX century, nowadays they diminished.

XVIth century proved to be a period of Renaissance not only for Europe, but also a creative momentum due to the quasi-simultaneity of Safavid and Mughal Empires. As long as Shia doctrine was promoted in an aggressive manner, many nobles and intellectuals left the Shahs' rein and found refuge at the tolerant Mughal court where some of them gained high esteem[49]. According to the historian of Middle Ages Irfan Iqbal: "*the sectarian divide could not prevent the intellectual interchange between the scholars of India and Persia; and for this the generally tolerant policy of the Mughal Empire deserves recognition*[50]."

Architectural wonders such as Taj Mahal, Fatehpur Sikri or Humayun's Tomb in New Delhi along with many other Persian modeled gardens are a testament of the successful synthesis between the two civilisations[51].

Taking advantage of the Silk Road, many Indian merchants established themselves across Central Asia up to the Caspian Sea[52]. Even if today such communities are in a small number as compared to the past, their remnant have acquired an archeological importance, such is Ateshgah, the Fire Temple at the outskirts of Azerbaijan's capital, Baku.

2.3.2. Social dimension

However, from societal point of view, Iran is important to India for several reasons: a) India has the world's fifth Shia community, therefore any sign from Tehran has to be felt in South Asia; b) even Indian expats in Iran does not surpass 60 family or so (mostly Sikhs) [53], New Delhi has to take care of the widest diaspora on the globe, 15-16 million[54], with many working in the oil rich countries in the Gulf region and Libya. Therefore, instability in the Middle East would

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[44] Jalal Jafarpour, Shahram Basity, Mohammad Reza Iravani. "A Study of Social and Cultural in the AsnaAshari Shias TwelverImami) Shi'ism in India (Case Study Mysore City)". *Technical Journal of Engineering and Applied Sciences*, 4 (3, 2014): 156-164. http://tjeas.com/wp-content/uploads/2014/08/156-164.pdf

[45] *** "Home". *Study in Hawza.* Accessed February 02, 2018. http://studyinhawza.in

[46] Jawaharlal Nehru, *The Discovery of India*, (Oxford, New York: Oxford University Press, 1985), 146

[47] Jawaharlal Nehru, *The Discovery*, 147

[48] Linguists have studied the similarities between different branches of the Indo-European stream concluding that Avesta and ancient Sanskrit share common roots. In this regard see: Alexander Lubtosky, The Indo-Iranian substratum. Originally appeared in: Early Contacts between Uralic and Indo-European: Linguistic and Archaeological Considerations. Papers presented at an international symposium held at the Tvärminne Research Station of the University of Helsinki 8-10 January 1999

[49] One case is Mir Muhammad Sharif Amuli fell out of favor with the Savafid court therefore he fled to Akbar's in Mughal Empire. Muzaffar Alam**,** *The Languages of Political Islam: India, 1200-1800*, (London: Hurst& Company, 2004), 66-71 and *passim*

[50] For a quantitative account of Iranian nobles and their estates at the Mughal court, especially during Aurangzeb's time see: Muhammad Ziauddin, Ph.D, Strength and Role of Persian Immigrants in the Politics and Administration of Mughal Emperor Aurangzeb Alamgir, *Pakistan Journal of History and Culture*, Vol.XXIX, No.2, (2008): 138-152, esp. 140

[51] Lesley A. DuTemple, *The Taj Mahal*, Lerns Publications Company, (Minnesota: Minneapolis, 2003), 27-30. FatemehTaghavi, Artistic and Cultural exchange between India and Iran in 16th &17th century, 2nd International Conference on Social Science and Humanity, IPEDR , Singapore, vol.31(2012), pp.115-118. Mohammad Akvan, Mahmood Seyyed, Architectural Interactions Between the Indian Subcontinent and Iran, 12 May 2015, 16th International Academic Conference, Amsterdam, 12 May 2015, pp.37-48

[52] During the 1660s, Jean Chardin, French traveler estimated Indian merchants living in Safavid Iran at 20.000, figure to be halved by the end of the century. Dr. Madhu Tyagi, *Theory of the Indian Diaspora: Dynamics of Global Migration*, (Horizons Books, 2017), 34

[53] Maya Mirchandani, Iran's connection to India's Sikhs, NDTV, August 29, 2012. Sridhar Kumaraswami, "Indian diaspora in Iran to meet PM during visit." *The Asian Age*. May 19, 2016

[54] Corinne Abrams, "This Map Shows Where India's Huge Diaspora Lives," The Wall Street Journal, Jan 19, 2016. Dr. Madhu Tyagi..,14. Lubna Kably, "Desi diaspora largest in the world." Times of India, Dec 15, 2017

not be desirable for Rashina Hill. It is a well known fact that in 1990, with the outbreak of the first Gulf war against Saddam Hussein's invasion of Kuweit, Indian air force was sent to lift from the ground 100.000 Indian citizens employed in that area[55].

2.3.3. Economic dimension

Starting from the natural cultural influence between Persic Gulf and South Asia, Indo-Iranian economic interactions came as a plus to stylistic affinities. On the other hand, the intensity of trade and industrial contacts has been influenced by political raison d'etat.

During the seventeenth century, India was Iran's main trading partner. According to a study, the value of their trade was the equivalent of 32 metric tonnes of silver. Safavid Iran was interested in four main products originated from Mughals: textiles, indigo, sugar, and spices. Many Gujarati merchants lived in Isfahan, as witnessed by different Western travelers like Jean Tavernier[56].

In modern times, after 1950, Indo-Iranian economic relationships focused on oil and technology. With Pahlavian Iran's great oil reserves, the Shah was aiming to modernize its society in a fast pace, and India was an opportunity with its technology and expertise. On the other hand, India's mammoth economy needed oil for it increasing domestic consumption[57]. Bilateral investments between the two countries have a tradition of their own. In 1965, Chennai Petroleum Corporation limited was created between the government of India, and National Iranian Oil Company. In December 1966, Madras Fertilizers Ltd was another landmark in common enterprises. Ten years later one could witness the birth of The Irano-Hind Shipping Company, a joint venture with 51% Iranian capital and 49% Indian[58].

Today, bilateral relations still evolve around energy matters. In the fiscal year 2016-2017, trade was estimated around $12.89 billion, with India importing $10.5 billion worth goods, mostly crude oil[59].

At the moment of our writing, three core issues were essential for the agenda of Indo-Iranian economic ties, and all of them reffer of geopolitics: a) the access to Farzad-B oil fields; b) the completion of Iran-Pakistan-India pipeline; c) the development of Chabahar port.

In 2008, a consortium of Indian companies headed by ONGC Videsh Ltd discovered a vast reservoir of natural gas in the Persan Gulf that was called the Farzad-B gas field. After the UN embargo against Iran due to its nuclear program, Indian companies took a step back. Since 2016, when the sanctions were lifted, the same consortium wanted a comeback, but they cannot settle an offer satisfactory to National Iranian Oil Company. Moreover, recent developments didn't help negotiations as Tehran signed an agreement with Russian company, Gazprom in May 2017. At the beginning of 2018, both nations indulge in a blame game and take retaliatory measures against each other: whereas India cut the import of gas by a third to 415,400 barills per day (bpd), Iran has cut by one-third the time it gave to Indian refiners to pay for oil they buy from it[60].'

The port Chabahar is Iran's only oceanic port with a coastline to the Gulf of Oman. If developed to its full potential, the port allows India to avoid Pakistan and better connect to Central Asia. In May 2016, India and Iran signed an agreement on this matter followed by president's Rouhani inauguration of the first phase in November 2017 surrounded by the officials of 17 countries. New Delhi strategists hope that Chabahar should prove a serious competitor for the Pakistani port Gwadar. '*Reducing the Pakistani blockage regarding India-Afghan connectivity is central*' to the enterprise, considers Indian analyst Harsh Pant. According to Afghan Chief Executive Abdullah Abdullah, "*Afghanistan used to rely only on one transit road, which was through Karachi. That is not the case anymore*. [Now] *it's* [also] *through Chabahar*[61]." India endeavors to help Afghanistan's reconstruction by limiting Afghan dependence to Pakistani goods. As a matter of fact, New Delhi send 15.000 tonnes of wheat to Afghanistan in October 2017 through Chabahar, and from than on the transport went to Zaranj, an outpost city at the Irano-Afghan border. The maritime pivot has to be linked to Zaranj-Delaram highway in Afghanistan, completed by India in order to attract Kabul in its area of influence[62].

The geopolitics of pipelines has, instead, an opposite stake: to link India and Pakistan in a wider corridor of energy which could fade their growing economies desire for supplementary energy. IPI (Iran-Pakistan-India) and TAPI (Turkmenistan-Afghanistan-Pakistan-India) are two major avenues pursed by India's Look West grand strategy. IPI was blueprinted in 1989 by Iranian and Indian diplomats didn't have an impressive evolution, especially after 2009 when

[55] Constantino Xavier, India's Expatriate Evacuation Operations. Bringind Diaspora Home, Carnegie Endowment for International Peace, 2016

[56] Sushil Chaudhury**,** *Trade, Politics and Society: The Indian Milieu in the Early Modern Era*, (Routledge, 2017), without page number (accessed from Google Books)

[57] In October 1974, the Shah visited India, event significant on the economic side for the conclusion of an agreement to supply nearly 75% of Indian oil import of 120 million barrels. A few months later Tehran also agreed to postpone an Indian debt worth of $750 million. In return the later would be granted by Tehran $ 300 million to develop the iron ore mines in Kudremukh, state of Kannada to an output of 7,5 million tonnes a year. Sujata Ashwarya, *India-Iran Relations: Progress, Problems and Prospect*, (Palgrave Macmillan, 2017), 52

[58] Mohammed Khalid, "Indo-Iran Relations: Strands of Cooperation and Potential for Conflicts in the 21 Century," 63-72 in R. Sidda Goud, Manisha Mookherjee (ed), *India and Iran in Contemporary Relations*, (Hyderabad: Allied Publishers Pvt Ltd, 2014), esp.67

[59] "Chabahar, Farzad-B gas field, security on Indo-Iran talks agenda," *The Times of India*, Feb 15, 2018

[60] "Iran-India Farzad-B Talks Deadlocked Over Gas Price," *Financial Tribune*, November 01, 2017

[61] Harsh V. Pant, "The Challenging Geopolitics of the Port at Chabahar," *The Diplomat*, December 12, 2017

[62] Sudha Ramachandran, *Iran's Chabahar Port Empowers India-Afghanistan Trade at Pakistan's Expense*, The Central Asia-Caucasus Analyst, January 10, 2018

Indian pulled back from the project due to US pressure to stop Iranian nuclear program. Instead, Washington proposed Manmohan Singh an alternative with TAPI. However, after Iran signed the agreement with P+5, India could follow both infrastructural projects[63].

2.3.4. Military dimension

Taking into consideration our arguments with regard to Irano-Indian military conundrum, their links in this matter are rather shy, oriented only on political and economical matters.

In 1983 both states have established a Working Group for defence matters to further the personal contacts between their militaries. New Delhi Declaration (2003) seemed to have unveiled a period of strong cooperation mainly in defence logistics (India would have refitted Iranian Soviet style T-72 tanks and MIG-21 jets). In March the same year Indian and Iranian navies conducted their first joint naval exercise in the Arabian Sea[64].

In the aftermath of Rouhani visit to India (February 2018) the common Declaration stressed out the threat of terrorism and the subsequent need to cooperate in this matter, especially on the Afghan front[65].

It is fair to think that in the near future, intelligence jointness seems more realistic than the military one; given that fact that Indian defence industry is still obstructed by bureaucracy and the national armed forces still rely on imports, and that a reenactment of international sanctions against Tehran might prove prohibitive to any further arms transfers.

2.4. Political dimension

It remains to the political level to synthesize the historical relations between two venerable civlisations and walk those steps necessary to implement the economic imperatives. Whereas during the sanctions era, India had to bend to structural pressure and bandwagon along the American side, now, with the warming up, New Delhi and Tehran can make the most of it and establish a functional and durable interdependence.

Past experience is not absent and may serve as a guide to further action[66].

The two pillar of Indo-Iranian most recent rapprochement are Modi's visit in Iran in 2016 followed by Rouhani coming to South Asia late February 2018. Synthetising both Joint Communiqués we find that both parties acknowledged the New Delhi Declaration from 2003 as the founding document of their collaboration, enumerated a wide range of items of mutual interest and expressed: "*their determination to build a strong, contemporary and cooperative relationship that draws upon the strength of the historical and civilisational ties between the two countries, leverages their geographical proximity, and responds to the needs of an increasingly interdependent world. They were also of the view that their governments must enable and encourage utilisation of the emerging opportunities to the maximum possible extent in all areas of bilateral economic and commercial cooperation, in particular connectivity and infrastructure, energy, and trade & investment.*" (2016)[67] and acted towards "*Wide-ranging and constructive discussions on bilateral, regional and multilateral issues were held in a cordial atmosphere*." (2018)[68]

Repeated promises about Afganistan ("*Both sides stressed that the interests of peace and stability in the region are best served by a strong, united, prosperous, pluralisitic, democratic and independent Afghanistan while supporting the National Unity Government in the country. They stressed out the significance of strengthening India-Iran-Afghanistan trilateral consultations and coordination, including by suitably supplementing their cooperation on Chabahar.*") spell the mutual desire to shoulder regional governance.

To return to theory, Indian elites try to craft their entanglement with Tehran in the language of interdependence and define a regime based on < mutual expectations, rules and regulations, plans, organizational energies and financial commitments >.

However, one must not think that it is all about pragmatism. Even though India's diplomatic behaviour did not pinpointed the promotion of democracy like US

[63] Stephen Blank, *"Will China Join the Iran-Pakistan-India Pipeline?"* Jamestown Foundation, *China Brief Volume: 10 Issue: 5*, March 5, 2010. Richard Rousseau, *"Pipeline Politics in Central Asia. With several pipeline projects under way, Central Asia is readying itself for a new "Great Game."* Foreign Policy in Focus, *June 24, 2011. Bhat Mukhtar Ahmad, America and Iran-Pakistan-India (IPI) Gas Pipeline*, African Journal of Political Science and International Relations, *Vol. 8(8), (November 2014): 260-265, DOI: 10.5897/AJPSIR2014.0696*

[64] Monika Chansoria. "India-Iran Defence Cooperation"..

[65] Ashok Sharma, Associated Press, " India, Iran to step up cooperation on Afghanistan," *The Associated Press*, 17 February 2018

[66] Postwar Indo-Iranian diplomatic ties begun in 1950 and passed through several phases. From a strictly structural/ neorealist perspective, both countries were part of different alliances with rather antagonist needs. While Nehruvian India styled itself as champion of non-aligned world, Iranian proclivities looked for the friendship of the United States and enlisted itself into CENTO, also known as the Baghdad Pact (1955-1979; a NATO inspired arrangement made up of Turkey, Iran, Iraq, Pakistan and the United Kingdom with the purpose of checking the expansion of the Soviet Union). Sujata Ashwarya, op.cit., pp.8 and 17. For more references about CENTO consult: Michael A Palmer, *Guardians of the Gulf: A History of America's Expanding Role in the Persan Gulf, 1833-1992*, (New York: The Free Press, 1999). Unal Gundogan, Islamist Iran and Turkey, 1979-1989: State Pragmatism and Ideological Influences, *Middle East Review of International Affairs*, Vol. 7, No. 1 (March, 2003). Umut Uzer, Ayşe Uzer, Diverging Perceptions of the Cold War: Baghdad Pact as a source of Conflict Between Turkey and the Nationalist Arab Countries, *The Turkish Yearbook*, Vol. XXXVI, pp.101-118. Apart from that, Indo-Iranian relationship was somehow strained by the particular moves within the Greater Middle East. Whereas the Shah maintained a close dialogue with Pakistan, Nehru's close friendship with Nasser, an enemy of Muslim dinasties, could not further the rapprochement between Tehran and New Delhi. Dr. Satyanarayan Pattanayak, *Iran's Relation With Pakistan: A Strategic Analysis*, (New Delhi: Vij Books Ltd, 2011): 22-23.

[67] India - Iran Joint Statement- " Civilisational Connect, Contemporary Context" during the visit of Prime Minister to Iran, May 23, 2016

[68] Ministry of External Affairs, India-Iran Joint Statement during Visit of the President of Iran to India (February 17, 2018)

did, still, Indian public opinion, pundits and decisionmakers shy away from the theocratic leanings of the Islamic Republic in the words of analyst Subhash Agrawal: "*If we could find a substitute for energy, we would walk away from them. India doesn't want to be with Iran, but who is there to give us oil? We would never choose to have a relationship with this type of unstable and reactionary regime*[69]."

Probably it would be unreasonable to conclude that these are the impressions of all important actors on the Indian stage, but we wonder how will India's external behaviour evolve when Hindutva nationalists will express an intolerant opinion towards Muslims both at home and abroad!

Conclusions

Iran's geographical position as a bridge between Central Asia, Middle East, and the Persic Gulf allows it to bet on regionalism in order to detect those strategic opportunities concerning the state with which Tehran has maintained historical, linguistic, and cultural connections.

Assuming the regional power status, Iran cannot even conceive being discarded out of the big players table; therefore, following this logic India can be counted as an emergent global power which Iran is eager to become friend with. Oriented on becoming a part of different regional cooperation formulas, Iran has identified India as the partner of choice based on three levels: politically, New Delhi might soften its sour relationship with the United States; economically it is able to receive Iranian fossil fuels; militarily- offering assistance and provide conventional equipment, and last but not least, cultural, given the previous linguistic, historical and civilisational affinities. Also, in spite of Iranian efforts to strengthen its friendship with India, New Delhi takes a prudent line, dictated by the dual rhetoric coming from Washington and Tel Aviv.

To return to the theoretical part and to Robert Keohane's theory or regimes, we may say that Tehran and New Delhi are on the verge of establishing an international regime pending the pressure of the global hegemon- the US and its allies. Up to this moment, principles and norms offer hope in this direction; what is lacking is substantial decision-making which would help the alliance between those great nations to use their shared civilisational roots in order to create an oasis of civility upon the Afpak conundrum.

References

- Alam, Muzaffar. *The Languages of Political Islam: India, 1200-1800*. London: Hurst & Company, London, 2004
- Ashwarya, Sujata. India-Iran Relations: Progress, Problems and Prospect. New York: Routledge, 2017
- Chaudhury, Sushil. Trade, Politics and Society: The Indian Milieu in the Early Modern Era. Routledge, 2017 (accessed from Google Books)
- DuTemple, Lesley A. *The Taj Mahal*. Minneapolis: Lerner Publications Company, 2003
- Hollister, John Norman. *The Shi'a of India*. London: Burlligh Press, 1953
- Garcia, Denise. Disarmament Diplomacy and Human Security: Regimes, Norms and Moral Progress in international relations. Routledge, 2011, Google books.
- Keohane, Robert. After Hegemony. Cooperation and Discord in the World Political Economy. Princeton: Princeton university Press, 1984
- Keohane, Robert O. *Power and Governance in a Partially Globalized World*. Routledge, London and New York, 2003
- Nehru, Jawaharlal. *The Discovery of India*. Oxford, New York: Oxford University Press, 1985
- Palmer, Michael A. Guardians of the Gulf: A History of America's Expanding Role in the Persan Gulf, 1833-1992. New York :The Free Press, 1999
- Palsetia, Jesse S. The Parsis of India. Preservation of Identity in Bombay City. Leiden. Boston. Koln: BRILL, 2001
- Pattanayak, Satyanarayan. *Iran's Relation With Pakistan: A Strategic Analysis*, New Delhi: Vij Books Ltd, 2011
- Tyagi, Madhu. Theory of the Indian Diaspora: Dynamics of Global Migration. Aisa: Horizons Books, 2017
- Khalid, Mohammed. "Indo-Iran Relations: Strands of Cooperation and Potential for Conflicts in the 21 Century". In *India and Iran in Contemporary Relations*, edited by R. Sidda Goud, Manisha Mookherjee, 63-72. Hyderabad: Allied Publishers Pvt Ltd, 2014
- Stohl, Rachel. "The tangled Web of illicit Arms Trafficking". In *Terror in the Shadows: Trafficking in Money, Weapons and People*, edited by Gayle Smith and Peter Ogden. Washington, D.C.: Center for American Progress, 2004
- Ahmad, Bhat Mukhtar. "America and Iran-Pakistan-India (IPI) Gas Pipeline". *African Journal of Political Science and International Relations*, Vol. 8/8. (Nobember 2014): 260-265 DOI: 10.5897/AJPSIR2014.0696
- Akvan, Mohammad, Mahmood Seyyed. "Architectural Interactions Between the Indian Subcontinent and Iran". *IISES*. 16th International Academic Conference, Amsterdam (12 May 2015): 37-48 DOI: 10.20472/IAC.2015.016.005

[69] Stanley Weiss, "Iran Is to India as Pakistan Is to the U.S.," The Huffington Post, year?

- Blank, Stephen. ”Will China Join the Iran-Pakistan-India Pipeline?” *Jamestown Foundation*. China Brief Volume: 10 Issue: 5 (March 5, 2010) https://jamestown.org/program/will-china-join-the-iran-pakistan-india-pipeline/
- Braddon, Derek. ”The Role of Economic Interdependence in the Origins and Resolution of Conflict”. *Revue d'économie politique*, Vol. 122, 2 (2012)
- Chansoria, Monika. ”India-Iran Defence Cooperation”. *Indian Defence Review* (17.02.2012) http://www.indiandefencereview.com/interviews/india-iran-defence-cooperation/
- Enomoto, Tamara. ”Controlling Arms Transfers to Non-State Actors: From the Emergence of the Sovereign-State System to the Present”. *History of Global Arms Transfer*, 3 (2017): 3-20 http://www.kisc.meiji.ac.jp/~transfer/paper/pdf/03/1_enomoto.pdf
- Fair, Christine, Jalil Roshandel, and Sunil Dasgupta, P.R. Kumaraswamy. ”The *Strategic Partnership* Between India and Iran”. *Asia Program Special Report*, No. 120 (April 2004) https://www.wilsoncenter.org/sites/default/files/asia_rpt_120rev_0.pdf
- Fair, C. Christine. ”Indo-Iranian Relations: Prospects for Bilateral Cooperation Post-9-11”. *Asia Program Special Report*. No. 120 (April 2004). https://www.wilsoncenter.org/ sites/default/files/asia _rpt_120rev_0.pdf
- Gundogan, Unal. ”Islamist Iran and Turkey, 1979-1989: State Pragmatism and Ideological Influences”. *Middle East Review of International Affair*s, Vol. 7, No. 1 (March 2003)
- Jalal Jafarpour, Shahram Basity, Mohammad Reza Iravani. ”A Study of Social and Cultural in the AsnaAshari Shias TwelverImami) Shi’ism in India (Case Study Mysore City).” *Technical Journal of Engineering and Applied Sciences*. (2014): 156-164
- Jeuck, Lukas. ”Arms Transfers to Zimbabwe: Implications for an arms trade treaty”. *SIPRI Background Paper*. (March 2011): 1-12 https://www.sipri.org/sites/default/files/files/misc/SIPRIBP1103.pdf
- Kozhanov, Nikolay A. ”Understanding the revitalization of Russian-Iranian relations”. *Carnegie Moscow Center*. (May 2015) http://carnegieendowment.org/files/CP_Kozhanov_web_Eng.pdf
- Madan, Tanvi. ”India’s Relationship with Iran: It’s Complicated”. *Brookings Institution*. (28.02.2014).
- https://www.brookings.edu/blog/markaz/2014/02/28/indias-relationship-with-iran-its-complicated/
- Maleki, Abbas. ”Iran and Central Asia”. *Central Asia Caucasus Institute. School for Advanced International Studies. Johns Hopkins University*. (05.04.2006) https://www.belfercenter.org/sites/default/files/legacy/files/iranandcentralasia.pdf
- Maleki, Abbas. ”Iran-Pakistan-India Pipeline: Is it a Peace Pipeline?” *MIT Center for International Studies.* (September 2007) https://www.files.ethz.ch/isn/39802/Iran%20Pakistan%20India%20Pipeline.pdf
- Andrew Moravcsick. ”Liberalism and international Relations Theory”. *Paper no. 92-96*:12. https://www.princeton.edu/~amoravcs/library/liberalism_working.pdf
- Ramachandran, Sudha. ”Iran's Chabahar Port Empowers India-Afghanistan Trade at Pakistan's Expense” *The Central Asia-Caucasus Analyst*. January 10, 2018 https://www.cacianalyst.org/publications/analytical-articles/item/13492-irans-chabahar-port-empowers-india-afghanistan-trade-at-pakistans-expense.html
- Rana, Waheeda. ”Theory of Complex Interdependence: A Comparative Analysis of Realist and Neoliberal Thoughts”. *International Journal of Business and Social Science*, Vol. 6, No. 2 (February 2015)
- Rousseau, Richard. ”Pipeline Politics in Central Asia. With several pipeline projects under way, Central Asia is readying itself for a new Great Game.” *Institute for Policy Studies* (June 24, 2011) http://www.ips-dc.org/pipeline_politics_in_central_asia/
- Taghavi, Fatemeh. ”Artistic and Cultural exchange between India and Iran in 16th &17th century”. *2nd International Conference on Social Science and Humanity*, *IPEDR*, Singapore, vol.31(2012): 115-118 http://www.ipedr.com/vol31/021-ICSSH%202012-S00046.pdf
- Xavier, Constantino. ”India’s Expatriate Evacuation Operations. Bringind Diaspora Home”. *Carnegie Endowment for International Peace*. December 2016 http://carnegieendowment.org/files/CP_299_Xavier_India_Diaspora_Final.pdf
- Uzer, Umut, Uzer, Ayşe. ”Diverging Perceptions of the Cold War: Baghdad Pact as a source of Conflict Between Turkey and the Nationalist Arab Countries”. *The Turkish Yearbook*, Vol. XXXVI (January 2005):101-118
- Ziauddin, Muhammad. ”Strength and Role of Persian Immigrants in the Politics and Administration of Mughal Emperor Aurangzeb Alamgir”. *Pakistan Journal of History and Culture*, Vol.XXIX, No.2 (2008):138-152
- *** ”Safar-e noḫost-e vazir-e Hend be Īrān/ Vizita premierului Indiei în Iran”. *Entekhab.ir*. 11-12 ordībehešt 1395/ 30.04 – 01.05.2016. http://www.entekhab.ir/fa/news/266035/ %D8%B3% D9%81%D8%B1- %D9%86%D8%AE%D8%B3%D8%AA-%D 9%88%D8%B2%DB%8C%D8%B1-%D9 % 87 %D9%86%D8 %AF-%D8%A8%D9%87-%D8%A7%DB%8C%D8%B1%D8%A7%D9%86
- *** ”Dastāvardhā-ye safar-e noḫost-e vazir-e Hend be Īrān/ Cadourile vizitei premierului Indiei în Iran”. *Farda News*. 04 ḫordād 1395/ 24.05.2016. https://www.fardanews.com/fa/news/525983/%D8% AF%D8%B3%D8%AA%D8%A7%D9%88%D8%B1%D8%AF%D9%87%D8%A7%DB%8C-%D8%B3%D9%81%D8%B1-%D9%86%D8%AE%D8%B3%D8%AA-%D9%88%D8%B2%DB%8C%D8%B1-%D9%87%D9%86%D8%AF-%D8%A8%D9%87-%D8%A7%DB%8C%D8%B1%D8%A7%D9%86/
- *** ”Dastāvardhā-ye safar-e noḫostvazīr-e Hend be Irān. Mūdī dast por be Delhī bargašt / Realizările vizitei premierului Indiei în Iran. Modi s-a întors la Delhi”. *IRNA*. 04 ḫordād 1395/ 24.05.2016. http://www.irna.ir/fa/News/82086752

- *** ”Chabahar, Farzad-B gas field, security on Indo-Iran talks agenda”. *The Times of India.* 15.02.2018. https://timesofindia.indiatimes.com/india/chabahar-farzad-b-gas-field-security-on-indo-iran-talks-agenda/articleshow/62937060.cms
- *** ”Iran-India Farzad-B Talks Deadlocked Over Gas Price”. *Financial Tribune*. 01.11.2017. https://financialtribune.com/articles/energy-economy/75398/iran-india-farzad-b-talks-deadlocked-over-gas-price
- *** ”Home”. *Study in Hawza.* Accessed February 02, 2018.
- http://studyinhawza.in
- *** ”Top Countries of the World by Zoroastrian Population”. *World Atlas*. 19.09.2017. https://www.worldatlas.com/articles/top-countries-of-the-world-by-zoroastrian-population.html/
- Abrams, Corinne. ”This Map Shows Where India’s Huge Diaspora Lives”. *The Wall Street Journal*. Jan 19, 2016 https://blogs.wsj.com/indiarealtime/2016/01/19/india-has-worlds-biggest-diaspora-and-this-map-shows-where-they-are/
- Lubtosky, Alexander. ”The Indo-Iranian substratum”. *Leiden University*. Originally appeared in: Early Contacts between Uralic and Indo-European: Linguistic and Archaeological Considerations. Papers presented at an international symposium held at the Tvärminne Research Station of the University of Helsinki, 8-10 January 1999 https://openaccess.leidenuniv.nl/bitstream/handle/1887/2691/299_054.pdf
- Ğalālpūr, Moḥsen. ”Moṭallaṭī bā monāfaᶜ-e moštarak/ Un triunghi în ceea ce privește interesele comune.” *Īrān*. 03 ḫordād 1395/ 23.05.2016. http://iran-newspaper.com/newspaper/page/6219/1/132778/0/
- Kably, Lubna. ”Desi diaspora largest in the world”. *Times of India*. Dec 15, 2017 https://timesofindia.indiatimes.com/india/desi-diaspora-largest-in-the-world/articleshow/62076636.cms
- Kaletovic, Damir. ”Iran May Cancel $7B Pipeline Project With Pakistan”. *Oilprice.com*. 27.01.2017. https://oilprice.com/Latest-Energy-News/World-News/Iran-May-Cancel-7B-Pipeline-Project-With-Pakistan.html
- Kumaraswami, Sridhar. ”Indian diaspora in Iran to meet PM during visit”. *The Asian Age*. May 19, 2016 http://www.asianage.com/india/indian-diaspora-iran-meet-pm-during-visit-795
- Kurasińska, Lidia. ”Balkan Countries Continue to Cash in on Arms Trade Despite Concerns of Diversion”.*Balkan Diskurs*. July 17th, 2017 https://balkandiskurs.com/en/2017/07/17/balkan-countries-continue-to-cash-in-on-arms-trade-despite-concerns-of-diversion/
- Kutty, Sumitha Narayanan. ”Rouhani’s visit a reality check for Iran-India relations”. *Al-Monitor*. 06.03.2018
- http://www.al-monitor.com/pulse/originals/2018/03/iran-india-ties-rouhani-state-visit-chabahar-farzad-jcpoa.html#ixzz5940rE93b
- Mirchandani,Maya. ”Iran's connection to India's Sikhs”. *NDTV*. August 29, 2012 https://www.ndtv.com/india-news/irans-connection-to-indias-sikhs-498087
- Pant, Harsh V. ”The Challenging Geopolitics of the Port at Chabahar”. *The Diplomat*. December 12, 2017 https://thediplomat.com/2017/12/the-challenging-geopolitics-of-the-port-at-chabahar/
- Pethiyagoda, Kadira. ”Naqšehā-ye monṭaqe-yi dehlī. Mūdī Hend rā be Ḫāvar-e Mīāne nazdīk mīkonad?/ Rolul regional al Indiei. Mudi apropie India de Orientul Mijlociu?” *Dīplumāsī-ye īrānī.* 01 tīr 1394/ 22.06.2015. http://www.irdiplomacy.ir/fa/page/1948780/%D9%85%D9%88%D8%AF%DB%8C% D8%8C+%D9%87%D9%86%D8%AF+%D8%B1%D8%A7+%D8%A8%D9%87+%D8%AE%D8%A7%D9%88%D8%B1%D9%85%DB%8C%D8%A7%D9%86%D9%87+%D9%86%D8%B2%D8%AF%DB%8C%DA%A9+%D9%85%DB%8C%E2%80%8C%DA%A9%D9%86%D8%AF%D8%9F.html
- Purushothaman, Uma. ”The Iran Opportunity for India”. *E-International Relations*. 19.08.2015. http://www.e-ir.info/2015/08/19/the-iran-opportunity-for-india/ Sharma, Ashok, India, ”Iran to step up cooperation on Afghanistan,” *The Associated Press*, 17 February 2018
- Siddiqui, Fazzur Rahman. ”India must not forget its historic support for Palestine”. *The New Arab*. 15.01.2018. https://www.alaraby.co.uk/english/comment/2018/1/15/india-must-not-forget-its-historic-support -for-palestine
- Weiss, Stanley. ”Iran Is to India as Pakistan Is to the U.S.”. *The Huffington Post* https://www.huffingtonpost.com/stanley-weiss/iran-is-to-india-as-pakistan_b_1456383.html

THE EUROPEAN UNION VERSUS THE RUSSIAN FEDERATION

George GRUIA*

Abstract

The article is part of a comprehensive social, juridical and economic study that seeks to find solutions to the current geopolitical situation where the Russian Federation has expanded its territory using force without the consent of the Kiev government or EU member states on Crimea. This situation, in conjunction with the Syrian refugee crisis, with the political crisis on the government formation in Germany, with the Brexit, with the establishment of Austria's controversial government, the sanction of Poland by the Council of Europe and, last but not least, with the problems facing the formation of the new inland government may and should be analyzed together and is one of the purposes of this study, which will be partial analyzed and presented in this article. The author wishes to open a constructive scientific discussion with the academic bodies empowered to properly inform the civil society and not only without favoring any of the parties involved in this issue, namely: the EU states (Germany, Austria, Poland, and Italy) and the Russian Federation. The author presents the results obtained by the EU in conjunction with NATO's actions in Eastern Europe.

Keywords: *NATO, European Union, Treaty of Amsterdam, Poland, justice reform, Law and Justice party, the European commission, Article 7, Frans Timmermans, Donald Tusk, Jean Claude Juncker, Germany, Austria, Angela Merkel, Christian Democratic Union, Social Democratic Party, Sebastian Kurz, People's Party, Right Party of Liberty, Hungary, Warsaw, Italy , Italy Force, North League, Berlusconi, 5-Star Movement, Russian Federation, President Putin, Constitution, State Duma, Crisis, Crimea, Nuclear Weapons.*

1. Introduction

The unprecedented peace and stability that Europe is crossing at the end of the 20th century and the beginning of the 21st century is due to the existence of the European Union. It is the European Union which has generated not only a high level of economic development on the continent, but also a new approach to security, based on the peaceful settlement of disputes and on multilateral international cooperation through community institutions. Of course, the United States has played a crucial role in ensuring European security, both through its support for European integration and NATO's security engagement with Europe. In contrast to these positive developments in the west of the continent, in other parts of Europe, and especially in the Balkans, a series of crises emerged after 1990 in the context of the geopolitical resettlements that followed the end of the Cold War. An essential feature of these was that they often took place within and between states. However, the experience of the period 1990-2004 has shown that no state, not even a superpower like the US, can approach global security issues by itself. Against this background, after 1990, and especially after 1998, the European Union has given new impetus to efforts to strengthen security and define the defense dimension at European level. The development of a common foreign and security policy also included the idea of defining a common defense policy explicitly mentioned in the Treaty of Amsterdam. At the same time, the European Union has been increasingly concerned about the completion of its internal institutional reforms, especially in the context of enlargement, as well as the finalization of the political debate on the future of Europe. Being a global economic actor, the EU participates fairly substantially on global security mechanisms, even if the concrete forms of such involvement are not yet clearly specified. As a result, international stability can now be conceived only by multi-level cooperation at the international community level, and especially through institutionalized dialogue, by increasing the involvement of large international organizations in defining world security. The globalization, manifested by the accentuation and liberalization of the global flows of goods, services, capital and information, has meant that internal and external risks can be mutually generated and reinforced. Against the background of an increase in the complexity and unpredictability of international threats, the improvement of the international security environment requires that internal crisis management measures be better coordinated and that the strategic information exchange between the involved states should take place in real time. As a result the state and its decisions are influencing directly the public and private sector, especially the business environment[1]. Since September 11th 2001 and March 11th 2004, more than ever, the risks to the international security environment and first of all to the proliferation of terrorism and weapons of mass destruction are to be tackled through flexible

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[1] Gruia George and Gruia George Cristian: „The role of state powers in the development of business environment", *Perspectives of Business Law Journal*, [online], vol.2, no.1: 105-112

cooperation, multilateral, balanced and consistent among states, including measures to phase out the causes of their production.

2. Political situation in EU

2.1. Political situation in Germany

For more than 100 days, Merkel has been trying to form a government - first with liberals and ecologists, now with social democrats. For her, there is no discussion of collaboration with the right-wing extremists in the ranks of the AfD party (Alternative for Germany). Uncertainties about the new governmental formula in Germany are coming to an end after the Social Democratic Party (SPD) approved the new government coalition agreement with the Christian Democrat Union, led by Angela Merkel. Two-thirds of the German Social Democrats voted for the agreement. SPD sources say most left-center members voted in favor of prolonging the coalition with the Christian Democrat Union. Out of over 366,000 SPD members casting their vote, over 66% voted for the new CDU agreement, which means continuing the big coalition between the two parties. The members of the Social Democratic Party (SPD) have been called to rule whether they support or not the prolongation of the coalition with Angela Merkel's party. The Christian-Democratic Union and the Social Democrat Party have concluded a new government agreement, negotiators agreeing on the division of key ministries, one of the last obstacles to the formation of the new government. Angela Merkel says the agreement provides the basis for "a good and stable government," while Martin Schulz thanked the Christian Democrats for accepting difficult compromises. Under the agreement, the SPD would lead six ministries, including Finance and Foreign Ministries. At the same time, the Christian-Democratic Union convenes the National Conference to approve the governmental agreement with the Social Democrats. This is one of the last obstacles to resolving the five-month political deadlock in Germany. The Christian Democrats' Conference takes place after the German Chancellor has announced who will be the members of the new cabinet. Merkel's ally, Annegret Kramp-Karrenbauer (AKK), general secretary of the party, will also vote. Kramp-Karrenbauer is seen as Merkel's successor. Being dubbed the "mini-Merkel," the 55-year-old prime minister of Saarland has visions similar to those of the Chancellor, but not entirely. It is often referred to as "AKK", and is similar to Merkel for both ideological and character-related reasons. "AKK" will follow Peter Tauber, 43, who resigned for health reasons, one of the critical voices in the CDU, after disappointing results from the latest legislation. Merkel's formation won the election, but with a low historical score of 32.9%. After being a 12-year chancellor and leader of the CDU for 18 years, Merkel's authority is declining in the party, and nominations for the new Cabinet come as an answer to the need for new people.

2.2. Political situation in Austria

The Austrian People's Party, headed by young Sebastian Kurz, ranked first in the general election in October 2017, with 31 per cent of voting options, following an anti-immigration and right-wing program. At 31, Kurz became Chancellor and thus the youngest national leader in the world and in the history of Austria. The People's Party will ally with the Social Democrats or the Liberty Party (far-right). He's always a few steps in front of everyone: this is how the new Austrian chancellor likes to present himself. Angela Merkel, head of the government with the longest experience in the European Union, said that "the young political star did not become Chancellor only because of his almost bold self-confidence. Sebastian Kurz has an instinct for populism and is willing to ally with partners who scare others. Its coalition with the right-wing populist FPO, a front ally of the Front National Party in France, gives rise to emotions in Western chancelleries. “Kurz wants more regional decisions and is not willing to offset Brexit's effects for the EU by providing additional amounts from wealthy states such as Germany and Austria. In addition, the young chancellor criticized Merkel's position on the "distribution of refugees on quota basis" and pleads for "an end to the sanctions against Russia" imposed following the annexation of Crimea. At the same time, the Austrian official has re-interpreted his sympathy for Hungarian Prime Minister Viktor Orban and other eurosceptics with extremely tough positions against refugees as "building bridges." Since 2015, Kurz has been remarked in the relationship with our country, when he was a Foreign Minister, demanding a reform of the social systems in the European Union, being dissatisfied with the fact that the Austrian state pays a child allowance of 160 euros for the child of a Romanian who works in Austria, although in Romania this allowance is much lower. Kurz then explained that for two Romanian children, whose parents work in Austria, the Austrian state offers about 300 euros a month, and "the sum almost corresponds to an average salary in Romania". His proposal had no chance of winning in Government and Parliament, but the young Kurz did not give up on the idiom. Earlier this year, the Vienna press reported that Austria paid nearly 250 million euros in one year as allowences for the EU citizens working in the country, but left their families and / or children at home. Sebastian Kurz, along with Labor Minister Sophie Karmasin, drafted a bill to cut off these allowances from January 1st 2018, and adjust them according to the level of living in those countries. The goal is an annual savings of 100 million euros to the state budget of Austria. It remains to be seen if the new Chancellor will accomplish this desideratum, especially as he is in the governing alliance with the far right Liberty Party.

2.3. Poland sanctioned by the European Commission

Immediately after it came to power in the fall of 2015, the Law and Justice Party (PiS, conservative) who is governing and has a majority in the two chambers of the Warsaw legislature, initiated a series of judiciary reforms considered by the Commission European as a threat to the rule of law. The PiS justifies these reforms by the need to end a "caste" of magistrates, considered PiS heirs of the communist regime and many of them being corrupt. As a sign of protest, thousands of people went out on the streets repeatedly, demanding the cancellation of these changes along with notifying Bruxelles. In this regard, the Community Executive has launched an unprecedented procedure against Poland, which could lead to the suspension of Warsaw's right to vote in the EU. After months of warnings, the European Commission has launched a lawsuit against Poland that has not been used so far and can go as far as depriving that country of its voting rights within the European Union. In this regard, the EU executive has announced that it is triggering the activation procedure of Article 7 of the Treaty of the European Union, often qualified as the "nuclear option" among possible sanctions within the Union. "I have a hard heart to activate" this article, said Commission Vice-President Frans Timmermans. According to Timmermans, within two years, 13 new laws allowed the government to "significantly interfere" with the judiciary system, adding that Poland received a three-month deadline to respond to the reported concerns. However, the procedure initiated against Poland is complex. In the first instance, Article 7 allows the "establishment of a clear risk of serious breach" of EU values, including the rule of law, requiring the opinion of a qualified majority of 22 EU Member States. But possible sanctions, such as the withdrawal of voting rights, can only intervene in a second phase, which, in order to trigger, would require a unanimous vote of member states, except the one targeted. And unanimity does not seem possible. Hungary, has announced it will oppose vetoing the EU's action against Poland. Hungarian Deputy Prime Minister Zsolt Semjen said that "Polish-Hungarian friendship and the Hungarian government's commitment to treaties force us to take an attitude in all the fora against the measure decided by the European Commission." Meanwhile, European Council's President Donald Tusk said that "Poland is perceived today as a force of disintegration in this part of Europe and that is why I think it is important to end the destruction (...) of Poland's reputation." In turn, European Commission's President Jean Claude Juncker stated that "we will not break all bridges with Poland" and "we are not in war with Poland," but that "it is a difficult day for Poland but also for the EU ". In the context of the EU being aware that a suspension of voting rights remains a theoretical threat, Brussels is considering new instruments: the idea of making access to European structural funds conditional on respecting EU values and decisions is already being circulated. In a press release issued by Warsaw announced that he "regrets the European Commission launched the procedure provided for Article 7 of the Treaty on European Union", a decision which he considers "political and not legal." Also, Warsaw declares its willingness to inform the representatives of the Commission of the aspects of the legislative process aimed at reforming the judicial system in Poland. Polish Justice Minister Zbigniew Ziobro, in his turn, said he had "calmly" received the decision of the European Commission, stating that "Poland is a country that respects the rule of law" and that its country "will play a significant role in Europe and the European Union only if it has efficient and functional courts."

2.4. Elections in Italy

The situation is worrying after the right-far right wing coalition ranks first on the legislatures recently held in Italy, but without the absolute majority, while the populist 5-star (M5S) movement became the first party in the country. But none can get the majority and the crisis deepens in the Peninsula. To make a fair analysis, the political crisis situation in Italy must be viewed from two perspectives: that of Italy's policy and from the perspective of the European Union. "From the point of view of Italian politics, a crisis that has the marks of a blockage has been reached. There are three large party groups or party coalitions at the moment who said they would not make alliance with each other and even if they would make the alliance we have no guarantee given their incompatibilities that these alliances will work. A solution to this blockage would be a government of technocrats chaired by the President of the Republic, which would have the task of keeping Italy in its current state and triggering early elections in one year. Such a solution, however, is an anti-democratic solution" the international policy analysts say. This government will have to lead Italy, and in a year to draft a new law so that general elections to be scheduled next year. But in fact this kind of solution is not democratic in the sense that it respects in a way what is happening in politics in Italy. If such a solution is taken, it means that any vote in a country of the European Union that is not convenient can be suspended and that would create a political reality unrelated to popular vote, which is not democratic . At this point, it is very hard to predict that any solution will lead to the expected results. Any groupings of two parties or groups of parties put together to make a coalition does not give any guarantee given the incompatibility between them, and the technocrat solution is an anti-democratic solution. At the same time, a possible alliance between the far right North League, which took 18%, more than Berlusconi's party, Forza Italia, and the populists from the 5 Stars Movement would lead to a profoundly anti-European populist government in the the third economy of the European Union after the withdrawal of Great Britain.

Regarding this, these parties declared through their leaders that a referendum is needed for Italy's exit from the EU, which in fact means a desire to bring Italy out of the European Union. At a time when in some important EU countries there is this conception of leaving the union, and Italy will be the third economy after Britain's outflow from the EU, the project risks not to be working. Here we do not refer to Austria - where it is a right-wing government and is a small state as a weight. We speak of Italy, which is the third country in the European Union. From this point of view, the project will be affected at the level of the functioning of Italy and of the European Union. At a political level, things are far more serious, because this political crisis has come to an important European Union state, and that means somewhere is wrong. This is a way of thinking about politics, especially since in Italy we have a spectacular comeback of Berlusconi, who has now become one of the most pro-European parties of Italy and which was until yesterday in the past. With regard to the Romanians in Italy, where more than 1.5 million people live, the pressure is huge. It will directly affect them, because Bucharest's policies to attract Romanians abroad are completely ineffective against the policies of extremist or populist parties. According to these aspects, the current EU policy will make migration within the Union increasingly difficult. All the policies of attracting Romanians who have gone abroad, declared by any government in Bucharest, are totally devoid of efficiency. Extremist or populist parties in Europe will send Romanian citizens back home. The public atmosphere that is created in these states will put pressure on Romanian citizens, not to return, but not to go to such proportions in different states as well. And Europe, through its populist tendencies to go to the far right or left, will make migration within Europe increasingly difficult. It is not about mass expulsions but about building an atmosphere that is becoming more and more unfavorable. This will be the policy that will stop the Romanians, and not only the Romanians, from leaving their country, but there aren't also any measures to favor those who return to the country.

3. The Russian Federation's policy towards the European Union

I will present the situation from the Russian Federation in the following points, due to facility of reading the presented study:

- The Russian Federation

The Russian Federation is a semi-presidential federal republic. In accordance with the Constitution, the President of Russia is the head of state, as well as a multi-party system with the executive power exercised by the government, led by the Prime Minister, who is appointed by the President, with Parliament's approval. Legislative power belongs to the two Chambers of the Russian Federation. A room is called the State Duma (Russian Dyma), which is made up of 450 elected deputies for five years. The second room is called the Council of the Russian Federation (Russian Federation of Societies) consisting of 170 senators. Since gaining independence after the collapse of the Soviet Union at the end of 1991, Russia faced serious problems in its efforts to build a political system to follow after nearly seventy-five years of Soviet domination. That conflict reached a climax in September and October 1993, when President Boris Yeltsin used military force to dissolve the parliament and demanded new legislative elections. This event marked the end of the first constitutional period in Russia. The current constitution of the Russian Federation was adopted by national referendum on 12 December 1993, replacing that of the Soviet period - the RSFS Constitution of 12 April 1978. This fundamental law was passed by popular vote after the constitutional crisis of 1993 was resolved by force.

- The History of Russian Constitutions

The first Russian Constitution was promulgated on April 23, 1906, on the eve of the opening of the first State Duma. The Constitution solemnly affirmed the emperor's emperor, including the Tsar's supremacy over the laws, the church, and the Duma. The new constitution defined the purpose and supremacy of the law on Russian subjects. It reconfirmed the granting of human rights as promised in the October Proclamation, making them subordinate to the rule of law. Define the composition and purpose of the State Council and the State Duma. The State Duma in the Russian Empire and the Russian Federation is the lower house of parliament. It is also the term that designates the advice of the boyars of the first Russian rulers – The Boyars' Duma, or city councils of the cities - Duma the City. The dummy name comes from the Russian word думать (dumat), "think". The existence of the Duma was interrupted by Peter the Great, who transferred his functions in 1711 to the Senate of Leadership. The conditions that a person has to fulfill to become president are determined by the Russian Constitution. The president must be a Russian citizen (he may be naturalized), he must be at least 35 years old and must have lived in Russia for at least 10 years before the election[2].

a) Period of 1993-1996

The struggle for power in post-Soviet Russia and the type of economic reform culminated in the political crisis and the bloodshed of autumn 1993. Yeltsin, who was the supporter of a radical reform, had to cope with the strong opposition of the parliament. Confronted with the outright opposition to his decrees and the possibility of making him accused, Yeltsin "dissolved" the Parliament on September 21, as the Russian Constitution did not give him such rights, and ordered the organization of new elections and a referendum approves a new fundamental law. A new constitution was approved by a referendum in December 1993,

[2] The New Columbia Encyclopedia, Col.Univ.Press, 1975.

which turned Russia into a presidential republic. The new opportunities for enrichment offered by the Russian economy in the last decade of the 20th century and the first years of the 21st century have been exploited by a number of Russians: those in leading positions of Communist Party leadership and technocrats, heads of the KGB, Komsomol, leaders of major union enterprises, and others like them. Some of them secretly liquidated the accounts and assets of their organizations and transferred them to foreign banks, or turned them into investments in their own name. They have set up banks or businesses in the country, taking advantage of positions in the power structure to win government contracts, obtain cheap credit, and supply state-subsidized preferential prices as well as sell their products or services to over-valued prices. The privatization process has been affected by deep corruption right from the start. The Westerners were advising for a swift liquidation of the planned Soviet economy to make room for "market economy reforms," but were shortly disappointed with the emergence of the "oligarchs" and the huge power conquered by them. There have been voices who have called this wave of enrichment by fraud "nomenklaturist capitalism." If the oligarchs were at the top of the enrichment pyramid, drug traffickers and organized crime leaders - the powerful Russian Mafia - were at the base.

b) 1996 Presidential Election

At the start of the electoral campaign, it was thought that Yeltsin, who was recovering after a series of infractions and sometimes had a strange behavior, had little chance of being re-elected. At the beginning of the election campaign, Yeltsin's popularity was almost zero. Meanwhile, the Communist Party had gained a strong position in Parliament after the elections of 17 December 1995[3], and its candidate, Ghennadi Ziuganov, enjoys strong support, especially in rural areas and small towns. Yeltsin changed his team of advisors, called his daughter Tatiana Diacenko to a key post and named Anatoli Ciubais as head of his electoral team. Ciubais, who was not only the head of the president's campaign, but had also been the architect of the privatization program, used his control of privatization as the main tool in the presidential campaign of reelection. In the spring of 1996, when the president's share of popularity was extremely low, Yeltsin and Ciubais recruited a team of leading Russian financiers and oligarchs from the press who funded the campaign with $500 million, although legally the limit was only $3 million. The same people provided Yeltsin with space for electoral advertising and favorable articles on all national televisions and newspapers. The image created by the press was that of a decisive choice between the reformist Yeltsin and Ziuganov, the adept of the "return to totalitarianism." The oligarchs have even made it clear that the country is threatened by civil war if the election is won by the communist candidate. The tactics of Yeltsin's team proved to be well-chosen. In the second round of the presidential election, Yeltsin won 53.8% of the votes, while Ziuganov only 40.3%, 5.9% of the votes were canceled. In August 1999, Yeltsin suddenly surrendered Prime Minister Sergei Stepaşintot and proposed Vladimir Putin as prime minister. Yeltsin said he considers Putin his successor to the position of president of the country. After Putin's victory in the December 1999 parliamentary elections, Yeltsin was confident enough in his first minister to deport six months before his mandate on December 31. Putin thus became interim president, giving him the chance to become the candidate with the most chances of winning in the presidential election of 26 March 2000, which was won by Putin.

c) Putin administration, from 2000 to the present

In August 2000, the Russian K-141 Kursk submarine was damaged by an explosion of its own torpedo, an accident that caused it to sink into the waters of the Barents Sea. The Russian authorities organized an attempt to rescue the crew, but it was all in vain. This failure has severely criticized the government, military authorities, and President Putin personally. On October 23, 2002, the Chechen rebels took hostages to all the spectators and actors of a Moscow theater. More than 700 people were hostages in what was called the Hostage Crisis in the Moscow Theater. Three days after the start of the crisis, commandos of the Russian Special Forces invaded the building, and the rebels were shot dead. After the end of the theater crisis, Putin renewed his promises of stunning Chechen insurrection. President Ahmad Kadirov, who had been elected eight months earlier in Russian-controlled elections, was assassinated in a bombing. The crisis of the hostages from the Beslan School followed, during which the Chechen rebels took over 1,300 hostages, especially children. Under these circumstances, in March 2004, popular support for the war in Chechnya fell to only 24%. As a result of the confrontation with the oligarchs, Putin's regime managed to take control of the most important means of mass information previously held by the richest Russians. Putin has reached the country's leadership at a favorable moment: after the devaluation of the 1998 ruble, which has increased demand for goods produced in the country, and in the context of rising oil prices. Thus, many Russians attribute to the president the merits of economic recovery, and Putin won the presidential election in 2004 without having a controversial candidate that would cause him serious problems. There are analysts who say that nowadays many Russians regret the dissolution of the Soviet Union in 1991. In an election speech, Putin said that the dissolution of the Soviet Union is "a national tragedy on an enormous scale," of which "only elites or nationalists of the republics had gained."[4] In 2005, the Russian government replaced the subsidy system, still in force since Soviet times, to public transport, heating homes or other utilities for socially vulnerable groups

[3] Horia C. Matei, Silviu Neguț, Ion Nicolae, 2011, *Enciclopedia statelor lumii*, ed. a IX-a, , Edit. Meronia, București

[4] Șerban Dragomirescu and Radu Săgeată, 2011, *Statele lumii contemporane*, , Edit. Corint, București;

with pecuniary payments. This reform, known as "monetization," was very unpopular, and caused a wave of demonstrations in various Russian cities. It was the first major manifestation of popular dissatisfaction since Putin came to power. Reforms have greatly reduced government confidence, but President Putin's popularity remained high. Putin's international prestige suffered an important blow to the West during the 2004 presidential election disputed talks in Ukraine. Putin visited Ukraine twice before the election to prove his support for the pro-victory candidate Victor Yanukovych, who fought the opposition candidate, Victor Yushchenko, a pro-Western liberal. Putin congratulated Yanukovych for the victory before announcing the official results and made statements against the recount of votes in the second round of voting won by Yanukovych under the assertions of defrauding the vote.

Finally we shall not forget about the Crimea crisis in 2014 started after President Viktor Yanukovych's departure from power, following the anti-government protests of 2013-2014. The triggering factor was the repeal of the law on languages with regional status through which several languages used in Ukraine, including Romanian, were removed from official use. The actors of the tensions are on the one hand the Russian-speaking groups wishing for Crimea to join Russia and, on the other hand, groups of Ukrainians and Crimean Tartars who support the Euromaidan movement. Integration of Crimea into the Russian Federation is the process of incorporating Crimea into Russia. The integration stipulated in Article 6 of the Crimean Arrangement Agreement with Russia will last until January 1st 2015. The integration of Crimea into Russia was organized and carried out quite quickly by the leadership of Russia. On March 27th Russian Education Minister Dmitry Livanov announced that all Crimean graduates will receive a Russian model attestation. During April, the Central Bank of the Russian Federation created the Crimean Bank in the region and passed the financial sphere from the Ukrainian administration to the Russian one, stopping the activity in the region of a number of Ukrainian banks. The official currency in the region became the Russian ruble. Since August 11, the Crimean civil status offices have been operating under Russian law, issuing Russian certificates. The vast majority of the international community did not recognize the Republic of Crimea and Sevastopol as part of Russia. Many of the world's states have openly denounced the referendum and the annexation, and continue to regard Crimea as an administrative division of Ukraine. It should be noted, however, that some states have recognized the referendum and the remaining ones have kept their opinion neutral. Resolution 68/262 of the General Assembly of O.N.U. arguing that Crimea and Sevastopol remain part of Ukraine, gathered 100 votes for and 11 against, 58 others abstaining, and 24 out of 193 member states did not vote because of abstention. The 100 countries that voted in favor of Ukraine account for about 34% of the world's population, the 11 that were counter for about 4.5%, the 58 who abstained represent about 58%, and the 24 absences represent about 3.5%. On October 31st the Government of the Russian Federation established a free economic zone in Crimea.

4. Conclusions

In Germany, the Christian-Democratic Union convened the National Conference, and approved the governing agreement with the Social Democrats, and the agreement, according to German officials, provides the basis for "a good and stable government".

The UCD National Conference will also vote for the appointment of Merkel's ally Annegret Kramp-Karrenbauer (AKK) as party general secretary. Kramp-Karrenbauer is seen as Merkel's successor, dubbed the "mini-Merkel".

The Austrian People's Party, headed by young Sebastian Kurz, ranked first in the general election, following an anti-immigration and right-wing program.

At 31, Kurz became Chancellor and thus the youngest national leader in the world and in the history of Austria. The People's Party will ally with the Social Democrats or the Liberty Party (far-right).

Sebastian Kurz has an instinct for populism and is willing to ally with partners that scare others in the West.

Immediately after it came to power in the autumn of 2015, the Law and Justice Party (PiS, conservative), governed and majority in the two chambers of the Warsaw legislature, initiated a series of judiciary reforms considered by the Commission European as a threat to the rule of law.

As a protest against these, thousands of people went out on the streets repeatedly, demanding the cancellation of these changes along with Bruxelles notification.

The EU executive has announced that it is triggering the activation procedure of Article 7 of the Treaty on European Union, often qualified as the "nuclear option" among possible sanctions within the Union.

Hungary, has announced it will oppose vetoing the EU's action against Poland.

The situation in Italy is worrying when the right-far right wing coalition is in the first place in the recent legislative reforms, but without the absolute majority, while the populist 5-star (M5S) movement became the first party in the country. But none can get the majority and the crisis deepens in the Peninsula.

At this point in Italy there are three large party groups or party coalitions who have declared that they will not make alliance with each other and even if they make an alliance there is no guarantee given their incompatibilities that these alliances will work.

A solution to this blockage would be a government of technocrats chaired by the President of the Republic, which would have the task of keeping

Italy in its current state and triggering early elections in one year.

With regard to the Romanians in Italy, where more than 1.5 million people live, the pressure is huge. It will directly affect them, because Bucharest's policies to attract Romanians abroad are completely ineffective against the policies of extremist or populist parties.

Vladimir Vladimirovici Putin is a Russian politician, a former member of the CPSU. He is currently the third president of the Russian Federation for the third time. He became interim President of Russia on 31st of December 1999 after President Boris Yeltsin resigned and then won the presidential election in 2000. In 2004 he was re-elected for a second term, which lasted until May 7th 2008[5]. Because of the Constitutional limit, Putin was unable to run for a third consecutive presidential term in 2008, but after the victory of his successor, Dmitri Medvedev, in his presidential election, Putin was appointed by the prime minister of Russia. Putin held this position from May 8th 2008 to March 4th 2012. In 2012 he became president of the Russian Federation for another six years - following the amendment of the Constitution.

Prior to the presidential election on March 18, 2018, who will almost certainly bring the fourth presidential mandate, Vladimir Putin, in his speech on the state of the nation in front of the reunified parliamentary chambers, said that: Russia has developed a new range of nuclear weapons which are invincible and can not be intercepted by the enemy.

This was a message of patriotic pride, but analysts also notice it as "a very aggressive warning to those who do not regard Russia as a world super-power."

New nuclear systems - can not be intercepted, and a "new cruise missile can reach anywhere in the world. It flies at low altitude, is difficult to spot, and is invincible in front of any interception systems. "

Another feared weapon would be a long-range rocket launched from submarines that could target a nuclear warhead. And a number of states of the world are struggling to get this perfect weapon, "rocket-hypersonic".

Russia has developed these weapons in response to the US anti-missile shield, whose elements are also installed in Romania at Deveselu.

Western analysts appreciate Putin's speech as an "electoral campaign" for the patriotic pride of the Russians. It is a way of telling Europe, the United States, and somehow to the Russian population that the only language the West understands is the language of force. To conclude the political crisis on the government formation in Germany, with the Brexit, with the establishment of Austria's controversial government, the sanction of Poland by the Council of Europe and, last but not least, with the problems facing the formation of the new inland government and and must be analyzed together in order to see the overall picture and how the world leaders are changing Europe and the world and how the history repeats itself in the same manner as the economic crisis from 2008 can repeat itself in the few following years to come. The final conclusions each can draw and as stated above, the authors will use this initial analysis in its own project, but due to the limitations of the article only initial analysis was presented above.

References

- Cătălina Mărculeț and Ioan Mărculeț, „Marea Neagră în secolul al XX-lea și la începutul secolului al XXI-lea – o radiografie geopolitică și geoistorică”, *Geopolitica*, (2011), no. 39
- Gruia George and Gruia George Cristian: „The role of state powers in the development of business environment”, Perspectives of Business Law Journal, [online], vol.2, no.1: 105-112. https://ideas.repec.org/a/sja/journl/v2y2013i1p105-112.html
- Horia C. Matei, Silviu Neguț, Ion Nicolae, 2011, *Enciclopedia statelor lumii*, ed. a IX-a, , Edit. Meronia, București
- Ioan Mărculeț and Narcizia Ștefan, 2012, *Mic dicționar geografic școlar*, Colegiul Național „I. L. Caragiale”, București
- Peter Stearns, Michael Adas, Stuart Schwartz, and Marc Gilbert, 2003, *World Civilizations:The Global Experience*, Longman
- Șerban Dragomirescu and Radu Săgeată, 2011, *Statele lumii contemporane*, , Edit. Corint, București
- The New Columbia Encyclopedia, Col.Univ.Press, 1975

[5] Cătălina Mărculeț and Ioan Mărculeț, „Marea Neagră în secolul al XX-lea și la începutul secolului al XXI-lea – o radiografie geopolitică și geoistorică”, *Geopolitica*, (2011), no. 39

REFLECTING ON THE ROLE OF PHYSICAL EDUCATION: BETWEEN NECESSITY, WELLNESS AND RECREATION

Maria LULESCU*

Abstract

Physical education has known during its long contribution to the human history both a continuation of old thinking such as mens sana in corpore sano, as well as new ideas, meant to support the role of children and adults in a changing environment. Major contributions about its role nowadays have discussed the relation with human metabolism and fitness (Drăgan 1978; Cheța and Mihalache 1989) while recent contributors explore its role in multi-cultural educational environments (Bronikowski in Hardman and Green 2011, Howie și Pate 2012). At present, schools and universities have adapted their curricula to turn physical education in a tool able to do more than simply stimulating the body and the mind work together: from a reduction of sedentary activities and focus on depending on computer to an active component of everyday lifestyle. The purpose of this paper is to explore current trends in the approach of higher education institutions, students and teachers to combine physical education as a summum of activities leading to wellness and recreation for the all actors involved.

Keywords: *physical education, fitness, wellness, recreation.*

Introduction

The role of physical education is known to mankind for millennia. In ancient cultures, and especially in the Roman Empire, as well as in Greek cities, leaders, philosophers and physicians were constantly concerned with improving the conditions of a healthy mind in a healthy body. Adrian Dragnea[1] presents in his volume how ancient Greeks looked at physical education and sport: for instance, the concept of harmony, suggestively expressed by the "kalos kai agatos" (a beautiful and good man), including Plato who develops the concept. Aristotle was also to discuss that the lack of balance between physical and intellectual education will determine a negative impact on the child, the future responsible and active citizen. This heritage has been passed to other cultures on the European continent, to many generations adopting the old dictum 'mens sana in corpore sano.' Such a concept allowed young people be prepared to bring their contribution to the society, and for athletes and military have a good physical condition before confrontations with other competitors or rivals. In the modern era, such concerns were to allow focused efforts to correlate the activity in educational areas with the results of performance in a professional career.

According to Dragnea, Jean Piaget discussed the role of cognition for a learner as a stage-structured process, while Ivan Pavlov presented associated learning as depending on neural cortical activation. More recent contributions continued in the early 20th century up to this day when scientists and teachers debate and work on new areas of research, such as neuroscience. Furthermore, results of extensive surveys conducted in the last decades indicate that in the context of substantial changes of demographics and multicultural spectrum, exercise contributes to a diminution of stress factors, reducing obesity and dementia for both young and mature generations. This paper tries to look at the effects of physical education for young adults, highlighting its connection to metabolism. Secondly, physical education is explored in terms of a need to be embedded in work and learning, while the third section presents its benefits as wellness and recreation. The final section is one devoted to Conclusions, where I try to sum up ideas taken for key specialists, as well as possible options for future projects and research.

1. Physical Education and Metabolism

Ancient European cultures have acknowledged the contribution of physical education in the existence of children and adults. Physical exercise, including many types of activities, has been acclaimed as a successful method to combat high blood pressure, obesity, cardiovascular diseases, and various psychological disorders. It has also been seen as a way to lead a healthy life, preserving the energy and contributing to an active role in society. However, in practice, many adults in developed countries practice less and less physical exercise, starting from an early age, despite encouragement provided by schools and educators. The current trend of having children at home after school, more often than not playing on a computer than outside, generates its own negative impact. The attraction to online media, and activities excluding a long or serious physical exercise becomes practically widespread in many families. In addition to that, parents are too busy during the week, as well as in the weekend, to play with their children or perform

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[1] Adrian Dragnea, *Teoria educației fizice și sportului*, Ediția a doua (revăzută), Editura FEST, București, 2002: p. 16

physical exercise as a type of entertainment. In their solid and detailed study focusing on metabolism, Dan Chețа and Natalia Mihalache explore changes associated with metabolism, with an impact on the life of various individuals[2]. Taking into consideration the physical effort, the two researchers suggest that this is far from representing only a certain physical activity using the human organism. Far from turning into it into a torture, the two authors refer to physical effort connected to relaxation, with a variable intensity, and reaching high performance only for those able to undertake and enjoy it. They also discuss various patterns, as related to age: while children often engage in physical exercise including climbing, running or jumping, adults usually prefer walking if not involved in more active forms of physical exercise such as swimming, tennis or football.

In an article published in 2000, Edward F Coyle[3] *explores the physical activities and processes changing the functions of the human body. Data from various studies mentioned in this paper also take into discussion the role of a healthy diet. Moreover, the American specialist debates on how "[t]he metabolic and mechanical stresses of physical activity stimulate many healthy adaptations in numerous tissues and organs" (513S). He also discusses the determinants of metabolic stress of physical activity, which cover, in his opinion, factors such as the type and intensity of exercise, the level of physical fitness, nutritional factors, and environmental factors.*

A good control of weight is a major motivation to attend physical activities every day. Although the metabolism is largely influenced by genetics, becoming more physically active helps one's body to have an efficient response to calories-burning. Exercising not only burns calories during a physical education session, but it also sustains a higher metabolic rate. The result is that the individual can burn more calories during one day. From over 50% to almost 70% calories, depending on age, genetics, lifestyle and gender, are burned by the body in producing hormones, breathing and blood circulation. This is known as basal metabolic rate (BMR), and it can vary from one individual to the other. Regular exercise as well as spontaneous activities ranging from running on the treadmill to getting up to switch the TV remote control can also contribute with an average of 20% to 30%.

In order to improve one's BMR, using physical exercise as a means to prevent various potential affections for the future adult requires establishing short term and medium term objectives, such as losing weight, serum lipids levels, lower blood glucose levels and prevent potential complications. The increase of smooth muscle mass enhances energetic metabolism and the production of anti-inflammatory cytokines. In additional to overall benefits for one's balance of life and work physical activity, the regular and diversified involvement in physical routines triggers positive immunologic responses with an anti-inflammatory effect. Physical education and physical activities are known to work as factors increasing the immunology of cells, with a visible impact on the physiological mechanism and contributing to one's motor flexibility and neuroprotection of the nervous system. When defining the amount of physical activity or routine, an important interrelationship exists between the total dose of activity and the intensity of each particularly planned and delivered activity. *Dose* defines the total amount of energy expended in physical activity, while intensity refers to the rate of energy expenditure during such activity. *Intensity* can be described in absolute or relative terms. Absolute intensity shows the rate of energy expenditure during exercise and is usually measured in metabolic equivalents or METs, where 1 MET equals the resting metabolic rate of about 3.5 ml $O2 \cdot kg1^{-1} \cdot min^{-1}$.

Both for healthy individuals, as well as for patients suffering from nervous illnesses, physical activities determine a strengthening of immunity, together with the development of movement, cognitive and functional independence abilities. In the last decades, several studies took place, in order to explore the physiological benefits brought by physical activity to the immune system. For patients or individuals who are recommended to follow physiotherapy through physical activity, a positive effect on the immune system was observed, including an improved cells flux, the identification of the antigen, and the reparation of damaged tissue. Dragnea (2002) underlines in his extensive contribution that: "Physical exercises have numerous beneficial effects on the organism, reason for which they are recommended as means to prevent diseases at the level of all systems and organs of the body (prevention), as well as in the process of rehabilitation, recovering after various diseases (therapy)."[4] Those effects are noted for all humans, no matter their age, including healthy individuals or those with a particular illness.

2. Physical Education as Necessity in Work and Learning

In his extensive and well-structured volume, Ioan Drăgan[5] presents the correlation and interdependence of work and physical education. According to him, and other specialists conducting research at that time, work has a certain pattern for any human being: the individual is capable of a good performance for a certain while, followed by a diminution, while for

[2] Dan Chețа, Natalia Mihalache, *Efortul fizic și metabolismul*, Editura Sport-Turism, București, 1989, pp. 23-28.
[3] Edward F. Coyle, "Physical Activity as a Metabolic Stressor" in *The American Journal of Clinical Nutrition*, Vol. 72, Issue 2, 1 August 2000, pp. 512S-520S.
[4] Adrian Dragnea, *Teoria educației fizice și sportului*, Ediția a doua (revăzută), Editura FEST, București, 2002: p. 147
[5] Ioan Drăgan, *Refacerea organismului după efort*, Editura Sport-Turism, București, 1978, pp. 23-82

another individual this fluctuation may not have a similar ascending and descending curve. In his view, although there are differences, research undertaken for subjects involved in work showed that starting working after a short break determines a better performance, allowing the person to increase again his/her results. He also discusses the role of physical education in terms of prevention: physical activities contribute to a lower risk of neurosis and other associated psychological disorders or dysfunctions. This is the very reason for which athletes seldom experience depression or similar affections.

In a recent study dedicated to the impact of physical education on patients with mental disorders by Elisabeth Zschucke, Katharina Gaudlitz, and Andreas Ströhle[6], the authors present significant correlations between mental health and physical activity. They present results of physical exercise leading to an impact on panic disorder, post-traumatic stress disorder, generalized anxiety stress disorder, social phobia and other disorders. Howie and Pate also acknowledge in their study that there is a correlation between physical activity and cognition: "The overall findings continue to be positive; as PA increases, cognitive function and academic achievement generally increase."[7]

In the current European context, most countries experience dramatic changes in terms of demographics, with a considerable increase of the number of senior citizens compared to working adults. According to sociologists, such a change is the result of lower birth rates on the one hand. Many adults get married considerably later than their parents' generation, and have children after turning 40 or 45. Because of this, it is vital to educate adults and senior citizens to continue physical exercise while working and after retirement. Physical activity and exercise training have risks that must be considered when recommending regular physical activity for the general population and for individuals with cardiovascular disease. Fortunately, several strategies are recognized as effective at reducing risk when recommending physical activity. Walking, the most popular activity and the standard example of a moderate-intensity activity, is a low-risk activity.

It is necessary at this point to indicate what kind of measurements can be performed to find out the contribution of physical education, or physical activities carried out outside physical education classes. Physical activity is defined by specialists as movements of the human body generating the contraction of skeletal muscles, which increases the consumption of energy level above the basal level. Physical activities cover the following categories: occupational, home chores, free time and transportation. Physical activities can be measured in METs (an acronym standing for metabolic equivalent). One MET represents the amount of oxygen consumed by one person per unit of body weight during 1 minute of rest. As a standard, one met equals 3,5 ml oxygen used during one minute, and nowadays there are numerous calculators (including online versions), which present the variation of mild activities, such as reading or writing, to moderate options (walking, gardening etc.) to very intense ones (cycling, running, or skiing).

Teaching physical education involves multiple decisions about the planning, carrying out, and evaluation of learning motor skills. This decision-making base develops from knowledge concerning factors that influence motor skill learning.

Teachers of physical education can benefit from developing knowledge about how various factors influence instruction as well as knowing how and why learning happens because of their involvement in teaching skills. It is vital to remember that teaching and learning have a close relationship. Effective teaching supports and nurtures learning. Better learning, even lifelong learning, happens when a teacher is able to establish the most appropriate environment for students to learn skills adapted to their individual needs. For teachers of physical education, their knowledge and experience comes for years of studying motor learning, correlating their findings with those of other peers, and taking the lessons from practice back into teaching methods. Michal Bronikowski observes in this sense that "a sport coach's role is to lead his/her pupils to a certain level of competency in the area of a specific sport, focusing on skills and technique, whereas a PE teacher should concentrate on the overall holistic development of motor (motor development), cognitive (moral, social and intellectual development) and behavioural patterns (attitudes and habits) [8]".

Taking a systematic approach to teaching and learning, Adrian Dragnea presents the motor characteristics depending on age[9]. He then focuses on effort as part of physical education and sport, detailing its dynamics, the coordination of the effort by the instructor in a class of physical education versus one training in sport and concluding with its general characteristics. He links the general lines of physical education classes with specific information about training in sport, the selection of youngsters fit for this area, as well as the role of the physical educator and trainer.

In this context, encouraging students from different backgrounds and abilities to attend classes of physical education is a must. In addition, numerous

[6] Elisabeth Zschucke, Katharina Gaudlitz, and Andreas Ströhle, "Exercise and Physical Activity in *Mental Disorders: Clinical and Experimental Evidence*, Journal *of Preventive Medicine & Public Health*, Jan. 2013 (Suppl.1): S12-S21

[7] Erin K. Howie and Russell R. Pate, "Physical Activity and Academic Achievement in Children: A Historical Perspective", *Journal of Sport and Health Science*, 1, 2012, p. 165

[8] Michal Bronikowski, "Transition from Traditional Approaches to Teaching Physical Education", in Ken Hardman, Ken Green, *Contemporary Issues in Physical Education* (eds.), 2011, Maidenhead: Meyer & Meyer Sport, p. 109.

[9] Adrian Dragnea, Aura Bota, Monica Stănescu, Silvia Teodorescu, Sorin Șerbănoiu, Virgil Tudor, *Educație fizică și sport – teorie și didactică*, Editura FEST, București, 2006, pp. 43-48

European and international agencies plan and deliver projects aimed to show that physical activities outside the classroom have major benefits for any professional. Moreover, activities during the classroom combined with those outside it support young adults to socialize and minimize their dependence on electronic media. Evidence from higher institutions curricula and academic practice demonstrate that the combination of such activities with a healthy diet and diminution of coffee, sweets and alcohol supports the integration of young people in a fast-changing professional environment. The increased energy demand for everyday tasks requires those living with physical disability to improve cardio-respiratory fitness. To maintain health, 20-40 minutes of aerobic exercise is recommended three to five times a week. Individuals participating in exercise can rate the intensity of this exercise from very easy to extremely difficult. Teachers needs to adapt their strategies to support those who might say towards the end of the class "I feel I cannot do it any longer." An open and friendly environment, and the support of other students will provide a suitable learning medium for those of different physical abilities. Adjusting rules, using adequate equipment and provide short breaks or low-paced routines will also sustain effectiveness. In particular, there is a need to focus on physical activity promotion efforts via organizational (e.g. work sites and communities) and legislative policy changes, rather than just on the individual level. Teachers cannot work only in a bilateral system of relationships; their efforts with the students, and the engagement of students in physical activities in universities and outside them can reach sustainability if multiple sectors of society get involved: health agencies and professionals, sport organizations, and community or youth centres, to name a few.

When students are expected to attend structured activities, they need the tools to engage in them. Such tools of active participation in physical education are movement skills. Students need to be able to walk, run, jump, throw and catch with confidence. Unlike other educational activities where reading or responding to tasks can be fail to engage the whole classroom, the physical education classroom makes everyone act as on a public scene. Few, if any, children and youth would voluntarily and intentionally put themselves in a situation where their lack of skills is publically on display for others to view. The opposite is also true: students who feel competent in their abilities and have acquired basic skills, are much more eager and willing to participate in activity. Physical education is the only subject that specifically aims to equip students with the movement skills necessary for voluntary participation in activity both during the school day and after school.

3. Physical Education as Wellness and Recreation

Nowadays, wellness is a familiar concepts and it crosses the boundaries of gym or spa centres. However, its definition varies, according to specialists placing an emphasis on one element or the other. In general, researchers agree that wellness transcends the area of health, that it is a rather self-directed approach encompassing a holistic vision.

The National Wellness Institute defines six major areas, according to the diagram below[10] as defined by Bill Hettler:

The key dimensions of wellness are:

- *Occupational*: referring to one's personal satisfaction derived from work. It relates to both gifts and skills used by individuals in their professions in activities that are seen as gratifying;
- *Physical*: this dimension recognizes the necessity of regular physical activity, including learning about diet and nutrition;
- *Social*: it refers to the role of the individual in the community, as well as the relationship between people and nature;
- *Intellectual*: it concerns one's creativity, the engagement in mental activities. It covers activities in the classroom and beyond the classroom, keeping one's curiosity and challenging the mind with creative tasks;
- *Spiritual*: describing one's search for meaning in life, as well as the harmony of the individual in the universe;
- *Emotional*: this dimension refers to emotions and the acceptance of one's feelings, keeping a positive attitude throughout one's life.

To follow wellness and have results, physical activities can be accumulated gradually. For instance, two 10-minute bicycle rides to and from class and an alert 15-minute walk to the post office or bank office. Wellness specialists recommend to choose activities which are seen as enjoyable and that do not interfere with the daily routine. Recent data also indicates that regular physical activity, regardless of intensity, makes everyone healthier and protect people from many chronic diseases. Physical fitness has several components, many related to health and more specifically to sports or other similar activities. The five

[10] http://www.nationalwellness.org/?page=six_dimensions, accessed 10 January 2018

components of fitness most important for health are: cardiorespiratory endurance, muscular strength, muscular endurance, flexibility and body composition (the proportion of fat and fat-free mass). To reach good results in fitness sessions, trainers and specialists recommend to work based on short-term adjustments, with the aim to get long-term changes. For example, when running, the breathing and heart rate will increase during exercise, and the body learns to pump more blood. Although people differ in terms of fitness and performance, they can get particular types of training and amounts of routines that work in a rewarding manner. In fact, this leads to the progressive load of exercise over time. Ideally, a fitness programme combines an active lifestyle with a well-structured physical programme to develop one's fitness.

In order to achieve maximum results from physical education seen as a wellness general goal, people need to know that this implies sometimes considerable changes. As a result, people need to accept that certain behaviours and attitudes are problematic and that they have to take action in order to improve the quality of their life. People need to have a good knowledge of themselves, and then to decide to take appropriate action. As a final step, good practice and long-term results appear if individuals become able to monitor their performance, assess their activity and adjust the plan for the coming period. Social habits may also act as support to one's motivation: if students have a community or group of friends interested in health, physical education and wellness, they will become better motivated towards durable outcomes. In addition, specialists advise young people to select one aim and follow it for a certain while, and once they feel on a safe track in that respect, they can add another aim to their list, and follow it until completed. The main idea behind this logic is that trying to change everything in one's life is so stressful, that it may obviously lead to failure. Taking moderate steps but staying focused is a tactic leading to better results.

The most common advice is to practice daily with in moderation since this contributes substantially to good health. The starting point is to assess one's physical activity profile, and build on it. As practice attempts are made, the results are assessed, reflected upon, modified, and refined over and over again with persistence and perseverance until eventually, automation is achieved. Students can be encouraged to assume roles of responsibility by taking out, distributing, and putting away equipment, leading warm-ups, and even assuming the role of a referee during a classroom competition or game.

In what concerns recreation, this is generally associated with structured group activities which are meant to benefit both individuals and group/communities. Such activities clearly depend on team spirit, skill development and enjoyment. Depending on age, skills and interests, people are attracted to sports, as well as creative activities. Sometimes, they could choose a combination, for instance dance. Some researchers consider that due to the changes of lifestyle of many adults, young people tend to spend less time playing in a group or in an outdoor environment than a couple of decades ago. However, with the rise of new sports and games, certain teenagers or young adults have more opportunities than their parents when those were young. Leisure or recreation participation can also be a resource for adolescents to cope with stress in their lives. Participation in recreational activity has been associated with decreased anxiety and depression, improved self-esteem, decreased psychological stress and reduced drug use.

Physical activity and personal engagement in satisfying leisure activities need to be a focus towards wellness throughout life. Their importance does not diminish with age, disability or chronic illness. While chronic conditions and health deficiencies may present challenges as we grow older, by using planning and creative thinking, modifications can (and should) be made to make activities accessible and enjoyable. Exercise programming should be monitored regularly and may change, based on an individual's progression, stabilization or improvement. In addition to various documented health benefits, such as decreased blood pressure, increased insulin sensitivity, and improved cardio-respiratory endurance, participating in physical and leisure activities tend to decrease isolation and increase inter-personal and community socialization, integral facets of independent living and quality of life.

In the light of those mentioned above, European countries directed their efforts to improve the physical education. One of the promising current lines is the European Framework of Quality Physical Education (EFQPE) adopted in February 2018[11]. The document establishes and presents the concept of Quality Physical Education, its aim and role. It also refers to the idea of "physical literacy", and "physical educated person". The document is the first version setting standards in five learning areas: movement literacy; health-enhancing physical activity; health consciousness beyond physical activity; self-awareness and self-management and finally problem solving and constructive thinking.

Conclusions

Recent research investigating the relationship between activity and mental health has found a clear interdependence between physical activity and good mental health. Participation in movement activities can reduce anxiety, stress, and depression.

In today's world, health and well-being are regularly discussed and remain a priority for the

[11] European Framework of Quality Physical Education, http://www.eupea.com/health-conscious-future-oriented-life-management-key-competence-2/, accessed 20 February 2018

educational system, no matter what country or continent we think of. Although schools and higher education institutions cannot be expected 'to do everything at once', they can continue to provide opportunities and experiences that contribute positively to the health and well-being of all students. There are numerous outcomes that contribute positively to students and youth's well-being that can be realized through participation in a quality, daily physical education schedule.

Successful programmes can be implemented by teachers, but good results for the future generation depend on accepting new practices, learning from the experience of other European countries and engaging in research able to provide new tools for long-life learning. Observing the role of wellness in the current experience of a busy adult, with a longer career than that of previous generations, teachers and universities can adopt tasks, adjust curricula and work with other organizations interested in the well-being of their citizens.

Arguments presented in this paper support a combined approach versus physical education, benefiting from the new direction set by the European Framework of Quality Physical Education. In practical terms, schools and universities will continue to focus upon a reorientation of their curricula and structuring of all study programmes to correspond to the needs of the 21st century. Research need to go hand in hand in hand with practice, and governmental policies be complemented by actions undertaken by community organizations.

References

- Michal Bronikowski, "Transition from Traditional Approaches to Teaching Physical Education", in Ken Hardman, Ken Green, *Contemporary Issues in Physical Education* (eds.), 2011, Maidenhead: Meyer & Meyer Sport, p. 109
- Dan Cheța, Natalia Mihalache, *Efortul fizic și metabolismul*, Editura Sport-Turism, București, 1989
- Edward F. Coyle, "Physical Activity as a Metabolic Stressor" in *The American Journal of Clinical Nutrition*, Vol. 72, Issue 2, 1 August 2000, pp. 512S-520S
- Adrian Dragnea, *Teoria educației fizice și sportului*, Editura Fest, 2002
- Adrian Dragnea, Aura Bota, Monica Stănescu, Silvia Teodorescu, Sorin Șerbănoiu, Virgil Tudor, *Educație fizică și sport – teorie și didactică*, Editura FEST, București, 2006
- Ioan Drăgan, *Refacerea organismului după efort*, Editura Sport-Turism, 1978
- Erin K. Howie and Russell R. Pate, "Physical Activity and Academic Achievement in Children: A Historical Perspective", *Journal of Sport and Health Science*, 1, 2012, p. 165
- Elisabeth Zschucke, Katharina Gaudlitz, and Andreas Ströhle, "Exercise and Physical Activity in *Mental Disorders: Clinical and Experimental Evidence, Journal of Preventive Medicine & Public Health*, Jan. 2013 (Suppl.1): S12-S21
- http://www.nationalwellness.org/?page=six_dimensions, accessed 10 January 2018
- The European Framework of Quality Physical Education (EFQPE), http://www.eupea.com/health-conscious-future-oriented-life-management-key-competence-2/, accessed 20 February 2018

REDRESS AND CRIMINAL DEVIANCE IN USE OF DRUGS AND PSYCHOTROPIC SUBSTANCES IN ROMANIA

Bogdan MARINESCU*

Abstract

In Romania, the approach to assistance to drug users had an incoherent evolution that ranged from a medical approach to drug-intensive psychiatric drug use since the 1990s, focusing on detox services and only exceptionally on methadone substitution, to a system integrated assistance.

Accordingly,"until 1999, the addicted persons had many relapses/relapses due to the lack of all therapeutic treatments (eg socio-vocational center and therapeutic communities) and the fact that, following diagnosis, consumers were not entitled to assistance free medical service"[1].

In 2000, the first strategic response from the Ministry of Health emerged to meet the needs of assistance in this field, namely the National Health Program of the Ministry of Health (Program 8), which led to the development of pilot sections for treatment within some psychiatric hospitals, and a first methadone maintenance center. Thus, in addition to the medical perspective, the development of the principles of harm reduction is envisaged. The lack of a complete therapy unit leads to a large number of relapses, and the recovery of patients is often impossible. Starting with 2004, the system of integrated medical, psychological and social assistance of drug users was established. By GD no. 1093/2004, the 47 Drug Counseling and Prevention Evaluation Centers (6 in Bucharest and one in each county) became territorial structures of ANA (National Antidrug Agency)[2] and, since 2005, according to the standards of the National System of Medical, Psychological and Social Assistance to Consumers drugs[3], coordination of consumer assistance and general management of each case across different services.

Keywords: *Drug redress, criminal deviance, drugs, drug relapse, drugs risk.*

1. Risk and prevention of relapse

Reducing use of drugs and psychotropic substances is part of the process a dependent person goes through in an attempt to quit consumption or reach moderate / controlled and less harmful consumption. Reducing may occur after a day, a month or years after stopping the consumption of the substance the person has become dependent on. The trigger factors of relapse may be multiple or just one.

Risk of relapse and prevention of relapse. Reducing is being tried to be prevented by certain therapeutic techniques. If this form of psychosocial support that would follow the medical stabilization period did not exist, the medical treatment of the problem of consumption would have failed the failure and would be a negative conditioning factor for the following attempts to implement the change[1].

The response of the community service network to the return of former injecting drug users who have served a custodial sentence. According to the study carried out by the National Anti-drug Agency and the National Administration of Penitentiaries in Romania's penitentiaries in 2006, it appears that:

- the prevalence of illicit drug use in Bucharest is 5.9% in the penitentiary;
- Lifetime prevalence of illicit drug use by educational level is 24% for those without primary education, 20.3% for those with upper secondary education and 15.1% for those with gymnasium / studies professional / 10 classes;
- the distribution of consumers by type of consumption is 22.3% individually and 77.7% in the group, most frequently, the group being made up of 3 persons[2].

The addiction service system envisaged to be developed in Romanian prisons is described in the Joint Order of the Ministry of Health and Family and the Ministry of Justice no. 898/725/2002 no. 898/2002 on medical and educational measures applied to drug addicts in penitentiaries.

In the Common Order no. 898/2002 does not provide services for former consumers to be released. Only consumers who continue or initiate a penitentiary assistant are covered by the Order.

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[1] National Drug Report 2010, Chapter 11, p. 126

[2] The centers have become operational since September 2006 and offer the following types of services: prevention, evaluation, psychological assistance, social assistance and case management.

[3] Do not refer to: alcohol, psychoactive substances administered on prescription, persons under 18 years of age, assistance in detention.

[1] Prelipceanu, D. ed. (2002): Treatment Guide to Psychoactive Substance Abuse, 2nd Edition; InfoMedica, Bucharest. Hriscu, E., Ioan, M. (2004): Prevention of recurrences in drug-related disorders (Practical Guide for Health Professionals), InfoMedica, Bucharest.

[2] National Anti-drug Agency, National Administration of Penitentiaries (2006) - Prevalence of drug use in the penitentiary system in Romania.

There is a risk of not considering a prisoner as a former consumer, perhaps he is an active consumer, but denies it because of the stigma, the humiliation he might be subjected to or the fact that he would not be able to explain the existence of the drugs in a carceral environment. Thus, the detainee who is an active consumer but is a consumer, is not considered in the population to whom the service network is addressed and which provides bio-psycho-social assistance in the penitentiary.

In the case of inmates who are indeed former injecting drug users, there is a risk of relapse after release, as evidenced by the experience of injecting drug users who have had several episodes of detention and as many retreats closer or farther release.

An institutional response to this risk category that comes to meet and prevent the risk of relapse is almost inexistent. We say almost because they are services that respond to the need to prevent relapse to former consumers, but only at their request and if they are aware of the existence of such services in the community.

In this regard, we propose that there is a need for a return risk management offer to meet former injecting heroin users who have been deprived of their liberty and returning to the community.

We believe it is useful for our work when talking about drug use to make a few points about the causes of the criminal behavior of drug-using people and, in particular, juvenile offenders.

The important weight of youth in the contemporary structure of contemporary society as well as its ever-increasing contribution to the different spheres of economic, social and spiritual life reinvigorates older and newer discussions and controversies regarding the status and role of this highly mobile age group creative. Youth is a social category subject to different bio-psychic and socio-cultural determinations, but individualized through a range of age, thinking, skills, mentality and behaviors.

The phenomenon of adolescent deviance, known as juvenile delinquency, is now manifested in our country with increased intensity. Criminal statistics, made up of specialized social control bodies, which have begun to be presented to the public, are revealing in this respect, demonstrating an increase in the frequency of delinquency committed by minors and young people in the period following the December 1989 revolution and, increasing the severity of these crimes.

Our intention is to present and highlight, in a scientific way, the causes and conditions that generate and favor the criminal behavior of minors.

In most cases, in the field of social inadaptability, behavioral disorder and personality, the phenomenon of juvenile delinquency involves a series of complex problems that cannot be highlighted and solved only from the perspective of a single discipline. That is why our effort has been placed on a multidisciplinary approach, assuming the approach of societal, psychological, psychiatric, pedagogic, criminological - to the motivations and causes of juvenile delinquency behavior from different angles, in order to be able to offer a meaningful and appropriate answer to the question: "*Why are young people violating criminal rules?*". To properly answer such a question, detailed studies are needed on the individual features and social variables that characterize the life situation of minors and young people, as well as on the etiological mechanisms of delinquency.

This problem of particular scientific and practical complexity tends to become increasingly a priority direction of sociological, psychological and criminological research being imposed both by the necessity of improving the criminal policy measures, meant to prevent and diminish the anti-social manifestations among the young people, and the need to identify and adapt effective educational solutions.

The necessity and usefulness of a complex study in this field is all the more necessary, as nowadays, as a result of the anomalous situation existing in our country, part of the moral and legal norms suspended their functionality, contributing to a hesitant oscillation of the conduct of the young deviators between educational and regulatory contradictory norms.

Therefore, the importance of these specifications is determined by:

- increasing the number of offenders, as well as diversifying the crimes committed by minors;
- the need to establish a methodology and method involved in the investigation of juvenile delinquency in order to identify the peculiarities of juvenile offenses, the factors that contribute to the orientation of minors towards behavior that is inconsistent with the law and the conditions for preventing and combating the criminality of minors;
- changing and completing legislation in the field.

The experience gained by non-governmental and governmental organizations through their programs of information, education, support, guidance, counseling and practical involvement in preventing and intervening in solving cases where children are victims of various forms of neglect within the family and the society in which we live, and the fact that many young minors fall prey to drug use and crimes, so that many of them get into re-education and penitentiary centers for minors and young people as a result of the crimes they commit, justifies once again the importance of addressing the phenomenon of social delinquency.

Derived from Latin the *Delinguere* and *Juvenis*, this notion designates "*the set of deviations and violations of social norms, legally sanctioned by minors*."[3] The term deviance was first used in 1938 by American sociologists Sellin as "*the set of behaviors against norms behavior or institutional order*"and by

[3] Mitrofan, N., Zdrenghea, V., Butoi, T. (1992): Judicial Psychology, Publishing House and Press "Iansa" SRL, Bucharest, p. 267

Merton, who considered deviance to be "*a normal reaction of normal people in abnormal conditions*[4]."
According to the Sociology Dictionary (Zamfir, Vlăsceanu, 1993), deviance is "*any act, conduct or manifestation that violates the written or unwritten norms of society or a particular group*[5]*."*

As a special form of social deviance, juvenile delinquency defines "*the whole of the conduct of minors and young people in conflict with the norms of social co-existence accepted and recognized in a society*[6]." This legal concept is useful as it allows us to avoid the ambiguity of other definitions but simplifies perhaps too much complexity of the phenomenon. By violating the social norm, delinquency is a sociological approach; in the fact that it implies the violation of criminal law, being a subclass of crime or criminality, juvenile delinquency is in the legal and criminal field involved in the detection, deferment of justice and prevention. The delinquent act is ultimately the product of the action of an individual, of a personality, the phenomenon calls for a psychological or even psychiatric approach.

Referring to people in an age-class normally enrolled in schooling, juvenile delinquency is also a psycho-pedagogical problem. The accents of analyzes vary, depending on the angle of approach. As a distinct form of deviance (of criminal nature), juvenile delinquency is a complex phenomenon, defining the set of conduct in conflict with the values protected by the criminal norm.

From the above it is explicitly stated that the term "*juvenile*" (juvenile delinquency) refers only to the age group of the minority. The legal perspective cannot be used to distinguish between the specifics of the juvenile delinquency and the peculiarities of adult crime and the criminality, so when it comes to juvenile delinquency we need to know in what sense do we use this notion and if we use it to designate a behavior that is dependent on the official competence of the criminal system. If, from the normative point of view, the undesirable character can be (but does not mean that it is) an essential condition of the criminality, it implies that it is also a condition of the facts as such.

The undesirable nature of the facts imputable to a teenager is also the product of a general perception of the public about the notion of offense which must necessarily fall within the scope of the law and be sanctioned. This collective reaction ignores the significance of the violation of the norm for the teenager. An incriminated flight, for example, "*vagabondage*" is often a normal behavior, based on multiple motivations related to conflicts with family, educators, or the temptation of adventure typical for the adolescent period.

Therefore criminal career of a young man does not resemble the adult, his actions illegitimate or illegal due to the fact mistakes made by educator and not some so-called antisocial motivations of the young offender. These minors, for the most part, are neither cruel offenders nor stranded marginal elements, but simply drifting children, lacking the educational benefits of a favorable family environment.

A number of authors consider that the specific features of delinquency consist mainly of:

- violation of laws and legal prescriptions prohibiting the commission of certain actions;
- manifesting behavior contrary to moral rules and social cohabitation;
- conducting an anti-social action that jeopardizes the safety of institutions and social groups, creating a sense of fear and insecurity among individuals.

2. The phenomenon of juvenile delinquency

Even if the offense appears to be a legal phenomenon governed by the rules of criminal law, it is fundamental, a social phenomenon that occurs in society, with negative and destructive consequences for the security of individuals and groups.

A delinquent behavior, according to Sutherland[7], has the following characteristics:

- Has a number of negative consequences, by damaging the interests of the entire society;
- subject to prohibitions or constraints formulated by criminal law;
- presents a deliberate antisocial intent following a destructive purpose;
- the deed is legally proven and sanctioned as such.

Depending on these characteristics, delinquency is "*a particularly complex phenomenon, including a number of aspects of statistical, legal, psychological, sociological, prospective, economic and cultural dimensions*"[8].

- the statistical dimension highlights the state and dynamics of delinquency in time and space;
- the legal dimension highlights the type of legal norms violated by antisocial acts and deeds, their social danger, the severity of the damages produced, the ways of resocialization of the delinquent persons;
- the psychological dimension that highlights the personality structure of the delinquent individual and the normal individual, the motivation and mobs of committing the offense, the offender's attitude towards the offense committed;
- the sociological dimension centered on the

[4] apud Banciu, D., Rădulescu, S. (1990): Introduction to sociology of juvenile delinquency. Adolescence - between normality and deviance, Medical Publishing House, Bucharest, p. 9
[5] Zamfir, C., Vlăsceanu, L. coord. (1998): Sociology Dictionary, Ed. Babel, Bucharest.
[6] Banciu, D., Rădulescu, S., Teodorescu, S. Current Trends in Crime and Criminality in Romania, Ed. Lumina Lex, Bucharest, 2002, p.7
[7] Sutherland, E.H., D. Cressey, *Principes de criminologie*, Editions Cujas, Paris, 1966
[8] Banciu, D., Rădulescu, S., Introduction to the sociology of juvenile delinquency. Adolescence - between normality and deviance, Medical Publishing House, Bucharest, 1990,

identification, explanation and social prevention of crimes and crimes in relation to multiple aspects of inadequacy, disorganization and deviance existing in society and the forms of social reaction to different crimes;

- the economic dimension highlights the direct and indirect consequences of material and moral crimes;
- the prospective dimension highlights trends in the future of delinquency.

"Social deviance means non-compliance, deviation or violation of social norms and rules. So deviant behavior is <atypical> behavior that moves away from the standard position and transgresses accepted norms and values and recognizes within a social system[9]*. "*

Deviance can manifest itself in one of the following forms of individual or group behavior[10]:

- moral deviance in the form of one or more violations of the moral norms accepted by a particular community, the norms of the global society and the deontological rules of a particular profession. All persons committing immoral facts which are not criminal because of their low social danger fall into this category and the situation of minors who commit immoral acts that do not meet the constitutive elements of a crime (the category of "under moral danger", "pre-delinquent ");
- functional deviance consisting of deviations from the rules and standards of the specialty (techniques) of the exercise of a certain profession or occupation; these are rules of competence. It may consist of disciplinary misconduct or manifestations of incompetence or inability to pursue an occupation or profession;
- the criminal deviance which includes all the facts provided by the criminal law committed, even if the circumstances in which they were committed or certain age characteristics, or the mental state of the authors or potential participants are legal causes for the elimination of the criminal character of the deed or responsibility criminal offense of perpetrators. We include here the criminality of adults (persons who have passed the age of civil minority and have committed acts that constitute the constitutive elements of a crime) and juvenile delinquency (of minors aged between 14 and 18 who have deliberately dealt with a deed constituting the constitutive elements of a crime) ;
- the deviance of juvenile offenders with behavioral disorders made up of all the deeds committed by juveniles who, due to their age, are not criminally responsible or have committed the act without discernment. Only protective measures can be taken against them.
- the deviance of mental aliens that encompasses the totality of criminal law committed by irresponsible people due to a pathological condition that seriously affects their discernment.

3. Determinants of deviant behavior

The factors that determine juvenile delinquency can be divided into two main categories: internal factors, individual factors and external, social factors.

The first category includes the neuro psychic features and structure, the particularities of the personality in training.

In the second category are socio-cultural, economic, socio-emotional and educational factors within the micro and macro groups of the human groups in which the child and the young person must gradually integrate from the family[11]. "The inclination towards deviance and the adoption of criminal behavior results from" meeting "the different factors for each case.

In juvenile and juvenile delinquency groups we find a relatively large number of cases with serious deficiencies in their psycho-intellectual development, reduced intellectual capacities that prevent, in particular, anticipating the consequences and implications of the actions taken.

In the view of Mitrofan, the minor offender presents a series of specific features[12]:

- lives longer at present, his actions being carried out in a supportive manner under the tyrannical pressure of present impulses and needs;
- low criticism of thinking;
- the difficulty or inability to anticipate mentally the unavoidable consequences of the offense;
- the absence of emotions and selfless and sympathetic inclinations;
- mild inhibition;
- lack of "conditional brakes" underlying the inability to control and overcome the tendencies and impulses that push him to antisocial acts;
- increased suggestiveness.

Minor delinquencies are characterized either by insufficient affective maturation or by various states of affective disorder. Insufficient maturation is characterized by:

- lack of affective autonomy, which leads to increased suggestiveness;
- insufficient development of affective self-control, related to insufficient knowledge and ability to control emotional reactivity;
- Poor development of emotions and superior feelings, especially moral ones.

In the category of affective disorder states are included:

- states of affectional frustration and feelings of frustration;
- affective conflicts;

[9] Dragomirescu, V., Psychology of Deviant Behavior, Scientific and Encyclopaedic Publishing House, Bucharest, 1976, p.53
[10] Banciu, D., Rădulescu, S., op. cit. pp. 162-165
[11] Idem, p. 59
[12] Mitrofan, N., Zdrenghea, V., Butoi, T. Judicial Psychology, Publishing House and Press "Iansa" SRL, Bucharest, 1992

- affective instability;
- affective ambivalence;
- affective indifference;
- the absence of emotions and altruistic and sympathetic inclinations.

Stoian characterizes the juvenile delinquent as: "lacking anxiety, especially those caused by the *feeling of guilt* that does not exist at all; has a great ingenuity in his constant endeavor to dissimulate, to defend himself through lies, to take *precautionary measures* against everything he could take by surprise; mastered by vivid self-esteem, proves remarkable faculties in adapting to new situations, in organizing negative actions; unbelievable resistance to pressures of any kind, intimidation, reprimand - using magistral technique of despising silence; obvious emotional maturity[13]. "

Research on the juvenile delinquent has highlighted that it is characterized by: a level of immaturities characterized by the following: insufficient self-control, impulsivity and aggressiveness, underestimation of mistakes and dissociated or antisocial acts committed, indolence, indifference and contempt labor, egocentric tendencies, the absence or insufficient development of higher social motives and ethical-moral feelings, the desire to achieve an "*easy life*" without work.

4. Family and deviant behavior

One of the most important functions of the family is the education and training of young people with a view to their optimal integration into life and social activity.

Studies of juvenile delinquency have shown that the atmosphere of disorganized families, lack of parental authority, control, and their affection, as a result of divorce, have led children to adopt social and antisocial acts.

Also, there are some families that, although organized, are characterized by accentuated conflicting states that can be of varying intensity and can extend over different periods of time. In these families, because of their great sensitivity, children receive and live intensely any "event" interfered with by their parents.

The main effect of conflicting interpersonal relations within the family on the personality of children is the devaluation of the parental model and the loss of the possibility of identification with this model. Often children who feel strongly the influences of the family conflict run away from home and seek to find different groups of belonging which, in turn, can be antisocially oriented. Children's home run is associated with the lack of purely extra-family supervision with great delinquent potential.

Also, the excessive severity, with many rigidities, with interdictions sometimes lacking in brutality, with all sorts of deprivations, leaves its mark on the process of forming the child's personality. Keeping a child in a hipper sever climate gradually drives serious changes into one of the most important dimensions of personality - it's about the attitude-relational one - translated into phenomena of apathy and indifference to what it needs to do or to the relationship with others. In the face of the over-hater and hyper aggressive parent, the child has no alternative but blind obedience, unconditional in relation to his requirements and claims, the personality is not delayed. There are also super protective parents who have simply invaded the child with affective investment, but not assuring educational treatment can lead to delinquent conduct, mostly explained by low resistance to frustration. The research also confirms that there is a correlation between delinquent conduct and schooling level, meaning that juvenile delinquents usually have a very low level of school education.

Conclusions

It can be said that the level of juvenile delinquency of a country sufficiently reflects the interest and capacity of this society to resolve the difficulties of raising and educating younger generations and at the same time warns of the gravity and extent of tomorrow's crime.

The teenager of these troubled times faces difficulties and multiple situations of conflict in the course of his integration into the social and legal field. At the microsocial level, preventive programs should aim at revitalizing the educational and social control functions of the main social institutions: family and school. Measures taken in the family area consist of economic support (for example, the increase of current childcare allowances) or in free counseling through family counseling cabinets within social welfare networks. The school in turn asks for a rethink of its role and system of functioning. The steps taken in this area have been small, perhaps due to the financial difficulties in recent years.

Organizational changes and changes to the ideas and principles under which school activity is guided are promising ways to prevent delinquency through school.

In this context, we mention the mentality of some of the teachers who cannot build a healthy school climate that is conducive to getting closer to the pupils he should find his replacement with responsible attitudes in terms of education. No less important is the organization of services with specialized staff (psychologists, social workers, etc.) within schools with the task of identifying and treating those students with serious behavioral and understanding disorders.

At the individual level, the re-education and re-socialization measures in the institutionalized environment (re-education centers, medical-educational institutions, minors' reception centers) and

[13] Stoian, M., Minor Drift, Encyclopedic Publishing House, Bucharest, 1972, p.9-10

measures for social reintegration of juvenile offenders become essential. This process of social reinsertion of former delinquents is experiencing difficulties in psychological terms, the success being not only ensured by the correct behavior of the former criminals but also by the society that receives them and should have an integrative action. To ease their way into life, it is not enough to be offered only a job, but also the opportunity to be successful at socio-emotional level. This is because the spectrum of social stigmatization frightens the ex-offender ever since its detention and is one of the major psychological barriers to its total reformation.

The juvenile delinquency as a whole is nothing but the consequence of the lack of moral support offered by the adult, the lack of protection and care received in the family, the failure of the activity of moral education received in school, etc. A delinquent minor is, in fact, a victim and not a culprit aware of the responsibilities imputed to him. He does not have the awareness of his inadequacy to normative requirements, experiencing a social experience different from that of the adult. For this reason, juvenile delinquency appears as an effect of the lack of responsibility of the family, the educators, the factors responsible for forming the young man's moral conduct.

Improvement of the prison regime for minors sentenced to imprisonment is also required, in the spirit of European rules, taking into account the experience of other developed countries.

Finally, it is recalled that in recent literature, the role of the community (local or neighborhood) in preventing crime and supporting educational and training actions at the family and school level is becoming more and more frequent. The UK model of community intervention with the help of agents specializing in reporting and resolving confidential sector issues (street children, playgrounds, sports grounds, pollution, road quality, promptness of social services, families with difficulties, unemployed, accommodating those released from penitentiaries and re-education centers, finding workplaces) can be successfully applied in our society as well. Far from being frightening in size, juvenile delinquency in drugs is steadily increasing, but significant in the antisocial character of its human and material components.

References

- Conseil de L'Europe, Transformation Sociale et délinquance juvenile (Resolution 178/62), Strasbourg, 1979
- Conseil de L'Europe, Réactions sociales a la délinquance juvénile (Recommendation No. R87 / 20), Strasbourg, 1989
- Abraham, Pavel, Costel, Dumitrescu, Sociology of Deviance and Social Control, Ed. Detective, 2010;
- Banciu, Dan, and Sorin Rădulescu - Introduction to Sociology of Deviance, Scientific and Enciclopedic Publishing House, 1985;
- Banciu, Dan., Rădulescu, S. M., Evolution of juvenile delinquency in Romania. Research and Social Prevention, Lumina Lex Publishing House, Bucharest, 2002
- ANA (National Anti-Drug Agency). (2000-2010) - National Drug Report in Romania
- ANA (National Anti-Drug Agency). (2003) - Report on the evaluation of the drug phenomenon in Romania – 2002
- ANA (National Anti-Drug Agency). (2003) Report on the evaluation of the drug phenomenon in Romania
- ANA (National Anti-Drug Agency). (2004) Situation in the field of drugs – 2003
- ANA (National Anti-Drug Agency). (2005) The Standards of the National System of Medical, Psychological and Social Assistance to Drug Users
- ANA (National Anti-Drug Agency). (2008) - Prevalence of drug use in Romania - Study in the general population 2007. Study report
- Presidential Commission on Social and Demographic Risks Analysis in Romania (2009) - Social risks and inequities in Romania
- Prelipceanu, Dan, Cicu, Gabriel (2010) - Clinical treatment for substitution treatment of opiate addiction, Romanian Psychiatric Association Publishing House, Bucharest

CONTEMPORARY ISSUES RELATED TO ILLICIT DRUG TRAFFICKING AND CONSUMPTION TARGETING THE NATIONAL SECURITY OF ROMANIA

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Abstract

A serious social problem is drug use, which is very widespread all over the world. Drugs are a terrible problem whose seriousness becomes more visible every day. Problems caused by drug abuse and illegal trafficking are among the most serious problems faced by the world today but also threatening future generations. After the First World War, drugs began to be consumed on a large scale. Up to the end of the 30s, they were legal. Their marketing over time has led to enormous profits outlaw, making drugs an invaluable source for the black market. Scourge illicit drug trafficking from South America and the Middle East comprised the whole the planet. Governments have begun to allocate more resources to the fight against drugs, but the processes were slow because the problem was very complex. The impact was very high among young people who out of curiosity, terrible or solidarity with the entourage, have begun to consume. The Romanian society was caught by surprise by this drug scourge, coming out so very serious problems both in justice and in the medical world. Weak reactions and untrained authorities have favored the phenomenon of drug abuse that has come to be devastating. Drug use is a high-risk activity. Optimism and illusion of maintaining self-control is also dangerous because it affects reasoning. The drug consumer becomes not only an unfortunate person, but also a social problem. Changes made by traffickers are evident in street-related lawsuits: thefts, arsonists, assassinations. We are all affected in some way by drug trafficking. The extent of the problem current narcotics outweighs the concerns of the police forces and the medical world, constituting a threat to the economic and social order of the world.

Keywords: *Illicit, drugs, trafficking, consumption, national security.*

1. National security

In our society, the issue of drugs is growing and the most affected are young people and their families. The consequences of drug use in Romania are disastrous. In a simple enumeration these would be:

- Decreasing the productive potential of the country
- Decreasing the defense potential of the country
- Decrease in population (through juvenile mortality and birth decrease)
- Increase the crimes and criminals
- Increased the number of young prisoners
- Increasing risks to national and individual safety

In this case, State intervention is necessarily required by some measures, such as:

- Fighting drug entry:

– Trolls and any means of transport crossing the territory of Romania shall be followed and supervised by the employees of the Ministry of the Interior, through the authorized personnel, by stages, until leaving the country.

– more efficient control in customs

- Detecting drug traffickers
- Fight against corruption
- Therapeutic measures:

– Simultaneously with the fight against drug trafficking it is necessary to take effective measures for the treatment of drug addicts, such as: establishment of free treatment centers, assistance of the patients to healing and their social reintegration

– involving the Church in its areas of competence

– drug addicts are no longer treated as delinquents, but as epidemic diseases.

- Fighting drug trafficking and treating drug addicts as a state policy

Risks to national security can be potentiated by: increased dependence on some hard-to-reach vital resources; persistent negative trends in demographics and mass migration; the high level of social insecurity, the persistence of chronic deprivation and the widening of social differences; the fragility of the civic spirit and the difficulties of manifesting civic solidarity; poorly-developed and insufficiently protected strategic infrastructure; poor condition and low efficiency of the social assistance system and population health insurance; organizational shortcomings, insufficient resources and the difficulties of adapting the education system to the requirements of society; low expertise, inadequate organization and precariousness of resources allocated to crisis management; insufficient engagement of civil society in debating and solving security issues.

If the Southeastern European space remains a potential provider of instability, both due to the political and economic situation of the former Yugoslav Federation states and to the amplification of the spectrum

Unconventional risks to regional security, the Black Sea area is at the same time an opportunity and a source of risk, interfering with two strategic axes, namely:

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The Black Sea - Mediterranean Sea, respectively the southern flank of NATO, an area of strategic importance for the North Atlantic Alliance, mainly affected by cross-border risks; Black Sea-Caucasus-Caspian Sea - transit space for Central Asian energy resources.

Active engagement in the process of ensuring security through the promotion of democracy, the fight against international terrorism, drug trafficking and live meat, as well as combating the proliferation of weapons of mass destruction, is an imperative for Romania's security policy and is the fundamental condition of participation of our country to the benefits of globalization, the exploitation of the opportunities presented by the international environment and the effective counteraction of major risks and threats.

In this context, a decisive role is played by international police cooperation, which will be a unique platform for the exchange of data and information in the prevention and combating of cross-border crime. At the same time, we believe that, in the near future, we need to re-evaluate the Romanian security system and to unify our efforts in the secret service community, along with setting priorities in a changing world of threats.

If Samuel Huntington (2004) considered that future wars might be related to the answer to the question "who are you?" Than "what are you doing?" Or "on whose behalf are you?"[1], The responsibilities of our country should not be limited only to design and adapt security policies in the context of globalization. It is now necessary for the new national security policies to aim at a more pronounced pro-active dimension, to focus more on integrated prevention of high-risk phenomena.

2. Globalization of risks

Globalization of risk has imposed and requires a much more sustained and concerted effort on behalf of all member states of the European Union to prevent and combat illicit trafficking and illicit drug use.

Globalization is either a source of benefits for the developed world, or a source of insecurity for developing ones. For this reason, it is necessary to develop assistance and other forms of regional involvement of developed countries in support of developing countries.

It can be said that globalization means more than remodeling the global economy. It reorganizes international policies and security issues at the same time as it allows many contradictory events to happen in the world at the same time: some states lose power, while others earn it; some groups aspire to the quality of nation, most possess it, and others, like the European Union, develop complex forms. Far from being an anachronism, state competence today is an important asset. The nation-state retains its importance as a political and economic actor, and the national interest is maintained and amplified, and it must be defended by strategies appropriate to the historical period.

In this chapter, we would like to draw attention to the importance of the process of globalization of risks to the phenomenon of trafficking and drug use, viewed from the point of view of national security and security.

3. The impact of globalization

Globalization is viewed by many specialists as an eminently economic phenomenon, involving a growing interaction or integration of national economic systems, by increasing international trade, capital flows and investment. At the same time, however, a rapid increase in cross-border social, cultural, technological and, last but not least, military cross-border exchanges can be highlighted as part of the phenomenon of globalization. At the same time, there is also a globalization and internationalization of the terrorist phenomenon, drug trafficking, organized crime in general.

Globalization, as a phenomenon, involves the multitude of interdependencies of economic, political, cultural, social, military, etc., which are established on a wider scale among the states of the world. As a result, globalization manifests itself and generates effects both in terms of national defense, public order and national security, as well as on the degree of economic and political stability of a state.

The impact of globalization can be seen in the tendencies of disappearance of the state's physical boundaries and the emergence of other types of borders, usually invisible and other. Changing traditional borders as a result of globalization will lead to essential changes in the perception and conception of national security as well as the role of the national state in this context.

4. The concept of globalization

Globalization denotes the unitary world system, which means that, to a certain extent, we will look at the world as a single social, cultural, economic, etc. order. This development is the essence of globalization, which embraces various forms of manifestation: the universalization of science; global trade and financial flows; transnational enterprises; mass media present globally; Internet; world-class tourism and social migration movements; frictions between cultural spaces; intensive use of the environment; international crime[2].

Under the inter-human relational relationship, globalization means compressing distances through new technologies (third-generation mobile communications, the Internet), interconnecting and increasing mutual dependencies, integrating financial and commercial markets, finding solutions to some global issues, developing transnational identities. In

[1] Samuel P. Hutington, The Clash of Civilizations and the Restoration of World Order, Ed. Antet, 1997, p.327
[2] Bari, John, Globalization and Global Issues, Economics Publishing House, Bucharest, 2001, p.129

this context, globalization will encompass all spheres of human existence and will constitute the model of society to which humanity will have to participate in its entirety[3].

Overall, globalization has broader meanings than the remodeling of the world economy. It is also reorganizing international politics and security issues. At the same time, globalization manifests itself as an internal, contradictory process that, on the one hand, opens up new possibilities for state development and, on the other hand, emphasizes existing problems or challenges new ones. On a global scale, the implications of the globalization process on state security are manifested in the context of the stability of the national economy[4].

The internal engine of globalization is identified in capitalism and technology, in the actions and policies of states and markets, or in features of modernity[5].

As a strict term, globalization signifies the multitude of socio - social transformations registered today by mankind, expanded on an integrative scale and generated by the impact of transcontinental financial - monetary flows on the characteristics of social interactions. Globalization of problems involves global policies and strategies to address common issues for the whole of humanity.

5. The effects of globalization

The phenomenon of globalization is a future stage of the general process of political, economic and cultural development of mankind. For now, it is difficult to speak with some certainty about the long-term effects of the globalization process on the international community, but even now, it is clear that the process of globalization has both a positive and a negative impact. The positive side of this process is that it will increase the interaction between countries, which in turn opens new possibilities for the development of human civilization, especially in the economic sphere. Increasing trade, investment and technology exchanges between different regions, facilitating people-to-people contacts, familiarizing themselves with cultures of other peoples are certainly beneficial to mankind.

Along with this, globalization also presents new challenges. Many hazards have a regional or even a planetary nature: ecological and technological catastrophes, transnational crime, international terrorism, etc. The uncontrolled expansion of dubious quality cultural patterns damages the national and cultural traditions of the peoples, threatening their originality.

The intensification of the globalization process also presents some dangers for national economies. At the same time, due to the uneven distribution of the benefits of globalization, the negative aspects of this process will particularly negatively affect developing countries, so that they can stay away from progress or even outside. Increasing interdependence in international relations generated by globalization brings new aspects of the notion of "national and international security." The number of external factors influencing the stable functioning of society is increasing.

First of all, globalization is a geo-economic and then geopolitical and geocultural process. This process is not only an approach, an integration of the economies of many countries. Changing the qualitative characteristics of these economies that transform from closed systems into elements of a world system. The very notion of "national economy" is changing. The core economic institution becomes the transnational corporation, which places its factories and sells its products where it is more convenient without taking into account the existence of borders. For this reason, the process of international division of labor takes place, and within a single state, whether developed, the "double economy" occurs, "flourishing enclaves", "donor regions, credit regions[6]".

6. The concept of security

Most authors in the field believe that security is a contentious concept. There is consensus on the existence of a sense of security against threats to fundamental values (both for individuals and for groups), but also a major disagreement as to who should be given priority attention: individual security , national or international. The specialized works that appeared during the Cold War had as a dominant topic the idea of national security, defined mainly from a military perspective[7].

The main area of interest for politicians and scientists represented him the military capabilities that those states should develop to deal with threats to them.

Lately, this idea of security has been criticized for its ethnocentric (cultural) nature and too narrow the definition. Instead, a large number of contemporary authors have promoted a conception of extended security beyond the traditional limits of national security in the parochial sense of the term, a concept that includes a considerable set of other considerations.

The state is a major source of both threats and security for individuals. The paradox is that as the power of the state grows, the state also becomes a source of threat to the individual. The State has the duty to ensure that its citizens are protected against any form

[3] Hirst, P, Thomson, G., Globalization is under question. International Economy and Possibilities of Governance, Ed. Tei, Bucharest, 2002, p. 45
[4] Bari, John, Globalization and Global Issues, Economics Publishing House, Bucharest, 2001, p.135
[5] Albu, Natalia, Globalization-Balance or Imbalance ?, Chisinau, 2005, p. 89
[6] Ignacio, Ramonet, Geopolitics of Chaos, Ed. Doina, Bucharest, 1998, p.77
[7] Lupu, Corvin, Romania under the pressure of the Cold War and the desire for Euro-Atlantic integration, Ed. Alma Mater, Sibiu, 2001, p.134

of attack on its identity, foreign intervention, attacks and invasion[8].

The concept of security represents at the contemporary stage one of the most important concerns of political entities, be it a kingdom or a nation state. In today's conceptual security conditions, a process of transformation is increasingly oriented towards economic, political, social and environmental aspects[9].

Substantial changes have occurred in recent years in the analysis and practice of national security. Among the factors that have caused these transformations, "we can highlight three of them as the most important: the decline of national sovereignty, the unprecedented increase in transnational density and the conflicting explosion of the international scene, backed by identity dynamics. Security, objectively, measures the absence of threats to acquired values, and in a subjective sense, the absence of fear that these values will be attacked[10].

7. Definitions of the security concept

"A nation has security insofar as it is not in danger of having to sacrifice its fundamental values if it wants to avoid the future and has the capacity, if it is provoked, to preserve it by winning such a war[11]."

"Security, in an objective sense, measures the absence of threats to acquired values and in a subjective sense, the absence of fears that these values will be subject to attacks[12]."

In the case of security, the discussion concerns the concern to be free of threats. When this discussion is in the context of an international system, security addresses the ability of states and societies to maintain their identity, independence and functional integrity.

8. Regional security

The beginning of the millennium brings to the foreground the world and international relations that have become much more complex than they were before. Paradoxically, today, when the Cold War is over and the European Continent has a real chance to integrate on the basis of the values of democracy and the market economy, respect for fundamental human rights, security has again begun to be a very controversial issue.

Far from being an exception, Romania is even more sensitive to this phenomenon, for almost 150 years our statehood has been the central pillar of the eternal and centralizing conception of sovereignty. People's sovereignty does not exist outside state powers[13].

Increasing interdependence in international relations generated by globalization brings new aspects of the notion of "national and international security". Increases the number of external factors that influence the stable operation of the company. The state of international security increasingly influences the possibility of securing national security.

That is why maintaining global stability, assisting in creating such international mechanisms that would ensure sustainable and balanced development will become a priority and one of the main issues for regional communities[14].

As a consequence of globalization, many transnational developments and processes have a significant impact on national security. In addition to stimulating economic growth and opening up societies, we can highlight some inconveniences in the globalization process that can lead to the destabilization of some states, the vulnerability of entire regions to the spontaneous fluctuations of the world economy. It is enlightening the positive influence of globalization on the democratic community, which includes 30 per cent of the world's population, disputing 70 per cent of the wealth, which guarantees and stimulates freedom and prosperity, stability and security[15].

Some security specialists note that, in contrast to the above-mentioned situation, as a negative element of globalization, the situation of the instability needle stretching from the Near East to the Asian coast. The area is marked by problems of great gravity, such as poverty, governance inefficiency, power imbalance, high unemployment, Islamic fundamentalism, extremism, and what is worse, the absence of security.

The main dangers of the current world: terrorism, tyranny, perverted governments, the proliferation of weapons of mass destruction, ethnic tensions, governance failures, resource shortages, geopolitical rivalries, drug trafficking and organized crime, find here a fertile ground of affirmation.

These things have a great impact on national security, democracy, stability and economic progress of the state. That is why governments are taking measures to protect their own territory against new threats, by aligning themselves with the international anti-terrorist coalition, working with other parties to defuse international conflicts, preventing the proliferation of weapons of mass destruction, increasing economic growth under the conditions of developing free markets and free exchange, the elaboration of cooperative action programs with world power centers, the

[8] Kolodziei, Edward, Security and International Relations, Polirom Publishing House, Bucharest, 2007, p.201
[9] Neumann, Simona, Traditional Security, Western University, Timişoara, p. 111
[10] Neumann, Simona, Traditional Security, Western University, Timişoara, p. 132
[11] Walter Lippmann, http://www.nuvisionpublications.com
[12] Arnold, Wolfers, *Discord and Colaboration*, New Ed edition, The Johns Hopkins University Press, 1965, p. 237
[13] Finnemore, Martha, *National interests in international society* , Ithaca and London: Cornell University Press, 1996, p. 154
[14] Marin, D, Globalization and its Approximations, Economics Publishing House, Bucharest. 2004, p. 56
[15] Kolodziei, Edward, *Op.cit*. p. 76

transformation and adaptation of international security institutions to the requirements of the 21st century.

9. National Security of Romania on Drugs

In the extensive efforts to develop cooperation on the non-proliferation of weapons of mass destruction and their launching devices, tightening existing regulations, combating international terrorism and other cross-border threats, states have a strong permanent involvement. Firstly, politically, states are interested and concerned about coordinating their positions and acting jointly to help find solutions to these major issues, as well as persisting conflicts, can seriously affect peace and stability in their environment geographically and then globally, all of which have a close relationship[16].

Through an active, dynamic national security policy, state security achieves a complex involvement in international security. In recent years, the State's national defense, state preventive diplomacy policies are combined with offensive policies to promote their own interest, which support global stability in different regions around the world. There is a overwhelming influence of global security on Romania's national one, perceived as a dynamic interaction, in continuous movement and transformation, a full international security meaning full national security and vice versa.

As ways of involving global security in state security, we can mention[17]:

- Restructuring and enhancing the global, regional economic, political and military bodies with a role in multilateral security of states;
- Intervention of global and regional organizations in the security of prevention and cessation of regional crises and conflicts;
- The immediate contribution of the international community to fighting terrorism without frontiers, drug trafficking and terror weapons of mass destruction;
- Involvement of international coalitions under international mandate, the process of security, stabilization and democratization of politically fragile states encompassed by violent conflicts;
- The contribution of the UN, the European Union and other international organizations and bodies, economic and financial institutions to combating poverty, trafficking and drug use, which seriously affects the security of states;
- Intervention of international organizations and bodies to combat the proliferation of cross-border organized and migrant crime, reduce vulnerability to disasters, prevent emergencies and provide health care, including in the treatment of drug addicts;
- Common international effort to stop environmental degradation and eliminate environmental imbalances, control the planet's deficient resources (water, food, energy) to fight disease, climate change;
- Increasing the role of international security institutions in the development of relations and exchange of information as a basis for enhancing national security;
- The approach of international institutions to strengthen humanitarian approaches to security, to ensure the protection of human rights and freedoms, to combat discrimination and violence against minorities of all kinds and refugees.

10. Threats to Romania's national security

In the Anglo-Saxon sense, the threat is an "expression of the intention to impose a person's disadvantage or touch by means of coercion or constraint[18]."

Starting from the general concept, the definition of the threat of political-military origin requires some clarification. Whether it refers to the violation of the fundamental rights of states or security systems, the perception of the fact-setting of threats remains the same, placing it among the virtual dangers.

Under the conditions of the beginning of the millennium it is appreciated that the global and continental system is experiencing profound transformations at a particularly accelerated pace. These are caused by the development of processes and phenomena that have a direct impact on the state security of states and their policies to protect and promote national interests.

The amplification and diversification of risks, their targeting under the conditions of internal vulnerabilities and favorable conjunctions can generate threats to the stability and security of the Romanian state, which will lead to the adoption of adequate, flexible and efficient measures and modalities of action.

The main external risk factors to national security are[19]:

- Gaps between security levels and the degree of stability of the states in the vicinity of Romania;
- acts of incitement to extremism, intolerance, separatism or xenophobia, which may affect the Romanian state and the promotion of democratic values; possible negative developments in the sub-regional area in the field of democratization, respect for human rights and economic development, which could lead to acute crisis with destabilizing effects on an extended area;
- the proliferation of weapons of mass destruction, nuclear technologies and materials, armaments and non-conventional lethal means;

[16] Moștoflei, Constantin, The Southeast European Space in the Globalization Context, U.N.Ap Publishing House, Bucharest, 2007, p. 39
[17] Bădălan, Eugen, Frunzeti, Teodor, Forces and Trends in the European Security Environment, A.F.T. Publishing House, Sibiu, 2003, p. 167
[18] Lander, Roy, Petry Frederich, Net-Centric, *Approaches to intelligense and national security*, Springer Publisher, New-York, 2005, p.239
[19] Alexandrescu, Grigore, Threats to Security, Ed. UNAp, Bucharest, 2004, p. 121

- Proliferation and development of terrorist networks, cross-border organized crime, illicit trafficking in human beings, drugs, weapons and ammunition, radioactive and strategic materials;
- clandestine migration and the appearance of massive refugees flows;
- limiting or forbidding the Romanian state's access to some regional resources and opportunities, important for the realization of national interests.

The analysis of these risk factors, in the subregional and regional context, highlights the fact that they are in a latent state, and the action, their production, can lead to crises of different natures and magnitudes capable of influencing the process of democratization of the country. Against this background, drug trafficking and drug abuse can address and challenge the safety of vital systems for the well-functioning of society. These actions not only bring serious damage to the health of the population, but by developing and escaping oversight can induce a state of uncertainty and a decrease in the defense potential of the country.

The lack of resources allocated to preventing and combating illicit drug trafficking and consumption as a result of the persistence of economic, financial and social problems resulting from the prolongation of the transition state and the delay in the implementation of structural reforms, results in a diminution in citizens' quality of life and aggravation the phenomena of crime of disruption of public order and personal safety.

Regarding the phenomenon of trafficking and drug use, the explanatory and operational importance of the concepts of human security and personal security is taken into account.

11. Drugs and personal security

The notion of human security was first mentioned in 1994 in the United Nations Development Program (UNDP) Annual Human Development Report. The term has thus become a benchmark for a new security model. The issue of human security has two aspects: first, it involves the absence of dangers such as hunger, sickness, reprisals; Secondly, it involves protecting the individual against unwanted events in everyday life (illness, workplace accidents, society).

The UNDP report identifies several elements specific to the concept of human security that pose threats to people. Of these, for our work, we will stop at food security, which is to guarantee the individual's access to basic food, both physically and economically. According to the UN, not lack of food is a problem, but poor food distribution or lack of purchasing power.

Another element is health security which provides for a minimum of protection against ill health and unhealthy lifestyles. In developing countries, the main causes of death are infections and bacteria, which annually kill millions of people. In industrialized countries, deaths are mainly caused by circulatory system problems. In both cases, poor people in rural areas, especially children and young people, are the most vulnerable to sanitary security threats.

Personal security means protecting people from physical violence, regardless of the source of this violence: the state, other states, other individuals, domestic violence. For most individuals, the greatest fear is related to crime, in its violent form. Community security is designed to protect individuals from loss of inter-human relations and traditional values and violence. The most threatened are marginalized, marginalized categories, including the category of drug users.

According to the Romanian Constitution - Article 22 - the Romanian citizen has the right to life and the right to physical and mental integrity is guaranteed. Also, the Romanian State (Article 34 of the Basic Law) recognizes the right to health of the citizen and is obliged to take measures to ensure hygiene and public health. In this sense, it is imperative to promote adequate social policies to reduce the risk of social exclusion, to reintegrate and reintegrate people with addictive drug-using behavior.

Threats to security can be different - famines and disease in poor nations, drug use and crime in the rich - but they are real and amplified. In addition, some threats are common to all nations, especially job insecurity and environmental issues. When people's security is affected in every corner of the world, it is possible for all nations to get involved.

Hunger, interethnic conflict, social disintegration, terrorism, pollution, and drug trafficking and drug consumption are no longer isolated events, closed between the borders of a country, but on the contrary, their consequences are felt everywhere.

The 21st century is marked by profound changes in the security environment. Consequently, the security concept has evolved. Human security is a concept centered on individuals and their security, which recognizes that sustainable stability, not just that of states but also societies they represent, is impossible as long as human security is not guaranteed. Many of the existing threats are common of all peoples, and may mention violations of human rights, crime, drugs, pollution and unemployment. The components of human security are interdependent.

All these threats of famine, epidemics, pollution, drug trafficking, terrorism, ethnic tensions, social disintegration can be more easily counteracted by preventive measures than through further interventions. It is less expensive to act on threats, dangers, when they occur, than after they have become permanent.

Even if there is no single definition of human security, which could be a handicap, given that definitions are essential when a consensus is sought for cooperation, an agreement on terminology has nevertheless been accepted as a basis for the adoption and implementation of joint work programs.

Under permanent threat, day-to-day existence can be characterized by a state of human insecurity. Adherents of human security theory speak both of

direct and indirect threat sources. Thus, direct threats are violent deaths (victims of violent crime, killing women and children, terrorism, riots, pogroms, genocide, torture and murder of dissidents, war victims); dehumanization (slavery, kidnapping, arrest of political opponents); drugs (addiction to drugs, illegal trafficking); discrimination (discriminatory legislation, practices against minorities, undermining political institutions, etc.); international disputes (tensions and crises between states); weapons of destruction (proliferation of weapons of mass destruction).

Under these circumstances, elements of the concept of human security inevitably appear in the social and political programs of the world's states, including Romania. For the most part, human security in Romania is ensured by post-December legislation and by the accession of our country to the Euro-Atlantic bloc (NATO and the EU).

The human being is the starting point of any governmental objective, human rights and human needs, providing the best approach to social development, humanity and based on rights and needs. Unlike the needs-based approach, rights-based approach offers several advantages, for at least three reasons: it focuses on citizens, pays special attention to rights and property, brings to the fore the importance of rules and rules by which society is governed.

Existence of political instability, corruption, low levels of living, lack of freedom of action and expression, marginalization of minority groups, inclusive of drug-using groups, contraption of social categories, elements pooled as bad governance may be the causes of conflicts violent.

The manifestation of human dignity presupposes more than equality in the face of the law, it implies the equality of the chances of all people. Unintegrated into a society, individuals are subjected to a tragic alternative: to die or to de-humanize themselves. Drug use and drug addiction exemplify how suggestive it may be. A harmonious cohabitation between people is based on knowledge, understanding and acceptance of the differences that separate them. Even if people are equal before the laws, their chances to achieve, to succeed are not equal, because not all of them benefit from the same family environment, education and health.

A just society, a democratic society is concerned with ensuring equality of opportunity for all its members. In this sense, it has to develop laws to support the underprivileged and we refer here to people with addictive, drug-using behavior for which healing and socio-professional reintegration must be priorities of the social policies of any state. Article 16 of the Romanian Constitution guarantees equality of rights.

Discrimination of drug users is favored by the following situations: the generalization of one's own life experience, the development of prejudices, insufficient knowledge of others.

In Romania, according to Governmental Ordinance 137/2000, discrimination means any distinction, exclusion, restriction or preference, based on race, nationality, ethnicity, language, religion, social category, beliefs, gender, sexual orientation, age, disability , chronic non-contagious disease, HIV infection or belonging to a disadvantaged category that has the purpose or effect of restricting or abolishing the recognition, use or exercise on an equal basis of human rights and fundamental freedoms or of rights recognized by law in the political field , economic, social and cultural or in any other areas of public life.

The normative act stipulates that the elimination of all forms of discrimination is done by preventing any acts of discrimination, by introducing special measures, including positive actions, for the protection of disadvantaged people who do not enjoy equal opportunities.

Unfortunately, in social practice, the constitutional provisions and the legislation in force are not always respected. Discrimination is practiced not only by individuals, but also by institutions, companies, schools, hospitals, governmental organizations, when drug addicts are treated as delinquents excluded from social life and by lack of practical measures of socio-professional reintegration.

From the perspective of internal security, it is also of particular importance for the citizen's safety to optimize, improve and improve the effectiveness of crime prevention and fighting strategies, aiming at reducing the risk, frequency and consequences of particularly dangerous crimes - murder, robbery, physical integrity, deprivation of liberty and drug use.

Efforts to prevent and combat illicit trafficking and illicit drug use should address the following objectives:

- protection of local communities;
- the special protection of educational establishments and other institutions and places frequented mainly by children and young people;
- adequate safeguards for those living in a high-crime crime environment;
- Effective communication and partnership mechanisms between public policy forces, health and social care institutions and local communities;
- informing the public about different ways to prevent crime;
- concrete and firm actions capable of rapidly changing the status of Romania as a country of origin, transit and destination of trafficking in drugs, arms and human beings.

At European level, Romania's actions will focus, with priority:

- effective implementation of programs aimed at strengthening the common area of justice and public security;
- Improving cooperation mechanisms between intelligence services, in particular through cooperation with European structures to combat trafficking and drug use;

- providing assistance - by virtue of the solidarity clause - to any Member State of the European Union which is faced with this phenomenon, if so requested;
- Strengthening border security; improving cooperation mechanisms between police structures and other forces fighting the fight against drug trafficking as well as between bodies acting to prevent and counteract money-laundering activities from drug trafficking;
- Strengthening air, maritime and ground public transport security;
- Responsible and effective engagement in the international campaign against trafficking and drug use when and where it is needed.

Conclusions

Human security and state security complement each other. The security issue needs to be addressed in a global way to include the excluded.

The main directions for action should be the promotion of human rights in general and the rights of women in particular (the fight against domestic violence, the fight for the emancipation of women and their participation in public life); the development of local solidarity (a program to support schooling and reducing school dropout among minority populations, promoting tolerance and helping people find their own self-confidence).

All these issues are related to the culture of peace and tolerance, and Romania has programs, both at governmental level and at NGO level, which addresses such issues. It is important, as we have drawn attention on several occasions, that these programs are effectively implemented so that the problem of rehabilitation and reintegration of people with addictive behavior is treated with professionalism, coherence and sustainability. In the final analysis, the issue of the safety of the individual and especially of the drug user is also a matter of knowledge and language, depending on how each of those involved describes, expresses, analyzes or understands the risks and types of insecurity to which he is exposed and is exposed.

On the other hand, the characteristics of the current international security environment, corroborated with national political and social choices, should lead the Romanian Government to reconsider the issue of security resource management from the perspective of national needs and capabilities. Romania, as a full member of the collective security structures, must have an effective Strategy, a coherent system of human, material and financial management.

The compatibility of the educational offer with the real demand for skills on the labor market in Romania implies a prior review of a global project of pragmatic structural reform of the entire Romanian social space, taking into account the high risk categories. Against this backdrop, this educational offer is capable of motivating people with addictive behavior and guaranteeing them a socio-professional placement in reliable professional structures.

Absorption of marginalized and high-risk categories in addiction is a test of structural flexibility, compatible with the internal dynamics of a democratic society.

Further organizing qualification / retraining courses for people with addictive behavior with a view to their reintegration into the labor market, such as identifying new ways of motivating and supporting them to pursue such courses, is, in our view, essential milestones diminishing the phenomenon of exclusion.

References

- Conseil de L'Europe, Transformation Sociale et délinquance juvenile (Resolution 178/62), Strasbourg, 1979
- Conseil de L'Europe, Réactions sociales a la délinquance juvénile (Recommendation No. R87 / 20), Strasbourg, 1989
- U.S. Department of Justice, coordinating the Council of Juvenile Justice and Delinquency Prevention, Combating Violence and Delinquency; The National Juvenile Justice Action Plan, March 1996
- United Nations (1954) European Seminar on Probation. London 30-30 Oct, New York: United Nations; St / TAA / SER.C
- Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty First Century, A / CONF.187 / 4 / Rev.3
- http://www.un.org./recs/45/112
- http://www.alternativesociale.ro
- ANA (National Anti-Drug Agency). (2000-2010) - National Drug Report in Romania
- ANA (National Anti-Drug Agency). (2003) - Report on the evaluation of the drug phenomenon in Romania – 2002
- ANA (National Anti-Drug Agency). (2003) Report on the evaluation of the drug phenomenon in Romania;
- ANA (National Anti-Drug Agency). (2004) Situation in the field of drugs – 2003
- ANA (National Anti-Drug Agency). (2005) The Standards of the National System of Medical, Psychological and Social Assistance to Drug Users
- ANA (National Anti-Drug Agency). (2008) - Prevalence of drug use in Romania - Study in the general population 2007. Study report

THE IMPACT OF SOCIAL RELATIONSHIPS OVER HEALTH AND LONGEVITY. THE "BLUE ZONES" CASE.

Elena NEDELCU[*]

Abstract

The present paper aims to analyze – both from a quantitative and a qualitative perspective – the impact of social relationships over health and longevity in contemporary society.

Today human interaction is more and more facile thanks to the new technology development. However, despite this facility, many Western countries face the "loneliness epidemic". Individual-centered cultures promote the atomizing of society to the detriment of strong and quality social relations. Insufficient social relationships and so much the more loneliness and social isolation - according to the psycho-social studies of Holt-Lunstad a.o. - negatively affect health state and significantly increase the risk of premature death. The impact of this risk is so serious that it surpasses the risks posed by most health indicators (food, exercise, etc.). In other words, the absence of social relationships and loneliness are enemies of health and longevity.

The present paper aims to comparatively analyze the types of social relationships which one can find in the so-called "blue zones" (where it has been noticed that people have the highest longevity on Earth) in comparison with the Western ones.

We intend to identify the differences between ,, the territories of longevity " and Western world concerning the lifestyle, the frequency and quality of social relationships. What type of social relationships encourages a positive attitude towards life, gives life meaning, reduced risk-taking, sustain health and longevity.?

In the conditions of recording - in Romania after 1989 - of a lack of frequency and quality of social relations with the consequences, the present paper wants to draw an alarm signal both for the governors and for the governors.

Keywords: *social relationships, quality, loneliness, lifestyle, longevity.*

1. Social relationships, health, longevity

1.1. Social relationships versus loneliness

Although the human being is a social being by definition, today the Western lifestyle tends to significantly reduce the quantity and quality of social relationships. Many persons no longer live with their families, so much the least in large families, and neither do they live close to the others. Many delay getting married or planning having a baby. A significant number of persons prefer to choose a bachelor's life. We have also noticed the existence of a deficit as to the relationships between generations, as well as an ever increasing geographical mobility, an increase in the number of families in which both parents develop a career and in the number of single-parent families. An ever increasing number of persons living in the Western World live alone and loneliness becomes a way of life for more and more human beings. These observations point out that, despite technological development and globalization – which one could expect to create more social connections – actually make people more and more isolated from a social point of view. According to a new survey made by AARP (American Association of Retired Persons**)** has revealed that an important number of adults, namely persons of over 40 years old, declared that they are affected by the lack of social relationships. These persons also mentioned that they started to confront with mental issues (memory and concentration deficit, etc.).

Research developed by Holt-LUnstad J. have revealed that "the insufficiency of social relationships or the relative lack thereof pose a major risk for health, as well as smoking, blood pressure, lipids in the blood, overweight and lack of physical activity. Loneliness generates human sufferance, especially to elderly persons and may lead to the appearance of serious health problems, such as: depression, cognitive decline and even cardiovascular problems."[1] (our translation)

On the other hand, social relationships may generate (informational, emotional or tangible) resources, which generate behavioral or neural-endocrine answers that help people adapt to acute or chronic states of stress (e.g. illness, life events, transitional periods in life). The support offered by social relationships reduces or alleviates negative stressful factors over health. In other words, Julianne Holt-Lunstad concludes, relationships between persons play a fundamental role in increasing survival chances." as well as in enhancing health, life quality and longevity. (our translation)

Sarah Lock, Prime Vice President for policies within AARP and Executive Director for GCBH (The Global Council on Brain Health), considers that, according to the studies made by GCBH, socially active

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[1] Holt-Lunstad, J., Smith T.B., Layton J.B., *Social relationships and mortality risk: a meta-analytic review*, https://www.ncbi.nlm.nih.gov/pubmed/20668659

persons pose a lower risk to mental decline, which demonstrates once again how important social links are for brain health[2]."

When you feel that you are loved, supported and encouraged thanks to a relationship that you have, your mind is exposed to less stressful reactions and issues more relaxing answers, and the physiology of the body reacts accordingly, as Lisa Rankin notices in her book *Mintea bate medicina: dovezi stiintifice ca te poti vindeca singur [The Mind Rules over Medicine: Scientific Proofs that You May Heal Yourself]*.

To support the same idea, we make reference to a study published in the Journal of Epidemiology and Community Health, which points out that persons who are more than 70 years old and have more friends and more social relationships live more in comparison with the others. "Ensuring that older relatives and friends are involved in society in some way seems to be a key factor in longevity," said Lynne C. Giles, the lead author on the study and a doctoral student at Flinders University in Adelaide. "Perhaps facilitating contact, either by phone or in person, is a simple thing we can all do to help older people. This is a question for both individuals and policy makers to think about[3]."

In this context, it is worth mentioning the study published by Harris and Yang after 20 years of research, according to whom social relationships may be as important for health as food and sport. In short, the conclusions of their research work are the following ones:

- the social circle that a person has is an importantly independent factor for health;
- to teenagers and adults the the number of relationships is more important;
- to the middle-aged the quality of social relationships matters more;
- social relationship protects against abdomen overweight;
- social isolation tends to increase the level of systemic inflammation;
- as to the more elderly persons, the small number of social relationships proved to be worse in comparison with high blood pressure or diabetes[4].

1.2. The Quality of Relationships. Willingness and health state

The studies quoted above analyze the impact of social relationships from a quantitative point of view (sufficient/insufficient or absence) on health state and longevity.

Other studies not only refer to the impact of the insufficiency/sufficiency of social relationships, but also on the effect of the quality thereof upon an individual's life or upon society. According to these studies, a certain category of social relationships tend to produce positive effects at social or individual level. To be more precise, it is about non-violent social relationships, which are based upon willingness and generosity - "quality relationships". These relationships lead to "the development of a high relationship quotient between most individuals, and to the development of lively, healthy and intelligent relationships."[5] (our translation)

A good quality relationship or the high relationship quotient (RQ) imply the inner presence of cordiality, willingness, which make it possible to have respect for the other, no matter who he/she is.

Relationship quotient (RQ), according to Maryse Legrand, a French clinical psychologist, may be evaluated in two ways: in the relationship one has with himself/herself and in the relationship one has with the others. RQ is linked to the more or less developed capacity of a person to propose for himself/herself, relationships which actively contribute to the enhance and development of them both. According to J. Salome, we could say of an individual who creates and develops energetic, creative and stimulative relationships, that he/she has a high RQ. On the other hand, the RQ of a person is low when he/she generates or stimulates naive, energy-consuming and alienating relationships for himself/herself and the others.

RQ is the art of creating mutually advantageous relationships. A quality relationship is characterized by the need of an individual to be accepted, to express oneself as a unique human being, to be recognized as such and to be appreciated. This type of relationship ensures the human being's development, openness and fulfillment. "In such a relationship, our physical, affectionate needs and the needs to relate to the others may be recognized and heard (but they cannot be fulfilled by all means). The need to relate to the others refers to the need to express oneself, to be heard, to be respected (to have the others' attention), to be appreciated (to feel oneself useful and valued), to feel that one is an intimate of someone else (to share secrets with another person), to feel that one belongs to someone (to feel accepted by a group), to influence others (to contribute to the accomplishment/creation of something new). The quality relationship develops within positive meetings which tends to consolidate personal security, the feeling that one lives a life full of dignity. RQ favors one's aspiration to be himself/herself when meeting the other one and when trying to offer the others the best that one has[6]."

Besides quality relationships, which are willingful and we previously referred to, Aurore Aimelet identifies other ones, which are at least as important as the mentioned ones. Synthetizing the

[2] https://www.aarp.org/health/brain-health/global-council-on-brain-health/resource-library

[3] *http://www.nytimes.com/2005/06/28/health/longevity-bonds-of-friendship-not-family-may-add-years.html?_r=1)*

[4] *Yang YC[1], Boen C[2], Gerken K[2], Li T[3], Schorpp K[2], Harris KM[4] Social relationships and physiological determinants of longevity across the human life expectancy. , Proc Natl Acad Sci U S A. 2016 Jan 19; 113(3):578-83.) , https://www.ncbi.nlm.nih.gov/pubmed/26729882*

[5] Jacques Salomé, Minuscules aperçus sur la difficulté d'enseigner , Editions Albin Michel. 2004, pp:56-61;

[6] Jacques Salome, Relation d'aide et formation a l'entretien, Septentrion ,2003, p. 27;

psycho-sociological works of certain famous researchers (Robert Ornstein, David Sobel, M. J. Ryan, Ștefan Einhorn, Robert Emmons, Allan Luks, Serge Cicotti etc.), Aurore Aimelet comes to the conclusion that practicing willingness as a lifestyle leads the individual to the following benefits:

"Willingness reinforces the feeling of personal fulfillment and accomplishment (….); it is a source of joy: it increases serotonin production, the hormone of hapiness, which creates a sensation of warmth, energy and calm(...); it improves memory, learning capacity, creativity and problem-solving ability (...); in enhances the imunitary system: it stimulates the dilatation of blood vessels, which is vital for the cardiovascular system, it increases lymphocytes production, a fact which enhances resistence to disease; it comforts pain: it activates the part of the brain that produces endorphins, generating analgesic and antistress effects, a higher tolerance to pain (...).; (...) it increases motivation to take part in different activities, including in volunteering acts[7]." ·

Apart from all these benefits, practicing willingness - Pierro Ferucci appreciates – removes the feeling of frustration, it is therapeutic and it has antidepressive effects. Pierro Ferucci notices, on the other hand, that "acting with willingness is not simple becaseu it requires the integration of certain essential virtues: trust, empathy, loyalty, patience, modesty, respect, gratitude. Empathy helps us understand what is in the mind of a furious person and to give up acting aggressively. Modesty helps us listen to our interlocutors, to enjoy their presence, diminishing the tendency to speak about our.own successes. Patience helps us give value to a relationship and to the colocutor. Generosity helps us choose staying with a peron rather than possessing something. Respect develops politeness. Without respect, politeness is superficial. Loyalty, a proof of someone's fidelity and justice, which gives the feeling of security, ensures the stable attitude of those staying about us. Gratitude makes us content with what we have and not to take things for granted. It comforts pain and frustration, while creating a feeling of fulfillment[8]".

In conclusion, in order to be able to act with willingness, we have to make use of all its "ingredients", namely: empathy, loyalty, patience, modesty, respect, gratitude. If not, willingness and quality relationships remain simple isolated manifestations or a theoretical concept.

We underline that the benefits brought by willingness are felt by society and its individuals altogether. We could say, without exaggerating, that in society the manifestation of willingness vs. violence is the key of survival. However, those who benefit most of willingness are those who practise it, which is difficult to understand by persons who do not appreciate it or who underestimate it.

Finally I would like to underline the idea that all the research that I referred to converge to the same conclusion: persons who have strong social relationships tend to be healthier than those who are isolated; persons who have adequate (good quality) social relationships are supposed to have 50% more chances of survival in comparison with those who have insufficient or relationships of a poor quality.

Social isolation leads to more stressful reactions, which increase systemic inflammation and the level of stress hormones and which reduce the mental function, generating a decrease of the health state, illnesses and a shorter lifespan. Relationships offer to our lives a meaning and a goal.

When one is aware of his/her meaning and goal in life, one tends to be more careful with himself/herself and to assume less risks.

2. Lifestyle in "blue zones" versus lifestyle in the Western World

Starting with 1990, Dan Buettner - a member of National Geographic – who was collaborating with Gallup – identified and researched the areas where persons with the highest longevity could be found: Sardinia (Italy), Nicoya Peninsula (Costa Rica), Loma Linda (California), Okinawa (Japan) and Ikaria (Grecia). He noticed that in these "blue zones", the natural and social environment and the inhabitants' lifestyle had quasi- similar characteristics. In his work entitled "The Blue Zones: 9 lessons to live longer", he identified the main factors that seem to increase the lifespan and life quality of those living in the "blue zones". In short, these factors are: being active, having a sense in your life, reducing stress, eating less, eating less meat, drinking with moderation, having a faith, giving your family a priority position in your life, staying close to your parents, grandparents and building a social network that supports healthy behaviors.

2.1. The rationale of living and leading an active life like in a flow.

Hector Garcia's and Francesc Miralles' studies confirm and complete the conclusions of Dan Buettner's research. The former ones confine their research to the Japanese island Okinawa. They notice that on that island the inhabitants have a philosophy of life and a particular, well-defined lifestyle, which is different or rather totally opposed to the Western one. Here, the human being does not fervently search the meaning of life, which has always existed and it is self-understood. The meaning of life seems to preexist in comparison with an individual's life. For example, to Okinawa inhabitants, the rationale / the joy to be living, the passion with which you do your duty/profession are "reasons for which you wake up in the morning'', "the happiness to be busy all the time"; all of these are, in

[7] Aurore Aimelet, „Șase motive să faci bine", în Psychologie Magazine, nr.33/noiembrie, 2010, pp. 82-83;
[8] Isabelle Taubes, Gannac, Anne Lure, ,,Revanșa celor binevoitori'', în *Psychologie Magazine*, nr.33/noiembrie, 2010, p. 77;

brief, their life philosophy or what they call "*ikigai"*. They identify their meaning in life, their ikigai, in work relationships, friendships, mutual support actions performed within the community *("moai").*

The Japanese – according to the above quoted authors – consider that once you have discovered your ikigai, you have to pursue and develop it ceaselessly so that your life could gain significance. The wisdom of Ogimi-Okinawa reveals that there are some fundamental laws which support the discovery and practice of the ikigai: being always active, never getting retired, being always in motion, being always surrounded by good friends, regarding all calmly, getting connected to nature, never eating one's fill, smiling, being grateful, seizing the day and following your passion[9].

The discovery and practice of the ikigai are closely linked to the experimentation of the "flow state", namely the "state in which persons are so much involved in an activity that nothing else seems to matter to them; the experience in itself is so pleasant that persons would like to repeat it by all means only for the pleasure of doing it."[10] It seems that the experience of the "flow state" may be found not only with the elderly persons from Ogimi, but also with most Japanese people. "Their capacity of being absorbed in the activity that they perform, forgetting about time passage, as well as their perseverance in solving a problem are indisputable. It is a characteristic we identify in any environment, from the retired persons who spare no detail in taking care of the rice paddy in Nagano Mountains to the students who work at the weekend in a conbini (a non-stop shop)''[11].

In conclusion, to the Japanese what really matters are not accomplishments, success, personal welfare (individualism), as it happens with the Western World mentality, but rather the opposite thereof (collectivism).

Multitasking, which blocks the flow state – and which is so much stimulated by the Western World – is underestimated by "100 year old people.". The elder Japanese understood that one is healthier and happier when one does one activity in comparison with those persons who try doing several activities at the same time.

2.2. Respecting biorhythm. Harmonizing social rhythms with natural (biological) ones

According to Diane Kochilas, a characteristic of those living on the Greek island Ikaria is lack of haste, lack of hasting against time. There are no cruel deadlines, no ceaseless reasons to race, the fear of being late/not being on time, which are specific to the Western World. The people of Ikaria do not keep their eyes on the watch. They live slowly, walk without being in a hurry, take their time to notice what is going on around them, as if they could decide what to do with their own time". In Ikaria nobody hurries to reach a certain place; according to local mentality, "being late or changing mind as to going to a place where one intended to go though one promised to do so, is deeply rooted in the local inhabitants lifestyle, according to Diane Kochilas – see her book ,,*Lecţii despre mâncare, viaţă şi longevitate de pe insula grecească unde oamenii uită să moară"* [*Lessons about food, life and longevity on the Greek Island where people forget to die*].

Similarly, the Okinawa population's mentality totally opposes emergency culture, which generates so many negative emotions. One of the ten laws of "ikigai", selected from the elderly's Okinawa (Ogini) wisdom impels us approach things calmly. Haste has nothing to do with life quality. The one who walks slowly will go far. "When we ignore emergency situations, our time and life gain a new significance[12].".

Another law of the ikigai, which completes the above enumerated ideas, refers to giving full value to the present or "trying to seize the day". All that we surely have is the present day and, consequently, we must live it as well as possible so that it will be worth remembering it. The Japanese concept "Ichi-go ichi-e", namely "this moment exists only now and it will never exist once more" explains why it is important to respect this principle. "This principle is used especially at reunions to remind us that each meeting, no matter if meet friends or the family or unknown persons, is unique and non-recurring. That is why we must concentrate on the present and enjoy the unique moment without feeling overwhelmed by worries regarding the past or the future. The concept of Ichi-go ichi-e is very much used in the tea ceremony, Zen meditation and Japanese martial arts[13].''

The Italians, especially those coming from Sardinia – which is another "blue zone" - do not hurry, and live with the feeling that they have time for everything. They consider that life is lived in the present. We must not waste the present trying to find something in the future. This attitude reduces the stress level considerably. Once a person adopts this mentality, his/her priorities change. The Italians this slowness with an increase in life quality, which is their main priority. They focus on personal accomplishment, trying to have time for the things that make them happy, working for living and not vice versa[14]."

We appreciate that the expression *dolce far niente* refers to this life philosophy and that this expression has nothing to do with laziness, but with living the moment, contemplating it and letting things happen and

[9] Hector Garcia, Francesc Miralles, Ikigai. Secrete japoneze pentru o viata lunga si fericita, Humanitas, Bucuresti, 2017, pp:168,169
[10] Mihaly Csikszentmihalyi, Flux: Psihologia fericirii, Publica, Bucuresti, 2015, p13;
[11] Hector Garcia, Francesc Miralles, Ibd., p 83;
[12] Ibd., pp:168,169;
[13] Ibd., pp:158,159;
[14] http://brightside.me/inspiration-health, http://www.gandul.info/magazin/zece-lucruri-despre-viata-pe-care-le-putem-invata-de-la-italieni-14980394

flow without pressure and without planning. It is a way of giving value to our spare time, it is a way of beautifully feeling idle after one finished an intense activity.

2.3. Social organization and the sense of belonging to a community.

Dan Buettner noticed that in at least three out of the five Blue Zones lifestyle and social organization are obviously different from lifestyle and social organization of the Western World. In the Blue Zones people are part of a real social network and appreciate family, friends and support each other; most often they are actively part of a religious community.

Thus, one of the secrets of the Ogimi population is the strong feeling of *belonging to the community*. Establishing strong links within the local communities is a tradition in Ogimi (Okinawa). Studies made by Dan Buettner, H. Garcia, Fr. Miralles and others reveal that social organization is accomplished in Ogimi on the basis of cooperation, solidarity and enhancement of life quality. Ogimi is organizes in 17 dwelling associations, each of them having a president and several persons who are responsible with different domains: social activities, longevity, culture, festivals, etc. It is interesting to notice that the Town Hall has a *Department for Enhancing the Inhabitants' life quality*. The Town Hall has portfolios with lists of all the inhabitants living in the village, who are organized, according to their age, in clubs. In other words, everyone is part of a club (*moai)*, that is a group of friends who support each other. "Groups do not have a precise goal, they are simply like a family.(...) Everyone offers to collaborate, the Town Hall only deals with task organization. In this way, everyone feels that he/she belongs to a community and may be useful to the village. In fact, to so-called *yui-maru* or mutual cooperation spirit is deeply rooted in the hearts of the Ogimi inhabitants. They practice *yui-maru* since childhood and learn team work and how to help each other."[15]

They help each other with rice seeding and cane cropping, as well as with other agricultural activities. They help each other build houses, do voluntary work for different public activities. In other words, they make up a *moai*, that is an "informal group of persons, who have common interest and who help each other. For many, this mutual help becomes one of their ikigai. Members of a *moai* must monthly pay a tax that affords them take part in reunions, dinners, go, shogi (Japanese chess) games or simply share a common passion.

Moai builds life-long connections and contributes to maintaining the emotional and financial stability of each member. "If one of the group members has financial difficulties, he may be granted the spared sum in advance.(…) The feeling of belonging to a community and mutual help create a feeling of security to the person and contribute to enhancing life expectancy[16]."

According to one of the 10 laws of the ikigai man absolutely needs the company of good friends. Japanese consider that friends are "the best elixir" for being care free or for asking for advice or for telling and listening to stories that make one person's life easier and more pleasant, or for amusing or sharing something and for living. Actually, interviews made by Hector Garcia and Francesc Miralles in Ogimi reveal that all the 100 interviewed persons (persons in their 90s and 100s) valued friendship and considered that it considerably increases life quality and longevity. The majority of the elderly interviewed ones declared that their most important hobby is meeting friends, for talking, drinking tea. Thus, going to karaoke and getball games with your family, friends and neighbours is the most beneficial activity. The persons interviewed by H. Garcia and Fr. Miralles, who were in their 100s, appreciated that one of the secrets for living long is to talk to the people you love, dance with them and sing with them daily. Such a vision reflects the joy of living and an intense social involvement, which are key elements for good health and longevity.

A society based on cooperation and affection to the community, the elderly ones and the forerunners enjoys a lot of respect. We could speak about a real worship of the forerunners, a fact which makes the Japanese culture so different from the Western one. The modern, Western society is individualistic and inhibits the community spirit, it does not value the elderly ones' expertise; in reality, the Western society places the elderly ones in a marginal position. In social and family hierarchies the elderly seem to occupy a modest position; thus, the proverb *he who does not have elderly one should buy some* has lost its meaning. This situation is not favorable either to the elderly ones or to society.

"On the other hand, the Japanese lives with the conviction that the voice of his consciousness is the voice of his parents, forerunners and masters, to whom he feels grateful, considering that if he does something wrong he is a disappointment to them. He preserves the same feelings to the forerunners and masters even when they pass away[17]."

The word "jibun", which corresponds for the self, accurately describes the person as a part of the common life environment. To the Japanese, according to Hamaguchi, the sense of identifying oneself with the others preexists and the Ego is only confirmed through interpersonal relationships. The Ego is not constant but a fluid which changes depending on time and context and in conformity with social interpersonal relationships . Social relationships are appreciated as such and not regarded as a means of meeting personal objectives. People are constantly aware of the others

[15] Hector Garcia, Francesc Miralles, Ibd., pp:98-109;
[16] Ibd.,p21;
[17] Markus, H.,R., Kitayama,S.,Culture and the self; Implications for cognition, emotion and motivation, in Psychological Review, 98, nr.2/1991;

and try to act for the others' goals and wishes in an attempt to reach their personal goals."

In Okinawa families, in the house of the primogenitor, there is a butsudan, a little altar at which forerunners are worshiped and prayers are said for them. Respect for the forerunners – according to Garcia& Miralles – is an attitude that is common to all Japanese.

Similarly, in Sardinia the elderly enjoy a lot of respect on the part of society. Here, according to Dan Buettner, "the older you are, the more equitably you will be treated and the more will be appreciated your wisdom. If you go to Sardinian pubs, you will find the Monthly Centenary instead of the Sports Illustrated calendars that are full of swimming costumes[18]."

As to Japan, one has to mention that inter-human relationship patterns are different from context to context, for example in corporations. Differently from most Western countries, here, "the employees within corporations may have a life-time commitment. Here it is the working group and not the individual who has the responsibility and who makes the assessments and decision-making is rather collective than oligarchical. (…)

Furthermore, the stats-corporations relationship is a special one. The so-called "one-day bankruptcy" cases are well-known because it is the state which takes over resources and redistributes them for a more efficient usage thereof. In these conditions, unemployment is under control (...). This organization type grants workers security, comforting confidence, stability and social cohesion[19]."

3. Conclusion

Analyzing lifestyle and social relationships in the so-called longevity realms, the present study is a meditation as regards the effects which the Western lifestyle has over health, longevity and the people's quality of life. Psycho-sociological research and the case studies quoted here bring into evidence that in the present Western World there is a deficit and an acute need of building strong and quality social relationships for all age categories, especially for those aged over 65. Health and life expectancy seriously depend on the intensity and quality of social relationships. On the other hand, the quoted research works underline the fact that the Western World seems to face the loneliness phenomenon more and more despite the advanced communication technologies that exist. The consequences of this phenomenon acquire ever more varied and complex forms affecting the wellness state of the individual and society.

The present paper did not deny the role played by the other factors on our health and life expectancy: food, exercise, etc.; however, the main goal of this paper is to analyze the positive effects of social relationships upon people's life. We have decided to write this study because we have seen that people do not pay attention to this factor. It seems that at least here, in Romania, many people do not understand the role played by social relationships in their lives (both from a quantitative and a qualitative perspective); they seem not to understand how much they are affected by loneliness and the insufficient or feeble social relationships that they have. They are neither aware and nor do anything to change this state of facts. They are rather concerned with survival problems or their career and personal success. When interviewed, they recognize that they are discontent with the social relationships that they have and that "loneliness is like an enemy to human being. (…) More than a half of the Romanians (54%) declare that they have experienced loneliness (…). They also recognize (36%) that most of their social relationships are superficial and appreciate (46%) that nobody really knows them. However, more than 80% of the Romanians declare that they have close friends and 43% declare that they often or very often take part in socializing activities[20]."

In reality, the feeling of loneliness and the loneliness phenomenon seem to be more acute than statistical data indicate. "When one in five persons and 77% of the interviewed persons consider that most of the people try to trade on the others and that you cannot trust them, it is clear that loneliness is a national phenomenon[21]."

The continuous worsening situation of formal and informal social relationships which seems to have started after 1989 and generated anomie in the Romanian society made us write the present paper as a warning signal for those who run our society and for all its members, as well. It is unquestionable that our society needs a correct and urgent policy that helps "rebuild" social relationships, reinvent communities, impose respect as a normal attitude for each of us, including the elderly ones, for traditions and history.

References

- Aurore Aimelet, *„Șase motive să faci bine"*, în Psychologie Magazine, nr.33/noiembrie, 2010
- Hector Garcia, Francesc Miralles, *Ikigai. Secrete japoneze pentru o viata lunga si fericita*, Editura Humanitas, Bucuresti, 2017
- Holt-Lunstad J ,Smith TB, Layton JB, Social relationships and mortality risk: a meta-analytic review.
- https://www.ncbi.nlm.nih.gov/pubmed/20668659

[18] https://www.ted.com/talks/dan_buettner_how_to_live_to_be_100/transcript?language=ro;
[19] Norman Goodman, Introducere in sociologie, Ed. Lider, Bucuresti, 2004, pp:62-63;
[20] Vasile Sebastian Dâncu, Politically Incorrect,editura Scoala Ardeleana, Cluj-Napoca, 2017, pp:356-358;
[21] Ibd.,p359;

- Isabelle Taubes, Gannac, Anne Lure, *,,Revanșa celor binevoitori''*, în *Psychologie Magazine*, nr.33/noiembrie, 2010, p. 77
- Jacques Salome, Relation d'aide et formation a l'entretien, Septentrion ,2003
- Jacques Salomé, Minuscules aperçus sur la difficulté d'enseigner , Editions Albin Michel. 2004
- Markus, H.,R., Kitayama,S.,Culture and the self; Implications for cognition, emotion and motivation, in Psychological Review, 98, nr.2/1991
- Mihaly Csikszentmihalyi, *Flux: Psihologia fericirii*, Publica, Bucuresti, 2015
- Norman Goodman, *Introducere in sociologie*, Editura Lider, Bucuresti, 2004
- Vasile Sebastian Dâncu, *Politically Incorrect*, Editura Scoala Ardeleana, Cluj-Napoca, 2017
- https://www.aarp.org/health/brain-health/global-council-on-brain-health/resource-library/
- http:://brightside.me/inspiration-health, http://www.gandul.info/magazin/zece-lucruri-despre-viata-pe-care-le-putem-invata-de-la-italieni-14980394
- https://www.ted.com/talks/dan_buettner_how_to_live_to_be_100/transcript?language=ro

THE EFFECT OF DEMOCRATIC HAOS REGARDING THE SOCIO-PROFESSIONAL CATEGORIES

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Abstract

The democratic social framework has the role of ensuring stability, social protection, equal opportunities, and above all ensuring the rights and freedoms of citizens. The right to freedom of expression leaves a less prepared, unprotected population of information on the selection of information. This category of population is representative in the population of a country and is exposed to unqualified opinion. The issue raised in this article is based on the fact that, following the formation of an unqualified opinion, the individual goes to action. This action will give rise to anti-social effects that the author will consider viable. Hence, manipulation and social chaos are born, leading directly to antagonisms between socio-professional categories. That is why we can talk about the wrong attitudes towards the workers in any field of activity. There is a general strife of all against all. No one is considered competent, a negative label is placed on each profession, because professionals in any field are discredited, accused without necessarily being guilty. All these are directed and serve interests of social destabilization.

The general chaos installed in Romanian society is also an effect of the non-elites' action at the level of the government's leadership. Above all, a strong footprint puts it the promotion of new values, non-values, affecting the future of the young.

Keywords: *socio-professional categories, the chaos of democracy, participatory democracy, representative democracy, anarchy through manipulation.*

1. Introduction

In approach of the new attitudinal manifestations that have arisen at the democracy level in Romania, it is necessary to analyze the relations between the categories of the population, both from a socially and professionally point of view.

The idea of the socio-professional category is based on the way of classifying the active population of a nation in significant categories in terms of the number of individuals, with essential condition that each of them to present a certain degree of homogeneity. This degree of homogeneity he refers to the fact that the individuals belonging to the same social or professional category are fit to maintain social or professional relationships between they. This involves behavioral manifestations, attitudes, opinions, sufficiently value close. This is how a socio-professional category identifies itself in relation to the others, and at the same time expects recognition from them.

In relation to these categories, there is a proper nomenclature, which must contain certain dimensions: job classification, skill grid, skills hierarchy, social status scale, etc.

The first nomenclature of the socio-professional categories was made in 1954 by the National Institute of Statistics and Economic Studies of France. In 1982 there was a massive reform, which led to a new code of "professions and socio-professional categories". In Romania, in 1995, under the aegis of the Ministry of Labor and Social Protection and of the National Commission for Statistics, the "Classification of Occupations in Romania" (COR) was elaborated, the first work of systematization (by codes and alphabetical) of the occupations in Romania and their description on four levels of aggregation, by harmonizing with occupational classifications in the European Union[1].

The social and especially the professional categories evolve on the background of the social matrix. In Romania, after 1989, we have a form of democratic society. At the beginning of the period, after 1989, the idea of authentic democracy was circulated. The lack of information and the sequelae of communism have pushed the population into accepting the new as the authentic expression of democracy.

2. Content

2.1.The representative and participative democracy in society

On the one hand, is acting the idea of **representative democracy**. According to this, the power of the people is delegated by himself to elected representatives of its ranks. The purpose of such detachment is represented by the need of the people to be organized and led to their own happiness and well-being. This is done through free elections, which gives legitimacy to the group selected and promoted at the government. It is true that the elected persons have the

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[1] http://cursdeguvernare.ro/dictionar-economic/categorii-socio-profesionale

right and duty to decide on behalf of the people without consulting him for a certain period of time. But it should be noted that decisions refer to the social needs of citizens. Until now, the form of representative democracy seems to be the ideal political regime, citizens are preoccupied with their private life, and those whom they have chosen to represent they get involved with maximum conscientiousness at public life, in social needs, and never to their private life, hidden interests, personal advantages, etc.

Apparently no social conflicts could arise. But for this it should be respected, "**the social contract**", explained and analyzed by J.J. Rousseau: the man develops naturally, based on a contract between the community and the sovereign chosen by the community itself. From this perspective of androcentric contractualist theory, we can speak of perfect society, provided the commitment is respected[2].

At the same time, it must be said that representative democracy has **limits and acts indirectly.** The limit lies in the fact that the popular participation at the government is periodical and short-time, being conditioned by the electoral ballot. The indirect action is manifested by the fact that citizens do not exercise their own power. This form of government is democratic only if there are real and affective ties between the governors and those who are governed during an electoral mandate. This is difficult to put into practice because selection requires separation between the ruling elite and the masses. Thus, discrepancies appear from the need for the superiority on the part of the governors. They feel superior on the basis of power that does not actually belong to them, but is in their custody with the guise of the population, the community. This social segment amounts to a value that does not really belong to it. That is why the government elite tries and most of the time succeeds in seizing the political power, to acquire it. We are in a situation of social conflict, where the agreement from the social contract is no longer respected by the ruling group. How can the group do that? By manipulation, the perfect instrument to create chaos.

The state of chaos brings about social anomie, which is the perfect recipe for divide for the purpose of illegitimate rule.

Another instrument used in this regard refers to the multitude of decision-makers, which leads to a lot of power centers and implicitly to the diffuse responsibility. But this is just an appearance. In reality, chaos is triggered by control. This control can not be localized by civil society, citizens.

We speak of a parallel structure that uses democratic values, such as freedom of expression, creativity, fundamental rights, but all directed towards obscure interests.

If by now we have talked about **the indirect (representative) form of democracy** here, it is time to also mention its **direct (participative) form**[3]. The basis of direct democracy is represented by the direct and continuous participation of citizens in the act of government. This requires, on the one hand, the elimination of the separation between the governors and the governed, and on the other hand the one between the state and the civil society, which leads to the self-government of the people by the people themselves. It is an ideatic model, which exists only in theory. In Romania it is considered real only if we are referring to referendum or free and direct elections. But the direct participation in the act of government stops here because at the next stage, the oligarchy already formed during the promotion of candidates will lead to the segregation of society into the ruling elite and the popular masses. We can say that from a direct democracy we arrive compulsory to the delegation of power, so again to representativeness.

To be possible, the participatory democracy requires the existence of certain conditions. In the absence of imposed conditions, the only possible democracy is the representative one. In practice, "the representation or the representative governance is a democracy that has become practicable for a long time and on vast territorial areas[4]."

2.2. The common methods of manipulation of the masses and their action on socio-professional categories

Because the representative democratic governance always enters into a crisis of legitimacy, is needed the manipulation of the popular masses. Noam Chomsky sets a number of ten basic rules that he calls diversion strategies. We will mention them one by one, showing the effect of the action of these strategies on the socio-professional categories in the Romanian society.

2.2.1. The people must always have their minds busy with something other than his real problems

The real problems of the people can create conflicting states. These states do not give comfort to those in government, so the collective mentality must be oriented towards anything different from the respective problems. In this sense, the population can be divided into age or occupational categories. The problems of each category can draw the attention of others to the specific shortcomings. That's why it's throwing into the public space an aspect that belongs to a category but affects also the other.

For example, the lack of equipment in hospitals leads false to the idea that physicians are unable to carry out complete investigations that would save children from dying, but the cause would be the incompetent of the doctors and not the mentioned lack. From here until the blame on the whole catego ry of healthcare personnel there is no difference. There is a feeling of contempt for the medical staff, this feeling is amplified

[2] J.J. Rousseau, 2013, *Contractul social*, Ed. Antet XX, București, p. 56
[3] Horia Irimia, 2005, *Consultarea cetățenilor și democrația locală*, Ed. Mirton, Timișoara, p.123
[4] Robert A.Dahl, 2003, *Despre democrație,* Ed. Institutul European, Iași, p. 90.

over time, is constantly fueled by similar incidents and leads to hatred. Collective hatred directed of each against all, leads easily to disunity for the purpose of mastery, manipulation, etc. Conversely, if the people did not have their minds occuped forced with false problems, the real problem of an age or occupational category would trigger the other categories' attention to their true problems. In this way, they would create a state of empathy among different categories of population, which would leads to a sense of solidarity. Against the backdrop of popular solidarity, it is difficult to implantation the hatred and to obtaining of the disunion.

In short, we talk about distracting attention from real social issues and orientation it to seemingly minor issues compared to real issues, but with emotional impact.

2.2.1. The people must perceive the rulling elite as the unique rescuer of the nation

In this regard are invented false threats such as avian flu. Of course, such a situation is really worrying, it creates panic among public opinion. Bird breeders are perceived as the true responsible for negligence. As such, the state offers as a solution the slaughter of mass birds. For this, the public opinion will welcome the decision because it will strongly believe that the state takes care of the population health. Bird breeders are directly harmed, and if they resist, because they know that the outbreak of the flu and the disease are not related to the birds, they suddenly become the enemies of the whole people. But the people will be also harmed because the birds, healthy ones, feed the people. The people are not aware of this, but they are convinced that those in leadership saved him from influenza virus infection. In parallel, however, those in leadership take unfavorable measures for the population, but this one is busy with the fake issue avian influenza problem and does not notice the real issue.

In other words, here we have false threats or serious problems created intentionally, which have the role of triggering panic and concern in the public opinion. This is the moment when the representative democratic government comes up with solutions.

2.2.2. The people must be constantly prepared for the worse

The people prepared for a much tougher and worse situation than they is in reallyti, will more easily support the difficult situations in which they are put by the governors. So the people will endure a lesser evil than the evil for which they have been prepared (unrealistically) and this because of a government permanently concerned with the well-being of the citizens. Now, the people appear who detect the fake and bring it to the attention of the public, but the audience will turn against the right ones, reasonable, positioning themselves on the side of the liar government, without detecting the false, the manipulation. At the same time, the antipopular political measures will be applied gradually, and the population will be convinced that it is for its sake, in order not to get worse. Social weights will be easier to bear.

2.2.3. The people must believe that what governments preparing him to live worse, is also for its own good

When the government puts higher taxes on the population, it has already a legal measure who is prepared for which the population has given its consent long ago. So the people were aware of the necessity of unfavorable measures for himself, but in the meantime it was used to the idea, and the shock was greatly diminished, so that no conflict would arise. This situation leads to intergenerational social conflict, because the unpopular measures decided by parents come to be applied to the descendants. It appears a feeling of hatred between generations.

2.2.4. The collective mentality should be at a mediocre level, which does not give it the ability to analyze and forecast

The public communication is realised at a minimum level of training, as if the entire population were at a level of mediocre education. This leads to superficiality, naivety and implicitly to conflicts. Through poor communication is reaching to the manipulation of information, to the informational poisoning through rumor and lying. Thus appear on the public stage the dilettantes, who have no respect for education and authentyc values. They choose to impose their point of view without respecting the opinions of others. In most of them, popular masses its identified in this category and think superficially, without looking for a link between cause and effect.

2.2.5. Is annihilated the capacity of the masses to notify the real social issues and the accentuated tendency of action based on collective emotion

It is known that reason is based on logic, and logic in turn is born on the basis of reality. This is the reason why governors choose to they used by the feelings of individuals by appealing to emotions. The emotions are encouraged, because under exaggerated, forced form, the emotivity leads to disorientation, illogical thinking, chaos. In the case in which is arriving at a period of social chaos, the collective thinking of the masses is much easier to manipulating compare with the situation in which she, this thinking, lies on a territory of logic, anchored in the social reality. Then, the collective thinking would have the ability to problematize the reality. In this case, there would be danger of direct democracy, which would annihilate the manipulation.

2.2.6. The small achievements, without long-term impact, without significant value, take time, consume energy and tired the individual enough that is no longer tempted to gain remarkable achievements, he no longer hopes great ambitions in professional, material, personal, no longer is motivated to achieve superior ideals

For this is need an attack on the educational dimension. To the basis of institutional education stand

the educational system.[5] The introduction of corruption and her deficiencies of functioning inside it has the effect of increasing the ignorance among the masses. Ignorance inevitably leads to manipulation. Lack of information or thereof deformation can lead toincorrect information of one professional category vis versus another. An example of this can be the expectations of society towards licensees that does not rise to the required level by society after it goes in production. They are happy with the small jobs that do not give them noticeable satisfactions, because they are not and are not prepared enough to perform in the profession they have chosen and for which they hold a diploma. Society condemns they, it is disappointed with they, but it does not take attitude, because she alsow it is totally, satisfied with small and unsatisfying achievements to the social needs it has. Lack of professional training, lack of culture, lead to an increase in ignorance, which represented the most suitable ground for manipulating public opinion, to serving at the same time certain obscure interests.

2.2.7. It is necessary to limit the access of popular masses to complete and correct information

Because the citizens need and seek information, the solution is that they to have many, but inaccurate, rather false, information. To accomplish this, we have to deal with financial groups that directing the information they want, through mass media controlled also by them. For this, of course, financial support is needed.[6] An example is represented by the removal of the public from the traditional culture, by sponsoring television shows that promote the vulgarity or behavioral deviance. Lately, emphasis is placed on the sexual deviance, cosmeticised under manifestations who is centrated to open mind, applied by fashion, film, parade, etc. This divides the masses into two categories. The first is that of traditional values and will never engage in homosexual manifestations. The second is the one oriented towards the new, without filtering the new through the point of view of quality of the values it promotes. Between these two social categories will be born contempt, hatred, disapproval in any form, sometimes reaching the conflict. It is intended the creation of the same state of chaos, because it is trying and sometimes it is also succeeds the stupidity of the public, by keeping intelligence at a lower level.

2.2.8. The gregarious spirit induced to the popular masses, leads to the loss of identity and will of human development

We have here as an example the obligativity of vaccination, a controversial issue that carries with himself a large deficit of information. By spreading certain viruses among the popular masses, the young population that does not yet have sufficient immunity, is getting sick. The parents who have resisted children's vaccinations, are manipulated to feel responsible, in an individual and common guilt at the same time for the decision they have made. In despair, unable to revolt and being social sanctioned by the category of those who accepting any pharmaceutical product without an analysis, prior information, they are pushed to desperate actions, gregarious, abandoning a lucid way of action. They will accept the vaccination, which serves group interests, following the manipulation they have been subjected to. They became part of the flock, being easily controlled.

So, we witnessing in stimulating individual sense of guilt, fatality, helplessness. People who do not have the impulse to revolt, become a flock and are easy to control[7]. .

2.2.9. The people should not believe in existence of the official strategies and means of manipulation

In order to control the crowd and, implicitly, to govern it at will, information about the psychology of the individual and the crowd is used. By using exactly by these, those interested discredit these with the help of the media (which is on the first place in terms of state power), so that the people have doubts about the state manipulation strategies. Also these creates chaos to, by dedintegration of the order between the social relationships between the legal representatives of various professions and occupations.

Generally speaking, we are dealing with a giddy society in which everything is questioned. All of this is manifested on the background of a hate-borned conflict, in the sense that for each individual or common problem of the socio-professional segment to which each belongs, guilty is the other one. Also is with the socio-professional category to. There is an idea that every professional is unprepared in conform to the social expectations, he is immoral, so he is guilty of everything that is happening or maybe it possible to happen.

All this time, non-elites are in government and seized the highest dignitaries. They have affected the most deserving social status, which they occupy otherwise than on the meritocratic criterion. In the society where everyone doubts everything, the values are overturned and dictate the non-values, the whole society is based on hatred. This leads to the total imbalance of a society that is left to drift and functioned only out of inertia.

3.4. Conclusions

We see easily that the machiavellian principle of „divide et impera“[8] has been applied successfully in our society.

[5] Gabriel A. Almond, Sidney Verba,1996, *Cultura civică*, Ed. DuStyle, București, p. 108

[6] Noam Chomsky, *How the world works*, 2011, https://1motorcyclist.files.wordpress.com/2016/03/noam-chomsky-2011-how-the-world-works.pdf, p. 240

[7] http://3dots.ro/externe/noam-chomsky-principii-manipularea-maselor-5485.html

[8] Machiavelli N., 2017, *Principele*, Ed. Humanitas, București, p. 67

A party itself, as an organization, is part of a society. Speaking of multiparty system, we are talking about many parts. In the political fight for power, each of these parties positions themselves against the others. „ The fragmentation creates competition between powers and ends up creating a conflict …)".[9] The purpose of the struggle between political parties is to seizure of the power, but what is more important is that this goal is achieved by creating a general state of divergence. This is often reflected in the negative label and blames on every professional category.

Divergence is precisely the matrix on which social chaos is installed. It hosts conflicting relationships between populational age groups, or professional categories. This division of society between age groups or socio-professional categories served very well to the mass manipulation in order to monopolized power in the state. We can even say that this categorization, both mandatory and normal, was a matched like a glove in the power struggle: it was a gratis win, a step ticked without any special effort, because the base it already existed.

In conclusion, the effect of social chaos determined by representative democracy on socio-professional categories is based on hate, doubt and despair. We are talking about the leadership of a minority called the oligarchy, in parallel with the so-called leadership of the majority, of the people, called democracy, in which we find a multitude of power centers polyarchy and a diffuse responsibility, that is, the leadership and responsibility of anyone, what what is called anarchy.

This is how the tyranny of democracy shows: the effect and the cause of alike of the ungovernance of democratic regimes.

References

- Gabriel A. Almond, Sidney Verba, 1996, *Cultura civică,* Ed. DuStyle, București
- Giovanni Sartori, 1999, *Teoria democratiei reinterpretata*, Ed. Polirom, Iași
- Horia Irimia , 2005, *Consultarea cetățenilor și democrația locală*, Ed. Mirton, Timoșoara
- J.J. Rousseau, 2013, *Contractul social*, Ed. Antet XX, București
- Machiavelli N., 2017, *Principele*, Ed. Humanitas, București
- Marius Precupețu, 2006, *Democratizarea postcomunistă și integrarea europeană,* Ed. Academiei Române, București
- Miculescu P., 1998, *Statul de drept*, Ed. Lumina Lex, București
- Noam Chomsky, 2017, *Who rules the world*, Prod. Hamish Hamilton
- Norberto Bobbio, 2007, *Liberalism si democratie*, Ed. Nemira, București
- Robert A. Dahl, 2003, *Despre democratie*, Ed. Institutul European, Iași
- http://3dots.ro/externe/noam-chomsky-principii-manipularea-maselor-5485.html
- http://cursdeguvernare.ro/dictionar-economic/categorii-socio-profesionale
- http://www.rasfoiesc.com/legal/administratie/stiinte-politice/Conceptual-de-democratie-parti76.php
- https://www.dzr.org.ro/democratia-un-mit-pentru-manipularea-maselor/#
- https://www.efemeride.ro/decalogul-chomsky-iata-cele-mai-comune-metode-de-manipulare-a-maselor
- https://1motorcyclist.files.wordpress.com/2016/03/noam-chomsky-2011-how-the-world-works.pdf, Noam Chomsky, *How the world works*, 2011

[9] Norberto Bobbio, 2007, *Liberalism și democrație*, Ed. Nemira, București, p.110

THE MAIN SOCIAL RISK FACTORS IN THE FEMININ DELINQUENT BEHAVIOR

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Abstract

The feminine criminality is a social phenomenon of defining importance in trying to draw the portrait of contemporary human society. What is the basic mechanism of this dimension of human behavior remains a continuing challenge for criminology researchers and beyond. The feminine offenses segment dresses a form of atypical aggressivity. This is the main reason who determine the identification, analization and explanation of the factors that influence and shapes the behavior of the woman, bringing it to the form of criminal behavior.

The contradiction between femininity and criminality is outlined as an intrigue of gender stereotypes, which the researcher can not bypass. That is why patterns, items, everything on the background of social change are considered. The social change comes, in turn, with challenges both from the domestic area and from the outside of the family.

In this paper we will review the main social nature factors that trigger the deviant behavior leading this to delinquency and even determining its identification with forms of delinquency. Women's evolution in time, in terms of age and social modernization, results in changes in the feminine attitude, the typical female actions, woman's personality as a mother, married couple, daughter, girlfriend, etc.

The purpose of this study is to present risk factors with criminogen potential on women's behavior in society.

Behavioral deviance, as a result of the multitude of bio-psychological, econ- omic, socio-cultural, political, natural factors, turns into violence, and violence tends to become an increasingly strong component of female temper. Last but not least, it is observed that the femininity itself, under the pressure of social factors, takes on new forms, dominated by aggressiveness.

Keywords: *feminine criminality, gender stereotypes, criminogen potential, social risk factors, feminine behavior.*

1. Introduction

In order to the prevent and combat the criminal phenomenon, it is necessary to identify, analyze and explain the factors that determine or facilitate the engagement in a deviant behavior.

„The research of the criminogenic factors is done from a etiological perspective - static - and from a dynamic point of view - the passing to the act.

From a dynamic point of view, the factors that lead to a crime are materialized at the level of human activity, in the act of will that stimulate the personality, the skills, the temperament, as well as the character (the ensemble of attributes that constantly manifests in the conduct of the individual) [1].“

The etiology of crime addresses the criminal phenomenon as a whole, individualises the factors that led to the commission of crimes and through a purely analytical methodology, offers the possibility of general knowledge of these criminogenic factors. In the genesis of crime, we distinguish the following types of factors:

- individual (biopsychological) - refers to the individual as a biopsychological unit;
- social - economic, cultural, political - refers to the individual's social environment;
- natural (physical) - cosmoteluric geographic - refers to the natural (physical) environment of the individual.

These factors do not act independently or according to a particular pattern depending on the type of offense, author, victim, etc.

The relationship between the different categories of factors and the preponderance of one or the other will vary from case to case, from individual to individual, giving the researcher the most complex combinations and effects.

We will focus in this article on the social factors of criminogenic risk, as a result of contemporary social changes.

2. Content

2.1. The socio-economic evolution and its influence on crime

It is well known that the economic evolution and economic cycles have an effect both on crime, regarding its structure and volume, also on the functioning of the criminal system. The transformations from the structures of economies framework in the modern age have determined long-term events and processes such as urbanization, increased of state authority, etc.

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[1] Roşca Al., 1995, *Psihologie Generală*, Ed. Didactică şi Pedagogică, Bucureşti, p. 504.

As far as socio-economic changes after the war are concerned, they have been at the basis of both the rise in living standards and the long-term negative effects such as the emergence of migration, the aggravated poverty under the old and new forms that led in our day to the impossibility of maintaining the subsistence level for as many families, managing to drastically "weaken" the average socio-economic category, another time a factor of stability.

The deepening of disparities between social categories led to the creation of a strong sense of estrangement and insecurity of individuals. An expanding political economy creates new jobs, confidence in individuals' own forces, as well as an increase in living standards.

Recession means among other things unemployment, falling living standards, tension by the social groups level. Lack of jobs is a determining factor of the increase of delinquency: people who do not work, having enough time and being at the limit of subsistence, benefiting of motivation, do not hesitate to break the law.

Factors of economic and social progress determine besides positive effects and negative effects. Among them, industrialization and urbanization have determinated to the creation of a strong status of anomie, which has inevitably led to deviant manifestations, disorientation at the individual level as well as to the deficiencies of social integration. All of this has been a ramp for the launch of many criminal careers.

2.2. The role of cultural diversity

Certain cultural factors have a predominant role in socializing individuals. The negative socialization through them determinated to deviant behaviors leading to increased crime.

The socialization is the main process by which individuals assimilate the norms, values, and behavioral rules specific to a particular social group to which they belong or represent the process of interiorizing the ethical-normative and cultural model in the consciousness and conduct of each member of a society.

2.2.1. The gender

Gender is the socializing factor that contributes decisively to the formation of normal, desirable behavior, which underpin at the gender problematize. There is a need for discussion about gender socialization in extenso, given that we are talking, throughout this paper, about women's aggressiveness, a feature somewhat borrowed from the masculine area. An mismatch of gender role with associated behavior leads, in particular, to gender research in female delinquency analysis.

The gender socialization, an integral part of the general socialization process, through which is internalizes and transmits gender norms, according to space-time, determines the issuance of positive or negative sanctions raported to the realization of conformity.

„The socialization, including gender, takes place in a set of situations that are related to each other (situations of moral socialization, cognitive learning, imagination, psychological communication, etc.), in which are built, shared, interiorized and are permanently transmitted the gender messages[2].“

The agents of socialization are divided into: direct - parents, or indirect - school, media, hobbies, etc. They have the highest weight in the differentiated socialization of girls / women and boys / men, a process that is achieved by specific methods and mechanisms. From the youngest ages, it make the differentiation is made by choosing certain toys for girls as compared with those for boys, specific feminine or masculine apparel, in order to continue in time, with the differentiated sex-based practice of extracurricular activities etc.

By identifying with direct socializers, children acquire behavioral affective models.

Gender messages transmitted through school textbooks also become indirect socialization sources, such thate, for example,the lack of strong and successful female models in the textbooks incites discreetly the model of the woman who just "do is" and the man who "do what[3]."

Gender socialization is a procesual phenomenon that carries its own mechanisms, generating the most prominent effects at the societal level. In conditions of stereotypy and beyond, it is a determining factor in gender discrimination and segregation. The identity appears to us as a reference system in the process of placing the individual in relation to himself and to others.

Self-esteem is the foundation for gender identity. Regarding the culture of domination, we can say that it attacks self-esteem, in favor of the power to dominate the other.

Through complex socialization processes and gender self-socialization, individuals acquire to himself (learn and interiorized himself) their gender identity (this concept was introduced by psychoanalyst Robert Stoller in 1964).

The gender identity is a social construction, an effect of gender socialization (Simone de Beauvoir: "We are not born, but become women").

Promoting stereotypes and gender prejudices, the gender socialization is closely linked to the phenomenon of self-creating prophecies.

Juliet Mitchell, in "Women. The Longest Revolution "(1966) addresses the socialization from the perspective of social structure, as one of the defining factors of the feminist movement.

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[2] Grunberg L., 2002, *(R)evoluţii în sociologia feministă*, Ed. Polirom, Iaşi, p. 329.
[3] *Ibidem*, p. 330.

Nancy Chodorow or Dorothy Dinnerstein believes that in most contemporary societies, the womens are the main socializers, and they put their mark on the personality of the child, depending by conformity at gender role.

Role designates the expectations of others as to how the individual fulfills himself his or not duties in relation to his or her status. Being the dynamic element of status, the role represents the standards accepted by a relative group to the behavior patterns, attitudes and values expected from individuals who occupy specific positions in these groups.

Social roles in general and gender roles in particular are modeled by and reflect the structural characteristics of society and culture. These widely shared expectations create social pressures so people feel the need to comply their.

The behaviors associated with female/male status are named by sociologist gender roles. Considering that in the stereotypical representations betwen man and woman the major difference lies in aggression, like forms and manifestations, within sociobiology it has been suggested the idea there is a genetic basis for specific behaviors of a sex role.

At the same time, the contribution of social and cultural factors in the differentiated man-woman behaviors was demonstrated. Therefore, the biologically difference of sex (anatomic, physiological, hormonal) in the plan of differences male-female is followed by difference of gender (the socio-cultural categorization of male and female, with all its representations).

"The sex-gender difference was theorized by the feminists of the second wave, the genre having the meaning of the difference built and interpreted socially and culturally between the two distinct social categories: *men* and *women*. These differences also have a normative character, in the sense that those who do not conformize to the gender role are seen as deviant from birth or socialized inadequate. So the sex operates with the biological distinction and the gender with the socio-cultural one[4]."

"The sense of self associated with the cultural definitions of masculinity and femininity, gender identity is especially a subjective experience, being the psychological interiorization of feminine / masculine traits and the result of a complex process of interaction between oneself and others[5]."

The conformism contained of traditional gender roles, beyond the advantages highlighted of functionalism, has negative effects on individuals.

Many research has shown, for example, that there is a greater number of depressions among female housewives than those who have a job, or the male mortality higer compare with than feminine, related of the social pressure specific to male public roles.

In sociology, gender roles have been approached from different perspectives:

- functionalist, with emphasis on the complementarity of gender roles (expressive vs. instrumental roles) so as to maintain the balance and stability of the social organism taked like totality;
- social - conflictualism, in the prolongation of Marxist theories, with emphasis on the conflict between roles and the importance of the economic factor in explaining gender inequalities;
- symbolic interactionism with an emphasis on microscopic aspects of gender roles analysis, on interactions between people trough which it is negotiated and created the reality;
- feminist, within which: (1) gender plays a central role; (2) gender relations are considered problematic, being linked to inequality, contradiction and constraint; (3) gender relations are neither natural not to unchanged, but are produced of the socio-cultural and historical factors. Of course,also within the feminist theories, we can distinguish liberal, socialist, marxist, radical, multicultural variants, approaching the theme of gender roles.

Gender stereotypes present themselves as organized systems of beliefs and consensual opinions, directly related to the characteristics of women and men and alike with the stereotypical qualities of masculinity and femininity.

Male/female physical and mental characteristics associated with social actors are both descriptive in the sense that they show how women and men are in reality, but also prescriptive, promoting the ideal models to which male/female behavior relates.

Gender stereotypes are part of a system of values and attitudes about gender. This system is based on social expectations regarding attitudes to gender roles, their violations, also the gender identity.

The transmission of socio-cultural expectations depends on the interrelation in which been the direct and indirect socializers: parents, extended family where appropriate, media, school, entourage, etc.

Sandra Bem (1993), considers that gender is the factor that determines during childhood the formation of an opticaly in terms of observing, interpreting and acquiring the behavior of the close ones, a stage who preceding another, namely the elaboration of its own "gender scheme" means of the own value system to which the vision of women, men, girls, boys is to be reported.

The dissimilarity between the sex role and the gender role leads to the idea of homosexual behavior, both in the case for men and for women.

The analysis of status and power concepts inevitably implies the analysis of gender stereotypes: from those who occupy higher positions in the social hierarchy expect specific male features, while from those with a lower status are believed to have female stereotype features. Those who do not conform to the gender roles of stereotypes expected from their sex are socially punished in various forms.

[4] Dragomir O., Miroiu M., 2002, *Lexicon feminist*, Ed. Polirom, Iași , p. 156.
[5] *Ibidem,* p. 192.

2.2.2. The etiological role of the family

Another social factor in the study of the etiology of delinquency is the family, involved in the majority proportion in the socialization process, which imparts to the child the value standard, as well as educating in the sense of acceptance or rejection of social values.

The delinquent behavior of the child has been studied among others of the point of view in terms of the relationship between the family atmosphere and delinquency. Thus, it was concluded that lack of affection, default couple relationship, inadequate supervision from parental part, lack of interest in the problems faced by the child, mother's inability to cope with conflicts, father's deviant behavior – alcohol, lacking at home, beatings, attending dubious entourage, spouse abuse - domestic violence in a word, are elements that can explain the delinquent behavior to a large extent.

Nowadays, the socialization process tends to be realized less and less in the family, thanks to stand a longer time in school, friendship, extra-curricular activities. Even the time spent by the child inside the home is captured by a computer, television or other media influences that transmit information that can lead in many cases to adopting a deviant behavior.

We are witnessing a certain independence of the child from the family, which means that socialization takes place outside of it, where the lack of parental control leads to choices not in accordance with norms and values accepted by society, finalizing themselves by committing deviant acts, which leads inevitably to the rise of criminality.

In the family where the mother executes a custodial punishment, family relationships have special features, being influenced among others also by the attitude of the condemned.

2.2.3. The domestic violence, a criminogenic factor

Domestic violence ("spouse abuse"), which is a topic of import in the social sciences landscape of ours from us, is an undeniable cause of the increase in the criminality rate.

The communist man was considered a spotless individual, totally devoted to the respective political ideology. This ideological creation of power does not allow to real individuals to existing in the attention of state policy.

The non-fulfillments felt by the individual in the plan of social life sprang into the one of his private life. The victim from work place, from society, became the executioner of the weaker than him. The adultery, beating, rape of the partner were practices that, through the frequency with which they were taking place in the private life sphere, had the aura of normality in the eyes of most individuals.

Domestic violence is now considered a form of social illness that affects the physical and mental resources of communities.

Variants of the solutions adopted by women victims are: remaining in a situation, divorce or separation, death or transformation of the woman into an aggressor, through a mimicry with a survival role in relation to her executioner. In the case of adopting the first option, everything stays behind closed doors, in the privacy of the home without any intervention from outside. Women who align with this behavior versus their own drama are the unseen side of domestic violence, which is, unfortunately, much higher than the one seen. In the case of the woman has the moral necessary force to take an attitude before chronicization her relationship with her partner, she will appeal to separation, following the divorce action. A third situation in which the woman victim of domestic violence can be, is the death of her. In Romania there is very little statistical data on the death of the woman victim of domestic violence. In order to get out of the crisis situation, there is a fourth possibility when the woman victim of domestic violence interrupts the violent manifestations on herself by taking over the aggressive behavior, as a response to the violence being suffered.

By adopting this solution to end the crisis, the victim woman turns into aggressor, to the adress to the life partner, child, or society.

The infractions committed by the women who have become aggressors range from low-risk of periculozity offenses, to the most atrocious crimes. Everything is done in correlation with all the other factors who determined the increase of the criminality rate.

2.2.4. Educational institutionalized environment – school

The excessive *schooling* leads to a drastic reduction of a time spent in family. This is the reason why the socialization is it realizing increasingly being done by school institutions.

The school is trying to recover what has not been realized in the family, especially since it also benefits by advantages like from the pursuit of behaviors and, as such, the identification of the deviance and their controlling. By order and discipline, by monitoring behavior, even "repairing" family failures in regarding of the education of minors is attempted.

The lack of family discipline, poor schoolling results, the school dropout, are present elements at the future sociopaths. In this regard, there is a growing problem for creating programs that would replace these shortcomings within the school with positive elements, with a preventive role.

2.2.5. The membership groups

The entourage, or the social environment of the individual, presents a particularly important contribution in it's socializing , whether positive or negative.

„S. and E. Glueck have reported that more than 98% of the 500 offenders observed had largely

delinquent friends while the other delinquents, less than 8% had delinquent friends[6].“

In the entourage, the delinquent behavior is learned, the individual being attracted by the encouragements of the group on the one hand, and on the other, it comes into play the fact that the expected rewards, cover and exceed as a value the punishments and sanctions afferent to these behaviors.

There are distinct social groups that have a deviant tendency (marginal groups) generated by a particular subculture. The most dangerous group in this respect is the group of detainees, who being characterized by the penitentiary subculture and dominated by the phenomenon of prison, will predominantly lead to a future relapse.

Apart from the family, the main source of learning about deviance is entourage.

Of great importance in terms of entourage is the fact that in each group who present deviance there is often a leader who knows how to behave in such a way as to shelter themselves from the rigors of the law by directing the weakest and believers in actions that run counter to moral norms, after then benefit more than they, of the illicit value. That is why it is imperative necessary that the family, if not these, the school, or other social control factor, act for the detection, tracing and deactivation of such groups, in order to save the exploited (see live meat traffic).

2.2.6. Mass media - methods of learning antisocial behavior

Since the media is the main means of informing today, it transmits in many cases unselected information which, for some sectors of the population, is a negative factor influencing delinquent behavior.

To increase ratings and for commercial purposes, some information is overstated or are presented as the most shocking, and during this it is intended to create panic.

By revealing to the public the plans and the activity of certain courts and a factors of social controlling, the unfolding of the activity of discovering and catching the offenders is aggravated, and more than that, the media contribute to the learning of deviant behavior style, by young people.

It should be noted that it is generally taken into account that the most shock the banal reasons for the crime, because at these have access the vast majority of individuals.

Media, and especially television, are undoubtedly contributing to the rise of criminality by:

- learning the aggressive style of conduct;
- reducing inhibitions related to aggression;
- insensibilization and habituation to violence;
- shaping the image of reality that people base their actions on.

The written press, covering a large segment of information, pursues the same economic goals and often promotes the triviality and describes the shocking situations to the limit of the unreal. Is arriving even to the distortion of information, without taking into account that this is how a segment of the population is borning which creates its selves an unreal world, driven by violence, with unpredictable consequences.

2.2.7. The religious factor between prevention and influence

Religion is a particularly powerful social factor, having on the one hand the power to prevent deviant acts and, implicitly, criminality, as well as leadership power, on the other, of the deviance manifestation.

First of all, it should be made clear that religion has an important role to play in combating criminality. Christians believe that the only cause of evil is removal from God, so committing a crime means a man without holy faith.

Religion has been a social control tool over the centuries. Her power have oscillated over time, becoming a marginalized reality in the socialist order. But man's faith in God to being innate, the Christians continued to live around the Church, so religion retained its gregarious force.

Since ancient times, the religion has been used as a tool of interest groups to seizure the political and economic power. Through her, the riots have started, through her perspective, was signed treaties of world importance and vital[7].

In church, the religion is a tool to combat delinquency, in social life it is a ready instrument at any time to initiate a mass movement, fact which may involve delinquent actions.

2.2.8. Discrimination of class, racial and ethnic - criminogenic factor

The offenders belonging to the inferior social class, commit criminal offence that can be discovered in much higher proportion than those belonging to the immediate superior classes and controlled more precisely by the competent organs. The economic factor, which causes material inequalities, creates the ground for deviant manifestations for obtaining illicit income.

The criminalty shows up different and depending also by race or ethnicity.

The mankind present varieties with distinct particular characters, or ethnic differentiations, which they call race.

In our country, the statistics show an increased criminality rate among romanian nationality women, compared to those of rroma nationality. This is a situation by the level of discovered criminality, the real criminality highlighting the very high criminality rate among rroma women.

In the US, the blacks present the highest rate of criminality.

The blacks represent almost one-eighth of the population, but in 1980 they accounted for half of those arrested for murder, rape, robbery, and between a

[6] Sandu I.E., Sandu F., Ioniță Gh.I.,2001, *Criminologie*, Ed. Sylvy, București, p. 224.
[7] The best reference can be made to the Inquisition

quarter and a third of those arrested for burglary, theft, car theft and aggression.

2.2.9. Criminal-related factors that perpetuate murder - alcohol and drugs

Consumption of alcohol is no longer a privilege of men. Nowadays, as many women use alcohol, for various reasons. The stress is the one of the reasons why the woman is appeal to alcohol, unrealizing the dependence that is being installed as well as the loss of control.

Between alcohol consumption and delinquent behavior there is a close link that bears the name of violence.

First of all, we can talk about traffic accidents, committed as effect of alcohol consumption, as culpable offenses. Also in the case of accidents, we can also mention work accidents caused by alcohol consumption, due to diminishing attention, slowing of reflexes, etc., accidents that most of the times had the most serious consequences. Leading by pronounced excitability and impulsive manifestations, incomplete drunkenness is the cause of crimes committed by violence: robbery, bodily harm, death-blow, sexual orgies in the group, who sometimes ending tragically.

Another factor related to violence is drug use. In some cases, alcohol precedes drug use, which leads to criminal acts. In other cases, criminal behavior precedes the drug use.

The drug consumption is considered a phenomenon that has grown even in our country.

Among women, there are occasional consumers who are not realized the danger at drug addiction, but also permanent consumers, some of which women do not accept treatments and helpness for give up consumption, and others who have understand the shortcomings caused and struggle to save themselves.

On the other hand, another problem faced by society is that not all drug users are known and as such remain a series of unknown traffickers, which causes an alarming rise in criminality. [8]

The cases in which the pimp networks do not deal with drug trafficking are scarce.

More and more women are recruited to work around traffickers, arriving themselves to directly involved, even to initiating and leading certain transactions. Under these circumstances, some of the women involved become victims, others are abusing by dependent persons, through blackmail or other means.

The human beings trafficking is another criminogenic factor that has taken a great amplitude in our country. In this phenomenon the women appear both as victims and authors. Whether they become drug addicts consumption, whether they are caught and condemned for drug trafficking, or human beings trafficking, they are all victims in the end.

2.2. Political influences on criminality rate

Since political factors governing the social life, they determine the rate of criminality to rise during times of crisis. In such situations, due to the increase in the unemployment rate, for economic reasons, the material shortcomings appear, which inevitably lead to criminal acts.

At the family level, there appear unfavorable changes to the functioning of this group at optimal parameters, conditions when the juvenile delinquency is in tendence of increasing.

In situations of struggle for the seizure of political power, as well as for transition, there are manifesting states of social anomy. They provide favorable conditions for criminal behavior, both at middle social class level (theft, robbery, deception, etc.), as well as at high social classes level (intellectual crimes, war crimes, state blows, etc.).

Although the aggression has been presented above as a psychic factor, it has to be said that this is also a cultural product.

Within a society, the subcultures of different social groups promote values that can lead to antagonisms, contributing to the development of different forms of aggression, which in their turn are the preconditions for deviant acts.

This is how the theory of political violence, which includes the theory of intrapersonal relative deprivation and the theory of interpersonal relatives deprivation, is born.

The relative deprivation consists principally in injustice, dissatisfaction and frustration, all depending on social comparisons that the individual, revolted, makes them out of positions considered inferior.

As far as intrapersonal relative deprivation is concerned, we are dealing with status frustrations that lead to disintegration of status, that is, the inability to occupy a previous status considered superior to the present, as well as an anomie in the sphere of personal psychic life. The relative interpersonal deprivation refers to the individual's desire to acceded a superior status, this being in the hierarchy of another social group different from the individual concerned.

As a political factor, it can be said that the aggressiveness, the element underlying the reporting of violent manifestations to different cultures, led to the emergence of *the theory of political violence*.

3. Conclusions

The social evolution does not give any sign of rest in terms of the need and the desire to quickly solve the problems in everyday life. The women are in a position to solve social and individual problems without benefiting often from help of the family, partner, friends, and of course society part. For some women, the solving of problems or the fulfilling of personal desires is limited to illicit methods. Conscious or not

[8] The trafficking in live meat is associated with the drug trafficking

aware of the crimes they appeal to, they change the ratio of forces between feminine and male criminality, contributing to the formation of a social matrix dominated by delinquency. Gradually, this female delinquency will fit into the normal social future.

References

- Bălan A, Stănişor E.,Mincă M.,2002, *Penologie*, Ed. Oscar Print, Bucureşti
- Dragomir O., Miroiu M., 2002, *Lexicon feminist*, Ed. Polirom, Iaşi
- Gheorghe F., 1996, *Psihologie penitenciară*, Ed. Oscar Print, București
- Grunberg L., 2002, *(R)evoluţii în sociologia feministă*, Ed. Polirom, Iaşi
- Roşca Al., 1995, *Psihologie Generală*, Ed. Didactică şi Pedagogică, Bucureşti
- Sandu I.E., Sandu F., Ioniţă Gh.I.,2001, *Criminologie*, Ed. Sylvy, Bucureşti
- Principiile directoare pentru tratamentul delincvenţilor, ONU, 1990
- Rezoluţiile 20 şi 24 din 24 mai 1990 ale Consiliului economic şi social al ONU-*Sistem de programe socio-educaţionale pentru resocializarea persoanelor aflate în custodie*- Ministerul Justiţiei, Direcţia Generală a Penitenciarelor

HORROR VACUI: THE MEANING CRISIS OF THE GLOBALIZED WORLD (THE CASE OF THE EUROPEAN UNION). A JUNGIAN APPROACH

Mihai NOVAC[*]

Abstract

In its widest acceptation, globalization amounts to a progressive 'interdependentization' of the various areas, levels and regions of human civilization. On account of globalization we are much more prone to becoming one, i.e. Humanity, than in the previous epochs. But what does this mean or, in other words, what is the envisioned shape of this One humanity is heading toward in the context of globalization? Is there in fact any meaning to it?

On closer examination, we might find that the issue of meaning was not very much addressed in the discussions concerning globalization; certainly, it is not a major issue on the agenda of the institutions impactful upon this process. If it did make the object of someone's preoccupations, it was rather only of certain fringe thinkers, political and economic authorities tended to ignore, given that there were always more immediate and practical concerns at hand.

However, an unasked question provides no answers and the lack of answers in this respect is very dangerous as it involves the risk of creating, willingly or not, a world without meaning. Socio-cultural arguments in this respect are there to be found by anyone willing to throw an unbiased look at our post-modern history: the industrial and technical revolutions went hand in hand with an over-instrumentalization of our Weltanschauung that, along with its obvious positive consequences, brought along homogenization, massification and alienation, in other words, lack of meaning. The European Union, for example, has just started facing the practical consequences of ignoring this apparently purely theoretical problem: its current legitimacy crisis, in favor of its more traditional state-nationalist counterparts, can be taken as a symptom thereof.

This paper is, first, an attempt at asking the question of meaning in the context of globalization and, second, to provide it with an answer (mostly, but not exclusively, on the basis of Jung's analytical psychology). The answer might prove unsatisfactory but, on the other hand, as probably with most meaningful issues, the question itself is much more essential than the answer.

Keywords: *Jung, archetype, crisis, globalization, EU.*

Motto:

" (…) the basic fact of the human will, its *horror vacui*. It requires a goal—and it will sooner will nothingness than not will."[1]

1. Preamble: Meaning, a short characterization

What is meaning? This is an important question, one to which however I will not try to provide an exhaustive answer in what follows. On the other hand, given that, one way or another, this notion also constitutes the vanishing point of our discussion, an operative characterization could not be superfluous.

In this respect, I have found the etymology of the term especially clarifying. As such, in the etymological regression, the first important semantic node is the Latin term *sensus* – i. *perception, sentiment, intention*, most probably figurate connotations of a proper acceptation referring to ii. *finding one's way*, or *heading to(ward).* Further back, the next semantic node (and also the original one, as far as I know) is the one associated with the Indo-European particle – *sent*, meaning, again, on the one hand, *going/heading to(ward)*, on the other, *feeling*, in both affective-emotional sense and perceptual (i.e. *observing, contemplating*). We can find a related etymology in the Germanic languages in association with the verb *sinnan – going, heading to(ward), yearning for, bearing in mind, perceiving*[1].

A short hermeneutical analysis of this etymological context discloses, as essential elements, a semantic subject which is rather active (i.e. *a someone, properly or figuratively heading toward*…) and a semantic object, which can be either passive (by repulsion) or active (by attraction), placed in a vectorial relation. As known, Brentano and Husserl refer to such matters by the notion of *intentionality*, designating that special quality of conscious acts (either personal or collective) by which they are always *of someone – somehow – about something*: the tripartite structure *ego* (*self-awareness*) – *noesa* (the aiming manner specific to the given experiential act, i.e. recollection, imagination, sensory perception etc.) – *noema* (the intentional object of the experiential act). Furthermore, in Brentano and, especially, Husserl, we find the anti-positivistic claim that there is no such thing as a purely empirical perceptual act, namely that any sensory matter (*hyle*), in order to become perception,

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[1] Friedrich Nietzsche, *On the Genealogy of Morals*, Par. 1

[1] Pokorny, Julius, *Indogermanisches etymologisches Wörterbuch*, B III, Bern, München, Francke Verlag, 1959, pp. 908.

necessarily involves the subject and his/her understanding of the world as a whole, his/her Weltanschauung, if you will. In this context, I have chosen to characterize the notion of *meaning* as the personal or collective representations involved in this quasi-systematic whole of someone's self-understanding against the backdrop of his/her world of belonging (both culturally and existentially), and having a descriptive, explicative and teleological role within the intentional flux of his/her consciousness and interaction with both world and fellows.

In the same sense, more pragmatically put however, Zaki Laïdi claims that the notion of *meaning* necessarily implies the convergence of three aspects: a ground, a feeling of unity and a final purpose, at the same time stating that, in terms of this definition, in the post- Cold War era, we cannot speak of a meaning of the international relations, given that, to paraphrase, *the political actions of Europe do not aim at a systematic construction based on a futurally oriented projection, but strictly on a pragmatic administration of current, ordinary problems and needs*. And he goes on by saying: "the need to project ourselves into the future has never been so strong, while we have never been so poorly armed on the conceptual front to conceive this future, which leaves a wide gap between the historic rupture that confronts us and our difficulty in interpreting it[2]."

What Laïdi claims here is, in fact, something that Nietzsche had anticipated more than a century ago, namely that, beyond purely economic and political considerations, most of the current problems of Europe (and especially EU) derive from the fact that it does not have the necessary culture for the envisioned unity. This because, firstly, cultural aspects have been mostly disregarded in favor of more pragmatic and immediate issues, secondly, because, as much as they have been considered, they have been conceived and developed by analogy with the cultural models already used in the historic construction of the national state. However, it is not yet the time to go further with this discussion.

2. Globalization and EU – socio-cultural background

I think it would not be far-fetched to say that the notion of globalization, in its widest sense, basically refers to the progressive increase in the degree of interdependence between the various international actors on a global scale: states, international organizations, corporations, ethnic, cultural, religious groups etc.. Edward Lorenz's *Butterfly Effect* begins to have a noticeable impact on the globalized international relations, fact which became even more apparent after the end of the Cold War. For the better or worse, as the newly-arrived states that emerged on the global scene in the context of either the world wars or decolonization, set about on the path to modernization, they got ever more drawn within the global market economy. As such, after the collapse of the Soviet Union and the communist block the possibility of opting out of this global market faded gradually. This is what Francis Fukuyama referred to, back in 1989, as the *end of history* (understood, in a Hegelian tradition, as the temporal evolution of civilization determined by the tension between opposed socio-cultural systems). The IT and media revolutions, especially the Internet, obviously accelerated this process.

But what does this ever increasing global interdependence mean? Some voices disapprove of this process on the grounds that it would allegedly bring about an *Americanization* of the world, as such seeing in it a dissimulated form of cultural materialism made over through the rhetoric of the freedom as choice and of choice as acquisitive option. Other voices ask to what extent the globalized cultural products still reflect the content of their original culture, in other words, *to what extent McDonalds, for example, can still be taken as a mere American exported phenomenon, and not as a product of globalization as such?* These latter voices associate globalization with a new form of social existence of humanity as a whole, allegedly unseen before the 20th century: mass society, i.e. a society in which, under the impact of planetary demographic outburst (gregarization) and of the universalization of flow production, which is, by nature, instrumental and all-pervasive, everything and everyone became so standardized and uniform that they lost any aspect of individual specificity, as such being dissolved within an undifferentiated mass. Among those sharing this concern for the future of humanity is also Martin Heidegger. He writes in this respect:

"The *world wars* and their character of "totality" are already a consequence of the abandonment of Being. They press toward a guarantee of the stability of a constant form of using things up. Man, who no longer conceals his character of being the most important raw material, is also drawn into this process. Man is the most important raw material because he remains the subject of all consumption. He does this in such a way that he lets his will be unconditionally equated with this process, and thus at the same time become the *object* of the abandonment of Being[3]."

On the other hand, the West became, during this process, much more permeable and vulnerable to what happens in the non-Western world, as the recent phenomena related to massive migration or, worse, terrorism show.

All these aspects were, I think, well captured by Marshall McLuhan's metaphor of *the Global Village* (1968), the conclusion of the book being even more

[2] Zaki Laïdi, A World Without Meaning: The Crisis of Meaning in International Politics, trans. June Burnham and Jenny Coulon, London: Routledge, 1998, pp.76.

[3] Martin Heidegger, "Overcoming Metaphysics", in *The End of Philosophy*, tr. Joan Stambaugh, The University of Chicago Press, Chicago, 2003, pp. 103-104/Par. 26

appropriate for our times. To sum it up: *in the age of globalization we cannot speak any more of problems of one isolated nation, alliance or political entity; to an ever greater extent, the problems 'in the world' became problems 'of the world' as a whole, and failing to undertake coordinated collective steps in addressing these issues might run the risk of global annihilation.*

The European Union constituted, at least for the Western World, one of the most serious attempts at mobilizing and articulating such a collective effort. In this respect, what during the Cold War emerged under the more or less official auspices of the U.S. as a collective attempt at (i) rebuilding Europe after the devastation of the Second World War and (ii) creating and strengthening an an-Bolshevik bastion within Western Europe, became afterwards an economic, political and, to a certain degree, cultural project *for peace*, assuming, at least apparently, growing autonomy with respect to the U.S.. Although our discussion will follow a different path, a short listing of the important moments in the history of this institution couldn't hurt:

- 1951 the Treaty of Paris: the creation of the European Coal and Steel Community (ECSC)
- 157 the Treaty of Rome: the creation of European Economic Community (TEEC)
- 1967 the merger of the European Coal and Steel Community (ECSC), European Atomic Energy Community (Euratom) and the European Economic Community (EEC)
- 1973 Denmark, Ireland and U.K. join the Community
- 1979 the first elections for the European Parliament
- 1986 the Single European Act; the joining of Spain and Portugal; the adoption of the European Flag
- 1989 the fall of the Iron Curtain
- 1992 the Treaty of Maastricht and the transformation of the European Community in the European Union – the introduction of the Euro as single currency within the EU market (except for the U.K. and Denmark)
- 1995 the joining of Austria, Finland and Sweden
- 2004 the joining of ten more states: Cyprus, Lithuania, the Czech Republic, Estonia, Hungary, Latvia, Malta, Poland, the Slovak Republic, Slovenia); the signing of the E.U. Constitution
- 2007 the joining of Bulgaria and Romania
- 2009 the Lisbon Treaty: the merger of the three original pillars of the Union
- 2013 Croatia joins the EU
- 2016 U.K decides by referendum to exit the E.U

Basically, the concept around which the unification strategy has revolved all this time was, at least declaratively, the so called *integration*. Ernst B. Haas describes it as such: "(…)actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institutions possess or demand jurisdiction over the pre-existing nation states."[4] This is a summative example of the functionalist approach that dominated the EU integration process all this time, that is of an approach insisting on *how* of the integration, rather than on its *what* or *whereto* (and that, at least in my opinion, given the enormous challenge presented by, on the one hand, Europe's cultural diversity, on the other, the traditional internal sovereignity claim upon which almost none of the European national states seemed willing to make compromises and this, quite understandably, because their peoples wouldn't have it). In other words, without a reasonably clear answer regarding the cultural identity of Europe, which had to be (i) general enough to include all those willing and able to participate in this project, but, at the same time, (ii) specific enough to exclude those unwilling or inadequate in this respect and, moreover, (iii) elastic enough, on the one hand, (iii.1) not to fundamentally threaten the members' sovereignity, (iii.2) not to definitively exclude those who, although not yet a part of this project, would show willing, in principle, to take the necessary steps in this respect, both the initiators and the continuers of this unification project preferred to indefinitely delay addressing this issue, focusing rather on instrumental, more easily solvable, economic and legal aspects. The hope was that, as long as these latter issues would be sufficiently well addressed, the cultural and identity issues would go away by themselves. Stephan Elbe's conclusion seems to be heading the same way:

"*After all, the founding fathers of the European project had deliberately avoided an overtly revolutionary process of European federalism, opting instead for a strategy that would achieve unification of Europe more gradually. By focusing on piecemeal and sectoral integration it was hoped that cooperation between states was more likely to ensue in the long run, and that such cooperation could, in turn, breed a habit of further cooperation which would induce ever greater steps towards integration. Eventually loyalties would begin to shift from nation-states to supranational institutions. In this way the functionalist mode of integration might over time culminate in a federal Europe. The founding fathers had thus adopted a policy that did not cast the European question in spiritual or philosophical terms, deliberately refusing to deploy new ascetic ideals. Instead it placed economics before politics, making the latter a function of the former, and relied on the logic of the market to drive forward the political project of Europe*[5]."

Although maybe a little exaggerated, one cannot deny the fact that the view criticized by Elbe in the previous statement is one of the most influential within the decision making process of EU integration. A *formal Europe*, understood as a techno-bureaucratic community and led mostly by the market logic

[4] Ernst B. Haas, The Uniting of Europe: Political Social and Economical Forces 1950–1957, London: Stevens & Sons, 1958, p. 16.
[5] Stephan Elbe, *Europe: A Nietzschean Perspective*, Routledge, New York, 2003, pp. 80.

constituted, for many Europhiles, an important reference system. Another critical voice asks in this respect:

"How can one possibly ask millions of citizens to think in European terms, to give up the usual national state framework and to adopt a new entity with a symbolic value reduced to rules, regulations and quotas[6]*?"*

Given that culture is one of the fundamentally defining aspects of a human community and that, consequently, the legitimacy of the political structures of any given community depends upon it, it is very likely that its neglect bring, sooner or later, a legitimacy crisis. And in my opinion, this is precisely what the European Union goes through presently: from the problems in Greece to the ones stemming from the massive immigration wave, the Brexit and so on.

As stated earlier, my basic claim is that all these problems derive from the way the European Union addressed (or rather failed to address) the cultural dimension of the integration process: the latter was, on the one hand, treated as a secondary issue, on the other, to the extent that it was taken into account, it was conceived by analogy to the way it was used during the process of edification of the national state. And I think this would not be the best model in such an endeavor. The motives would be the following:

I. The construction of the national state sought to create a unitary and centralized political entity (i.e. with *legitimate monopole over the collective violence*) and not a federative or even confederative political entity, based on the free adhesion of its members.
II. The linguistic ties: the national state was, in most cases, more or less coercively coagulated around a language (that got to become) common and specific to a certain people, thing to which the EU could not have access for obvious reasons.
III. The religious ties: religion constituted a very important cohesive factor in the edification of the national states, thing to which the EU, as *secular and secularizing* institution, was again denied access.
IV. The warlike tradition of the European states: war constituted one of the most important factors involved in the construction of the European national states, aspect to which a *peaceful* political project, as the EU always claimed to be, could not and would not resort.
V. The kind of unity aimed at: unity by (usually coercive) homogenization in the case of the national state vs. unity by diversity in the case of the EU.

The technological revolutions took all these aspects to their climax. A good analysis of the impact of the impact of the industrial revolutions upon the edification of the modern national state is provided by the Dutch historian Peter Rietbergen:

"Due to the demands of the mechanization of industry, the nineteenth century brought an increasingly far-reaching division of labour; this contributed to the genesis of many parallel, but by and large separate sociocultural networks and thus ultimately furthered the advancing process of individualization. At the same time, standardization led to both the expansion and the internationalization of production. The consumer culture that developed increasingly crossed the borders of states, nations and their traditions, creating a first phase of 'globalization'.

However contradictory it may seem, the national state yet proved itself, even increasingly so, the most adequate framework for all these progressive developments. Nationalism was—and perhaps is—both a component of and a reaction to the 'processes of modernization' which the economic and political revolutions expressed, processes which should more appropriately be called 'processes of change', since both 'modernization' and 'progress' are to a large extent immeasurable phenomena, mainly moral and, thus, subjective categories.

On the one hand, old certainties were lost, on the other, a strong state was clearly an advantage in growing international competition. Hence, from the late eighteenth century onwards, cultural notions were increasingly linked with politics in an attempt to achieve a sense of identity and thus of unity that, soon, acquired rather extreme dimensions.

Nationalism became an ideological instrument used not only to reconcile the disparate and often conflicting sociocultural elements and regional identities that made up the European states but also to buttress these states' expansionist politics[7]"

In other words, the culture of the national state was, at least since the 19th century, politicized to the extreme, becoming more of an ideological weapon of the nationalist expansionism than a mere systematic expression of a Weltanschauung. As such, it could not have provided an adequate reference system for a seemingly peaceful and integrative political project as the EU. But is something like this possible? I think the answer is 'yes' and that one solution might come from a rather surprising direction: Carl Gustav Jung's analytical psychology. Obviously, this is the subject of the next section.

Consequently, I think that in order to overcome its present legitimacy crisis, the European Union must (i) start taking the cultural dimension of integration more seriously and (ii) seek to avoid, in this respect, the cultural models developed during the historical creation of the national state.

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[6] Ariane Chebel D'Appollonia, 'National and European Identities between Myths and Realities', in Ulf Hedetoft (ed.), *Political Symbols, Symbolic Politics*, Ashgate, Aldershot, 1998, p. 65

[7] Rietbergen, Peter, *Europe: A Cultural History*, Routledge, New York & London, 1998, pp. 328

3. Carl Gustav Jung's analytical psychology

The most famous notion related to Jung's name is the *collective unconscious*. The following passage clearly states Jung's basic thesis and concepts in this respect:

"*My thesis, then, is as follows: In addition to our immediate consciousness, which is of a thoroughly personal nature and which we believe to be the only empirical psyche (even if we tack on the personal unconscious as an appendix), there exists a second psychic system of a collective, universal, and impersonal nature which is identical in all individuals. This collective unconscious does not develop individually but is inherited. It consists of pre-existent forms, the archetypes, which can only become conscious secondarily and which give definite form to certain psychic contents*[8]."

In analyzing and interpreting Jung's thought I have found it useful to distinguish between *entitative* and *functional* concepts. Basically, the entitative concepts stand for psychic entities with a distinct and discernable structure, i.e. for some sort of *psychic organs*, as Jung seems to understand them: Self, ego, archetype, shadow, anima/animus, complex etc[9].. The *functional* ones, on the other hand, stand for the processes taking place within and among these psychic entities, processes whose specific character and evolution obviously derive from the structure and the state of the aforementioned entities: individuation, symbolization, dream, projection, introjection, repression, actualization, relativization, synthesis. In principle, the functional concepts are supervenient on the entitative ones.

I will start by following James A. Hall[10] in distinguishing between the four levels of the Psyche (at least according to Jungian analytic psychology):

1. The personal self-awareness, in other words *our daily self-aware minds*, namely our reflexive-apperceptive capacity for consciously following with a sense of personal identity everything happening within our experience (be it internal or external). The history of this concept is so vast that any attempt in summing it up in these few pages would be destined to fail. As such, in attempting to offer, at least, an essential glimpse of the matter, I will just mention here Kant's perspective that places *intelligence* at the basis of self-awareness, that is our capacity for spontaneously generating a representation of our own existence, i.e. *of the fact that I am* (not necessarily also of *how I am*, this latter aspect having more to do with *self-knowledge* than with pure self-awareness):

"The *I think* expresses the act of determining m y existence. The existence is thereby already given, but the way in which I am to determine it, i.e., the manifold that I am to posit in myself as belonging to it, is not yet thereby given. For that self-intuition is required, which is grounded in an a priori given form, i.e., time, which is sensible and belongs to the receptivity of the determinable.

Now I do not have yet another self-intuition, which would give the determining in me, of the spontaneity of which alone I am conscious, even before the act of determination, in the same way as time gives that which is to be determined, thus I cannot determine my existence as that of a self-active being, rather I merely represent the spontaneity of my thought, i.e., of the determining, and my existence always remains only sensibly determinable, i.e., determinable as the existence of an appearance. Yet this spontaneity is the reason I call myself an intelligence[11]."

2. The personal unconsciousness has to do with *everything that is unawarely unique to person's Psyche*[12]. In other words the personal unconsciousness contains everything related to a person's psychic existence that does not involve his/her sense of a *biographic identity*; and I think the latter aspect should be stressed because, despite their name, the unconscious phenomena do not lack the aforementioned Kantian self-consciousness as *intelligence* (i.e. one's capacity for spontaneously generating a representation of oneself as existing), but only the *biographic material* within which this is usually embedded in our daily lives. Dreams, for example, always suppose an *oneiric self* that perceives and interacts with the oneiric material. As such, the dream is also always someone's, i.e. *mine* – in a more general sense, this could also be taken as another proof (maybe from an unexpected direction) in favor of the Kantian thesis according to which the original-synthetic apperception constitutes the *sine qua non* precondition of any conceivable experience, be it exterior or interior[13].

Freud has described the personal unconsciousness as that part of the psyche reserved for the complexes generated by the repression of the primary libidinal drives, a process that, according to him, accompanies the entire ontogenesis of the individual. Strictly with respect to the personal unconsciousness Jung , actually, does not have much to

[8] C.G. Jung, "The Concept of the Collective Unconscious" in *Collected Works IX*, Part I, 1981, pp.43/parr.90.

[9] In what follows I will refer only to the most important of them, an exhaustive analysis of all the entitative and functional concepts in Jung's psychology requiring much more space (and time(:) than a mere article.

[10] Hall, James A., *Jungian Dream Interpretation: A Handbook of Theory and Practice*, Inner City Books, Toronto, 1983.

[11] Immanuel Kant, *The Critique of Pure Reason*, tr. by Paul Guyer & Allen W. Wood, Cambridge University Press, Cambridge, 1998 pp. 260/parr. B 157-158.

[12] Hall, James A., *Jungian Dream Interpretation: A Handbook of Theory and Practice*, Inner City Books, Toronto, 1983.

[13] On the basis of such considerations some authors label, quite counterintuitively, both Freud and Jung as neo-Kantian structuralists. See Adams, M.V. „The Archetypal School" in Cambridge Companion to Jung, Polly Young-Eisendrath and Terence Dawson (Ed.), Cambridge University Press, 2008, pp.107-124.

object or add to Freud's view: this is, according to both, the field of those drives which are denied, for certain reasons, direct access to the conscious reality, as such remaining confined to this obscure realm out of which they constantly seek an escape to the conscious world in a disguised, dissimulated form.

3. The collective consciousness has to do with *the official cultural world*, what in the German Romanticism was called *Zeit-/Volksgeist* (the Spirit of the Age/Community): the norms, symbols, values, myths, practices by which a given human community explicitly functions (they make the object of education and intermediate both the intra- and inter-communitary relations). We will come back to discussing the collective consciousness after clarifying the basic aspects of the collective unconsciousness. I have preferred this order because, fog Jung and the Jungians, in principle, everything included in the former is based, in one way or another, on the *tacit infrastructure* of the latter: "Archetypal forms that are enshrined cultural institutions become the tacit furniture of the collective conscious mind."[14]
4. The collective unconsciousness or the *objective Psyche*, as Jung sometimes cals it, is by far the oldest stratum of the human psyche, *unspecifically belonging to each individual by heredity*. On the backdrop of the collective unconsciousness, the phylogeny irrupts into the ontogenesis, i.e. the psychic development of a person follows certain trans-individual archaic patterns emerged in the course of the phylogenetic evolution. Jung inferred the existence of this stratum of the psyche by constantly noticing, in his clinical practice, the fact that some events and processes on the level of the individual unconsciousness reproduce certain absolute models absolutely independently of the biography of the respective individual, therefore that could not be explained in terms of the Freudian Id-ego-Superego dialectics and that, all the more, appeared, actually, to make it possible.

In Jung's thought, the *collective unconscious* or the Self (*Selbst*) has, basically, three hypostases with respect to the psyche:

I. It is the psyche as a whole, i.e. as a specific and autonomous ontological realm of the human Spirit;
II. The central archetype, that is the supreme regulative authority within the hierarchy of the psychic structures;
III. The main reference system of the individual psychological becoming.

In other words, the Self constitutes, concomitantly, the *psychic substance* into which the ego is immersed, its origin and the model of personality which it[15], as the center of the conscious existence, attempts, voluntarily or not, to overtake and emulate.

As noticed, the constitutive substructures of the collective unconscious are the so called *archetypes*. Their existence is always felt but never fully perceived. In fact, according to Jung, they cannot be explicitly and directly observed, but only postulated, i.e. *necessarily guessed* if you will on the basis of their influence upon the perceivable contents of the psyche (complexes, archetypal images etc.).[16] As such, we could say that the archetype corresponds rather to the recurring tendency of structuring certain types of images in determined ways, than to a specific concrete psychic image. For those familiar with Kant, we could say that the archetypes fulfill the same role that in the *Critique of the Pure Reason* was ascribed to the pure concepts of the understanding (i.e. the categories) and of reason (i.e. the Ideas), the existence of which could not be directly shown on the empirical level, but only *transcendentaly deduced* or postulated, that is presupposed with necessity by the *sine qua non* preconditions of an experience such as ours. In fact, Jung himself promotes at times such an interpretation:

"One could also describe these forms as categories analogous to the logical categories which are always and everywhere present as the basic postulates of reason. Only, in the case of our 'forms' we are not dealing with categories of reason but categories of the imagination. The original structural omponents of the psyche are of no less surprising a uniformity than are those of the body. The archetypes are, so to speak, organs of the prerational psyche. They are eternally inherited forms and ideas which have no specific content. Their specific content only appears in the course of the individual's life, when personal experience is taken up in precisely these forms[17]."

Unlike the categories however, which are essentially *neutral* and *impersonal*, the archetypes are more personally, mundanely and pragmatically oriented, i.e. the *presuppose and open up a world* (as a system of meanings and practices), at the same time anticipating concrete human ways of being within it (in other words, *roles*): maternal/paternal, sexual, educative, aggressive, creative, cynegetic etc..

As such, the primary conditioning by the archetype of the personal experience goes along with a secondary and opposed conditioning, *i.e.* by the particular psychological event of the archetype. Jung's explanation would be the following: the archetype is actually only a *necessary latency* (in the form *if → then*), a *formal receptacle* that in order to actualize itself must be filled with the *psychic matter* of the personal experience – when the corresponding individual psychological event arises, it triggers the archetype and the correlative psychic process. Consequently, the ego, as the center of the individual

[14] Hall, James A., *Jungian Dream Interpretation: A Handbook of Theory and Practice*, Inner City Books, Toronto, 1983, pp.114.
[15] The ego, that is.
[16] Not unlike the existence of the planet Neptune, for example, was initially inferred from its gravitational pull upon Uranus.
[17] Jung, C.G., "Psychology and Religion: West and East", in CW 11 pp. 845.

consciousness, displays a constant tendency towards some sort of *metonymic abuse*, that is of taking over and substituting the whole, i.e. the Self along with the entire archetypal system, due to the fact that it (the ego) is the one that provides (and experiences) the triggering events of the unconscious process. This accounts for our growing tendency, both individual and collective, of automatically taking everything happening within the psyche as of a personal and conscious nature. However, we must always bear in mind that despite this secondary conditioning of the collective unconscious by the personal psyche, the primary determination is the opposed one, i.e. by the collective unconscious of the individual psyche – adapting Kant's words, we could say that *the fact that any experience starts with the personal psyche does not mean that it originates entirely in the personal psyche*. In fact, in his cultural psychology studies, Jung will try to understand modernity and its correlative phenomena precisely as a progressive (and actually unrealizable) historical assertion of the individual consciousness against the collective unconscious:

"The iconoclasm of the Reformation, however, quite literally made a breach in the protective wall of sacred images, and since then one image after another has crumbled away. They became dubious, for they conflicted with awakening reason. (…) I am convinced that the growing impoverishment of symbols has a meaning.It is a development that has an inner consistency. Everything that we have not thought about, and that has therefore been deprived of a meaningful connection with our developing consciousness, has got lost[18]."

In nuce, the archetypes are not inborn ideas but only purely formal categorical (ideational) potentialities that must be experientially actualized. In his study "The Relation of Analytical Psychology to Poetry" Jung refers to the archetypes as *innate possibilities of ideas giving shape to the contents accumulated through personal experience*. As such, their role with respect to personal experience is rather *regulative*, that is determining the ordering of the psychic contents within certain default patterns, than constitutive. They are intentionally oriented toward consciousness to the extent that they become actual only insofar being filled with the *psychic matter* of personal experience.

Moreover, Jung refers many times to the archetypes as unconscious images of the instincts. In other words, the instinct, defined by him as a *physiological drive as perceived by the senses*, always carries with it a series of phantasms and symbolic images whose psychic *eidos* is precisely the archetype. In another study, "The Concept of the Collective Unconscious"[19] he explicitly refers to the archetypes as *copies of the instincts themselves*, respectively *fundamental models of instinctual behavior*. From this perspective, the archetype seems to include not only a purely psychological layer (the *image*), but also a nervous and ultimately behavioral one (coming quite close to the Freudian notion of *nervous drive*).

As such, in order to understand more clearly the way an archetype, once triggered, seeks realization within the individual personality, a few points concerning the notion of *complex*, that Freud and Jung share, are in order. Basically, for Jung, the complex is the personal unconscious product of the interaction between the collective archetypal underlayer of the Psyche and conscious experience. For Freud, on the other hand, the problem has more to do with the interaction and confrontation of the individual unconscious and, shall we say, social or cultural demands. As known, much of Freud's work was dedicated to describing, explaining and interpreting the dialectics of the *vital drive* (*libido*), which was governed by the pleasure principle and whose realization was, consequently, felt as satisfaction, a complicated and contradictory process during which it had to either comply with, or fool the exigencies of the ego and super-ego (governed by the so called *reality principle*). In other words, in Freud's view, the complexes arise precisely as a result of the constant repression of certain drives which the ego and the super-ego find unacceptable – more precisely, once repressed, they do not just vanish but are cast away into this dark region of the individual psyche, i.e. the unconscious, from where they constantly seek an escape in a dissimulated form. According to Freud (but not also to Jung), this is actually the basis for the entire symbolic-sublimative activity of the human spirit, i.e. culture. In other words, from his perspective, everything having to do with dreaming, art, mythology, politics and even sports constitutes, in fact, nothing more than the product of the perpetual attempts made by this ostracized Dionysian pulsional sublayer to symbolically integrate itself in the conscious reality.

Jung, on the other hand, acknowledges the relative (but substantial) validity of Freud's interpretation of the complex, but *deepens and widens* its causal basis much beyond mere sexuality or aggression, rooting the entire libidinal dynamics in the archetypal structure of the collective unconscious. According to Jung, Freud's perspective does not seem capable of explaining why the experience of the constant repression of certain unacceptable drives always tends to crystallize in specific and recurrent patterns on the level of the individual unconscious. For him, this tendency of the individual unconscious to assimilate in a specifically determined and recurrent way certain experiences within complexes proves the influence of some broader trans-individual structures, namely the archetypes. James A. Hall provides the following Jungian definition of the complex: "a group of related ideas and images, held together by a common

[18] C.G. Jung „The Archetypes and the Collective Unconscious" in CW IX, pp. 12-14, par.22/28
[19] C.G. Jung CW IX

emotional tone and based upon an archetypal core."[20] Basically, every archetype is a *psychic eidos* that instantiates itself on the level of the individual unconscious in a specific complex whose appearance depends upon the personal life of the individual in cause. One example in this respect is provided by another Jungian psychologist, Anthony Stevens[21]: in children, the maternal archetype instantiates itself in the Mother complex according to the rules of contiguity and similarity; as such, the close and constant presence of someone with characteristics sufficiently similar to those claimed by the maternal archetype triggers in the soul of the child this archetype which acquires, during the individual's life, acquires an ever more specific shape in the form of the individual Mother complex.

Mutatis mutandis, a complementary process takes place in the mother's soul. The conjunction of the two processes generates a special kind of synthesis of the two personalities (*participation mystique*), which can cover the entire early and middle childhood of the individual in cause.

However, in understanding these issues we must keep in mind that the evolution of the collective unconscious follows a specific and autonomous path that does not necessarily depend upon the facts of the personal biography. As such, we should not take the previous example in the sense that the presence of a person corresponding to the specifications of the mother *causes* the archetype and not even, necessarily, that it *pulls it out of latency*. When the time comes, the archetype activates itself irrespective of whether in the factual life of the child there is a mother or not. But if for some reason the archetype does not find fulfillment on the level of the conscious life of the individual, the unconscious will spontaneously seek to compensate, i.e. (1) to realize the respective archetype beyond the conscious life of the individual in cause and, at the same time, (2) to press him/her into realizing it on the level of the conscious life. This compensation tendency may take the form of dreams, neuroses or of all the *troubles and turmoils* specific to the transitional periods in the life of an individual. Jung brings his own example in this respect, in his autobiography, *Memories, Dreams, Reflections* referring to a certain period of his childhood when his mother, due to certain familial issues, was absent for a relatively long time. According to his self-analysis, in this situation, he projected the maternal archetype upon the maid who acquired consequently an outmost importance in the development of the child Jung. In time, her figure was assimilated to the maternal image and thereby became representative for femininity in general. However, Jung adds, in his case, the typical sentiments associated with motherhood, i.e. closeness, warmth, protection were grafted upon a fundamental lack of trust with respect to femininity, derived from his mother's *original betrayal*, a mistrust that followed Jung for a substantial part of his life.

As such, in a general sense, the ego-Self relation could be understood through Schopenhauer's analogy of the strong blind man carrying on his back a cripple (with sight): the *seeing cripple* has the impression that he has the role (and power) of telling the strong cripple where to go, when in fact the latter can go wherever he wants, irrespective of what the cripple tells him. The seeing cripple can either take things as they are and reconsider his position accordingly, or he can resort to some sort of compensatory self-delusion and claim that he wanted all along to go precisely where the blind was carrying him.

The methodic analysis and moderation of this more or less natural inflation tendency of the ego with respect to the Self is an important aspect of Jungian analytical psychology. In short, the (endogenous) causes behind this tense relationship between the ego and the Self are the following:

1. The tendency of the ego to replace the Self as the center of the Psyche and, consequently, to subdue it entirely to the personal consciousness (due to the fact that it[22] is the one that provides and experiences the life content of the archetypes).
2. Given its inherent limitation, the perspective of the ego is always unilateral and, therefore, even if it attempts to realize an archetype, on the level of conscious reality, it will not be able to fulfill the entire array of its meanings and demands. More precisely: the aspects which get realized are integrated within the personal identity; but the frustration originated with the unrealized ones will press the ego towards realizing them as well. However, the realization is again partial, so the process restarts within a new tension and so on.

The ego follows with respect to the Self a perpetual dialectics in which the elements that are initially conjoined (synchronically, within the Self), subsequently get separated (on the level of the ego, given its unilaterality) and then get synthesized again, diachronically, through their successive fulfillment, in one way or another, on the level of the conscious personality and life of the individual in cause. This is what Jung calls *individuation* and its driving force is the so called *transcendent function* of the unconscious realized through symbolization. In *Aion* Jung writes:

"The one and only thing that psychology can establish is the presence of pictorial symbols, whose interpretation is in no sense fixed beforehand. It can make out, with some certainty, that these symbols have the character of "wholeness" and therefore presumably mean wholeness. As a rule they are "uniting" symbols, representing the conjunction of a single or double pair of opposites, the result being either a dyad or a quaternion. They arise from the collision between the conscious and the unconscious and from the confusion

[20] Hall, James A., Jungian Dream Interpretation: A Handbook of Theory and Practice, Inner City Books, Toronto, 1983 pp.61
[21] Stevens, Anthony, On Jung, Routledge, 1990
[22] I.e. the ego.

which this causes (known in alchemy as "chaos" or "nigredo"). Empirically, this confusion takes the form of restlessness and disorientation. The circle and quaternity symbolism appears at this point as a compensating principle of order, which depicts the union of warring opposites as already accomplished, and thus eases the way to a healthier and quieter state ("salvation"). For the present, it is not possible for psychology to establish more than that the symbols of wholeness mean the wholeness of the individual. On the other hand, it has to admit, most emphatically, that this symbolism uses images or schemata which have always, in all the religions, expressed the universal ground, *the Deity itself*[23]."

For Jung, in other words, the symbol, be it oneiric, mythic, artistic and so on, has as main function the compensation of the insufficiency of the ego with respect to the Self, by relativizing the initial opposite terms, on the level of the conscious life, with respect to their encompassing archetype(s) and, ultimately, to the Self as the all-encompassing collective unconscious. As you can notice, in this model, the conflicts between the opposite elements are not repressed in order to be tempered or settled, but get transcended by relinking them to their initial encompassing archetype and, ultimately, to the Self. We might say that a specific aspect of Jungian therapy resides in the fact that it does not so much seek to alleviate the symptoms, but rather to amplify the pathologic images so that the ego gets to experiment the archetypal roots of the complexes, by avoiding however its *dissolution in the archetypal sea*, that is by keeping its sense of self-identity. Ego's coherent capacity in keeping a constant connection to the Self results in the formation of an ego-Self axis which can bring about, given the appropriate circumstances, a fortification of the ego through the provision of an explicit reference system in the course of personal becoming. But this positive outcome takes place only provided that the ego is strong enough to withstand this experience of the Self, otherwise running the risk of being engulfed[24] by the Self wich may result in very serious psychic pathologies (as schizophrenia for example).

A distinction that is central to Jung's thought, but that, up to this point, would have been prematurely introduced, is the one between the archetype and the archetypal image. While the notion of archetype, as we have seen, refers to the subjancent and indirectly observable tendency of the Psyche to structure our personal experience within certain archaic and universal patterns, the so called archetypal image represents the concrete image(s) a certain archetype acquire(s) within a given historical and cultural context. Following Jung, James A. Hall offers the following definition for the archetypal images: "Archetypal' images are fundamental and deep images formed by the action of archetypes upon the accumulating experience of the individual psyche. Archetvpal images differ from the images of complexes in having a more universal and generalized meaning, often with numinous affective quality."[25] What differentiates them from the images of the complexes is their universal meaning, on the one hand, their numinous quality, on the other.

The archetype is therefore as a crucible, or an alchemic vessel, to put in in more Jungian terms, within which psychic materials of different sorts and origins (i.e. personal conscious, personal unconscious, collective conscious etc.) get molded. As previously mentioned, the ego, in his *average everydayness*, participates in a collective layer of consciousness consisting in values, existential stances, shared images and sentiments characteristic of the any given cultural context. The psychic materials originating in this layer are assimilated by the collective unconscious, synthesized and shaped in specific (typological) images. In other words, in his dialectics with respect to the ego, the Self, although restating the same messages, uses the language specific to each and every age and culture. As such, the archetypal images restrict, adapt and apply the archetypes to a specific cultural context. On the other hand, no archetypal image, however wide in its semantic array, cannot provide an exhaustive expression of its original archetype(s), and, precisely by this insufficiency, enters (in a secondary sense) in contradiction with the archetype(s), fact which pushes the collective unconscious into finding a new archetypal image, with a greater synthetic capacity and so on. Jung explains by this kind of dialectics, both the becoming of the personal psyche and that of cultures in general.

As such, for example, every individual has a threefold relation with the representation of the mother:

I. The Mother archetype (corresponding to the maternal principle);
II. An archetypal image of the Mother, shaped by the cultural context of the individual in cause;
III. An image of the personal mother, corresponding to the mother complex as specifically instantiated in the personality of every individual;

The personal instantiations of the mother image synthesize, most of the times, aspects derived from all these levels of the psyche, one of the basic finalities of Jungian therapy being precisely that of discerning, and actually enabling the patient to discern, among them.

On the level of the collective consciousness we encounter an equivalent process to that of the personal consciousness, with the difference that now the archetypal images, and not the complexes, take on the main role. In other words, the archetypes become embodied, or rather embody themselves, on the level of the collective consciousness, in different images of historical and cultural significance – epochal individuals (Charles the Great, Leonardo da Vinci, Napoleon etc.), typological artistic representations

[23] Jung, Carl G., "Aion: Researches into the Phenomenology of the Self" in CW 9, par. 304.
[24] As Jonas, for example.
[25] Hall, James A., *Jungian Dream Interpretation: A Handbook of Theory and Practice*, Inner City Books, Toronto, 1983 pp. 10-11.

(The Virgin and Child, the *Danse Macabre*, the self-portrait etc.), institutions, systematized, as previously mentioned, into a *tacit infrastructure of the collective consciousness*. According to Jung, all these represent, along with their correlative practices, archetypal images, as such reducible, despite their diversity, to their original archetype. Once constituted, they are projected, i.e. their meaning, along with their correlative feelings and behaviors, gets transferred over the corresponding events and characters on the level of everydayness. The projection process constitutes, in Jung's view, the interface between man and nature in all human cultures; however, while in primitive cultures, this happens spontaneously, explicitly and uncritically, in the modern ones, this relation gets more complicated due to the (over)expansion and potentiation of the ego and its correlative faculty: rational-analytic thought. Especially relevant in this respect are the next two passages from „The Archetypes and the Collective Unconscious":

"Primitive man is not much interested in objective explanations of the obvious, but he has an imperative need- or rather, his unconscious psyche has an irresistible urge - to assimilate all outer sense experiences to inner, psychic events. It is not enough for the primitive to see the sun rise and set; this external observation must at the same time be a psychic happening: the sun in its course must represent the fate of a god or hero who, in the last analysis, dwells nowhere except in the soul of man. All the mythologized processes of nature, such as summer and winter, the phases of the moon, the rainy seasons, and so forth, are in no sense allegories of these objective occurrences; rather they are symbolic expressions of the inner, unconscious drama of the psyche which becomes accessible to man's consciousness by way of projection-that is, mirrored in the events of nature[26]*."*

"Whether primitive or not, mankind always stands on the brink of actions it performs itself but does not control. The whole world wants peace and the whole world prepares for war, to take but one example. Mankind is powerless against mankind, and the gods, as ever, show it the ways of fate. Today we call the gods 'factors,' which comes from facere) 'to make.' The makers stand behind the wings of the world-theatre. It is so in great things as in small. In the realm of consciousness we are our own masters; we seem to be the 'factors' themselves. But if we step through the door of the shadow we discover with terror that we are the objects of unseen factors. To know this is decidedly unpleasant, for nothing is more disillusioning than the discovery of our own inadequacy. It can even give rise to primitive panic, because, instead of being believed in, the anxiously guarded supremacy of consciousness-which is in truth one of the secrets of human success-is questioned in the most dangerous way. But since ignorance is no guarantee of security, and in fact only makes our insecurity still worse, it is probably better despite our fear to know where the danger lies. To ask the right question is already half the solution of a problem. At any rate we then know that the greatest danger threatening us comes from the unpredictability of the psyche's reactions. Discerning persons have realized for some time that external historical conditions, of whatever kind, are only occasions, jumping-off grounds, for the real dangers that threaten our lives. These are the present politico-social delusional systems. We should not regard them causally, as necessary consequences of external conditions, but as decisions precipitated by the collective unconscious[27]*."*

4. Globalization and EU: A Jungian Analysis

How can these considerations help us in our discussion of (i) the meaning of the globalized world and (ii) the correlative EU legitimacy crisis?

But first, a summative overview: Following Jung, Husserl and Jaspers, my understanding of the *meaning of the concept of meaning* would amount to the following: any personal or collective representation, partaking in the (quasi-)systematic structure of (some-)one's self-understanding against the backdrop of one's encompassing world (both culturally and existentially) and concomitantly serving a descriptive, explicative and teleological function within the intentional flux of self-awareness, respectively within one's interaction with the world and fellow humans. Zaki Laïdi seems to be in agreement with such characterization when writing that the concept of meaning essentially involves three aspects: a ground, an identity feeling and a telos.

Moving forward, I think a proper way of interpreting the process of globalization would be through Edward Lorenz's Butterfly Effect, that is as an accelerated *interdependentization* of the global causality, respectively as a marked increase, both extensively and intensively, in the interdependence between the different fields, levels and regions of human society, civilization and culture. As such, against the backdrop of globalization, phenomena that would previously have had only local or, at most, medium level consequences, can now reach global impact (and that ever more rapidly). Through globalization the world self-compressed, if you will. Consequently, humanity became ever more exposed to endogenous unpredictability for the management of which it developed, mostly during the 20th century, various projects, systems or sub-systems of collective control. The European Union is one of them – I think we might count as other examples thereof, the League of Nations, the various world peace or international security organizations, the totalitarian systems and, more recently, even the various IT control systems.

[26] C.G. Jung „The Archetypes and the Collective Unconscious" in CW IX, pp. 6/par. 7
[27] C.G. Jung „The Archetypes and the Collective Unconscious" in CW IX, pp. 23/par.49.

But why would all this induce a world crisis of meaning, in other words, why would globalization threaten to devoid humanity (or significant parts of it) of ground, identity or finality? My answer would be that, hopefully, this is not something inexorable, but rather contingent upon our form of globalization. In other words, although I do not think that globalization would necessarily have such nihilistic consequences, the way in which it happened to emerge along human history threatens to lead us thereto. Again, why? Because globalization essentially happened to progressively assert itself, at least since the modern age, in close connection with the overinflation of the techno-instrumental rationality and to the detriment of the teleological-holistic rationality . An explanation for this might be that the ever increasing competition between the rising nation states, spanning across the entire modern age, provided the favorable socio-political framework therefor: the techno-instrumental rationality could provide immediate and concrete advantages within such ever increasing interstate competition, the teleological-holistic one couldn't, or at least not in the short run. Of course that the Industrial Revolutions have done nothing but to accelerate and intensify this process that consequently, on the long run, has come to fundamentally reshape the European Weltanschauung. Ultimately, the mass production engendered, in ever more efficient ways, by the Industrial Revolutions has also brought, aside from technological progress and sustained increases in life expectancy, standardization, instrumentalization and massification in both cultural and existential senses. The accelerated population growth that, with certain regional differences, has accompanied globalization all through its history, has provided the favorable demographic conditions as well. As a side note, it is remarkable how the fear of the alienating effects of mass society was shared by many important 19th and 20th Centuries thinkers who were otherwise very different in terms of background or philosophical and political views: Delacroix, de Tocqueville, Marx, Nietzsche, Husserl, Freud, Heidegger, Jung, Marcuse, Ortega y Gasset etc..

All this conjoined with the marked bellicosity of the European Weltanschauung as reshaped within the aforementioned progressive interstate competition spanning all through modernity and post-modernity, created an explosive mixture: nationalism, as aggressive assertion of the alleged superiority of one's national culture, civilization and, in extreme cases, even biology, which is probably the most historically influential and poignant phenomenon in this respect.

The European Union is one of the most salient collective projects for the prevention and control of the endogenous unpredictability emergent within the context of this form of globalization. But I think that unfortunately the European Union, along its evolution, has not taken seriously enough the cultural dimension of europenity or, as much as it did, it conceived it (intentionally or not) by analogy with the models already tested during the historical construction of the modern nation state. In nuce, as noted by Stephan Elbe , the so called integration was conceived in terms of economic or political know how, rather than cultural, the basic idea (or hope) being that a purely functional integration would bring about by itself a specific culture as well. But the latter kept failing to emerge, up to the point at which the European Union has come to face the serious identity and legitimacy problems of today.

Now, on a milder note, it would be unfair to claim that the European Union has completely neglected the cultural dimension of integration, but, on the other hand, we could rightfully claim that, to the amount that it has attempted to do something in this respect, the so called European culture was mainly conceived by analogy with the models pretested within the context of the historical edification of the modern nation state. In a course way, one might claim that the European Anthem, Flag and Day are things that, by their very source and symbolic form are rather associated, within the collective psyche, with the national conflictual entities and therefore in contradictory tension with the E.U. motto: United in diversity! In Jungian terms we might say that, onto them, as symbolic forms, i.e. Anthem, Flag etc. the history of the conflicts within which they appeared and evolved as such gets projected, consequently the aforementioned motto, the circle on the flag (as a supposed symbol of unity) or the fact that the anthem is Ode to Joy appearing in this context as unconvincing.

What solution could there be to all this? Well, firstly and quite obviously, the EU should take the cultural dimension of integration much more seriously than it has until now and that especially with respect to its holistic-teleological aspect. Secondly, it should somehow attempt to determine and bring forth the subjacent cultural layer of Europenity, against the backdrop of that of the humanity in general and then attempt to non-abusively reinterpret in its terms the elements of national specificity.

Here, the Jungian distinction between the archetype and the archetypal image may prove very useful. As we know, according to Jung, the archetype is the constitutive substructure of the collective unconscious, fulfilling a regulative role with respect to the personally lived experience, be it conscious or unconscious. The archetypes provide us with certain trans-individual phylogenetic schemata for the typologization of the collectively or individually relevant experiences, i.e. the content of the latter is integrated within such essential forms (eidé) belonging to humanity in general. The archetypal images, on the other hand, are the result of the interaction between the archetypes and the specific culture of a certain community or age: they translate, if you will, the meaning of the archetypes in the imagological language of the present. As such, while the archetypes are hereditary, the archetypal images are cultural. One of the fields that express most clearly these dialectics between the archetype and the archetypal image, on the

one hand, the collective and the personal unconscious, on the other, is quite expectedly art:

"The creative process, so far as we are able to follow it at all, consists in the unconscious activation of an archetypal image, and in elaborating and shaping this image into the finished work. By giving it shape, the artist translates it into the language of the present, and so makes it possible for us to find our way back to the deepest springs of life. Therein lies the social significance of art: it is constantly at work educating in the spirit of an age, conjuring up the forms in which the age is most lacking. The unsatisfied yearning of the artist reaches back to the primordial image in the unconscious which is best fitted to compensate the inadequacy and one-sidedness of the present. The artist seizes on this image, and in raising it from the deepest unconsciousness he brings it into relation with conscious values, thereby transforming it until it can be accepted by the minds of his contemporaries according to their powers."

As such, a substantive foundation for the European unity could be found precisely by laying bare the archetypal substratum of the allegedly specifically national images, institutions and behaviors, in other words through their archetypalization : roughly, this would involve their reinterpretation and determination as different archetypal images of the same archetype (or series of archetypes). The obvious advantage provided by the eventual success of such an undertaking is that it would render possible the harmonious integration of the specifically national elements without any homogenization, given that an archetype can be expressed in a potentially infinite variety of archetypal images and complexes, each valid in its own way. Understood in these terms, the historical construction of the modern nation state has actually hyperpotentiated certain images with specific relevance for certain political communities, at the same time repressing (intentionally or not) their subjacent collectively-human substratum, precisely in order to create (or one might even say invent), by semi-ordered culturalization, political communities with a specific and, most frequently, agonistic identity. In a Jungian interpretation, besides the bellicose consequences of this phenomenon, which are historically obvious enough, subtracted from their archetypal foundation, these collective representations became weak, unconvincing, artificial and, consequently, justifiable only by the nation state's monopoly on the legitimate use of collective violence, i.e. authority. The archetypalization of these elements of national specificity would render possible their harmonious and non-homogenizing integration, while at the same replenishing their psychological persuasiveness.

Another advantage would derive from the fact that the archetype is, in principle, oblivious to the distinction between secular and religious, it can be expressed in images, institutions or behaviors of both natures. Therefore the archetypalization would also allow us to close the ever expanding gap between the religious and the irreligious man, which is an ever more pressing problem in post-modernity.

At the same time and for the same reasons, the archetypalization would also allow for the integration and peaceful coexistence of elements belonging to various mythical-religious traditions, thereby instituting, again in a non-coercive and non-homogenizing way, one of the basic principles of the EU, namely tolerant coexistence: to the extent that the sacred is, in one way or another, a definitive problem for humanity, i.e. a question to which the human being is unrelentingly pushed, by its own nature, to find an answer, the way in which this happens, the answer found as well as the actual living by this answer may legitimately vary with each culture, religion and, ultimately, individual, at least as long as this does not infringe upon the others' possibility in doing the same for themselves. Archetypalization would allow for the actual and effective assertion of this form of tolerance which, I think, becomes ever more necessary in a globalized world.

But beyond all this, I think that archetypalization would, most importantly, enable humanity to overcome the most serious problem faced by today's world globalized as mass society: what Heidegger called the instrumentalizalization of Being, i.e. the understanding and treatment of all relevant aspects of both human existence and nature in general as mere resources (Bestand) for the productive complex (Ge-stell) devoid of any telos outside of production itself, a phenomenon which both him and Jung lay at the basis of all the problems related to the growing alienation of post-modernity.

In a nutshell, in my opinion, archetypalization could bring about the rebalancing of today's humanity on four fundamental levels:

I. between the techno-instrumental and the teleological-holistic dimensions of rationality;
II. between the rational consciousness and the unconscious;
III. between the individuality and the collectivity;
IV. between humanity as a whole and nature;

In other words, through archetypalization, each fact and aspect of existence would be connected (in its specificity) to the encompassing community and, through it, to humanity in general, both synchronically (the global culture) and diachronically (history).

How could this archetypalization be enacted? By what means? Although an exhaustive answer to this question is beyond my present possibilities, I think that, for the moment, I could indicate at least the field in which this process might start: art. Why art rather than other fields? Because, at least as I see it, art, by its pronounced symbolic character, holds a more direct and, maybe, intimate, relation to the unconscious (both individual and collective). Furthermore, it can engage its subject/subjects in a both passive-contemplative sense (i.e. as spectator) and active-creative (as author) and can cover, at the same time, both the individual and the collective dimensions of personality. Moreover, art

is easier and more spontaneously accessible for the common man, than other spiritual fields, all the more in our post-modern age with its unprecedented development of the information and communication technology. On the other hand, there is still the issue of whether the IT and media technology is adequate in this respect, but this, I think, should be discussed separately.

Novalis, Fichte, Schelling and the other German romantics had initially envisioned a resacralization of the world through art (Weltvergöttlichung). What I have in mind through the concept of archetypalization is something similar but, as we have seen, grounded in Jung's analytical psychology which, by its openness, mindfulness and attention to specificity, could protect this undertaking from abusive ideological distortions as it, unfortunately, was the case with the original project of the romantics.

References

- Anthony Stevens, On Jung, Routledge, 1990
- Ariane Chebel D'Appollonia, 'National and European Identities between Myths and Realities', in Ulf Hedetoft (ed.), Political Symbols, Symbolic Politics, Ashgate, Aldershot, 1998
- C.G. Jung, "The Concept of the Collective Unconscious" in Collected Works IX, Part I, 1981
- Jung, Carl G., "Aion: Researches into the Phenomenology of the Self" in CW IX, Part II, 1969
- C.G. Jung „On the Relation of Analytical Psychology to Poetry" in Collected Works XV, 1972
- C.G Jung,, "Psychology and Religion: West and East" in CW XI, 1970
- Ernst B. Haas, The Uniting of Europe: Political Social and Economical Forces 1950–1957, London: Stevens & Sons, 1958, p. 16
- Immanuel Kant, The Critique of Pure Reason, tr. by Paul Guyer & Allen W. Wood, Cambridge University Press, Cambridge
- James A. Hall, , Jungian Dream Interpretation: A Handbook of Theory and Practice, Inner City Books, Toronto, 1983
- Martin Heidegger, "Overcoming Metaphysics", in The End of Philosophy, tr. Joan Stambaugh, The University of Chicago Press, Chicago
- Peter Rietbergen, Europe: A Cultural History, Routledge, New York & London, 1998
- Pokorny, Julius, Indogermanisches etymologisches Wörterbuch, B III, Bern, München, Francke Verlag, 1959
- Stephan Elbe, Europe: A Nietzschean Perspective, Routledge, New York, 2003
- Zaki Laïdi, A World Without Meaning: The Crisis of Meaning in International Politics, Routledge, London, 1998

TRANSPARENCY IN EXERCISING PUBLIC OFFICES, PUBLIC FUNCTIONS AND IN BUSINESS ENVIRONMENT

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Abstract

The right to information is a fundamental right guaranteed to citizens by the Constitution of România, pursuant to article 31. This right may not be silenced or limited by public administration authorities who are obliged to ensure accurate information of the citizens with regard to public activity. The right to information may only be respected by an appropriate transparency level of both central and local public administration authorities. Although the assurance of the transparency of the decisional process should not become a goal in itself, it should represent a permanent concern of public authorities, dignitaries and business environment. In addition to general aspects, this article also comprises the analysis of the legal provisions in România and in the European Union regarding decisional transparency and the main causes which determine the burdening or the impossibility to implement the concept of decisional transparency among public administration authorities, causes which are due not only to authorities but also to how citizens perceive this concept. A better accountability of the leader of public administration authorities and leaders of entities in charge of social dialogue as well as public high officials with regard to the need for real involvement of citizens in the decision-making process will ensure the latter's confidence in central and local authorities, in the political and business environment and also in the result of their activities – normative acts, administrative decisions.The purpose of this article is torecognition the concept of decisional transparency represents an important means to be used in implementation of the rule of law and of the principle of accountability of public institutions

Keywords: *transparency, decision, public interest, public administration, public office.*

1. Introduction – General Aspects on Decisional TransparencyIn any democratic society, transparency represents an essential characteristic of public administration activity, whether we refer to central or local administration. Additionally, the transparency of dignitaries' activities represents a permanent concern of the democratic civil society.

According to the explicative dictionary of the Romanian language, the term "transparency" means something "which may be easily understood, guessed, obvious, clear, discerned, explicit, precise[1]."

In legal literature, the concept of transparency includes both the concept regarding free access to public interest information and the one regarding the transparency of the decisional process. Whether we refer to the free access of the civil society (citizens, groups of citizens, non-governmental organisations) to public interest information at central and local level or to the transparency in the decisional process of the central and local leading boards or even to the transparency in the decisional process of the business environment, it is imperative to know the legislative norms on decisional transparency.

The overwhelming majority of normative acts issued in Româniaare the creation of the executive power. When enforcing laws and ordinances, the Government, ministries, other state central or local institutions and also all local public administration institutions issue, on an ongoing basis, a large number of normative acts. All this corpus of legislation is published and is frequently amended without the involvement of the parties concerned, be they the ones who are to apply such acts or the ones whose activity is regulated thereby[2].

Transparency and accessibility, representativity and accountability are obviously key values on which the law makers need to keep vigil. A transparent legislative power is a legislative power open to the nation and transparent in their activity. An accessible legislative power is a legislative power which gets the public involved in the management of the law-making process[3].

The lack of decisional transparency, along with lack of civil society's confidence in the governing act and in the observance of the good governance principles, trigger off low confidence of civil society in the force and the importance of normative acts[4].

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[1] http://dexonline.ro/definitie/transparență

[2] Romanian Agency for Transparency – Transparency Internațional România "Decisional Transparency in Public Administration" – guide to citizens and administration. Laura Stefan and Ion Georgescu, Project Coordinator Oana Zabava., Ed. SC AFIR SRL Bucuresti, 2003, page 4

[3] Http://iup.oug/PDF/punlications/democracy en.pdf – Parliamentanddemocracyinthetwenty-firstcentuy: a guidegood practice, page 10

[4] Romanian Agency for Transparency – Transparency Internațional România "Decisional Transparency in Public Administration" – guide to citizens and administration. Laura Stefan and Ion Georgescu, Project Coordinator Oana Zabava., Ed. SC AFIR SRL Bucuresti, 2003., page 4

The transparency in the decisional process as well as the right to information and the right to administration are rigours imposed by several international standards materialised in:

- The Universal Declaration of Human Rights of 10.12.1948;
- The International Covenant on Civil and Political Rights of 16.12.1966;
- The Recommendation Rec (2002) 2 of the Committee of Ministers of the European Council to member states on access to official documents;
- The Recommendation Rec (2001)19 of the Committee of Ministers of the European Council to members states on the participation of citizens to local public life (6.12.2001);
- The Recommendation Rec (2001)19 of the Committee of Ministers of the European Council to members states on the participation of citizens to local public life (adopted by the Committee of Ministers on December 6 2001).

Article 1 paragraph 1 (2) of the Treaty on the European Union (TUE)[5]marks "a new stage in the process of creating an even closer union among the peoples of Europe in which the decisions are taken as openly as possible and as closely as possible to the citizen"[6].

The European Union recognises the rights, freedoms and principles provided in the Chart of Fundamental Rights of the European Union[7] and aims to adhere to the European Convention to protect human rights and fundamental freedoms. "As guaranteed by the European Convention to protect human rights and fundamental freedoms, and as resulting from the constitutional traditions of members states", fundamental rights "constitute general principles of the Union law"[8], pursuant to art. 6 paragraph 3 of TUE. The Chart of Fundamental Rights of the European Union comprises five basic principles which the public administration authorities/public institutions are obliged to observe: openness, participation, accountability, effectiveness, coherence[9].

România has taken important steps towards elaboration of normative acts which should transpose the provisions of the European Union legislation on decisional transparency and free access to information of public interest. The current legislation meets the strictest requirements and is comparable to the legislation of other countries in the European Union. Alongside the other rights guaranteed by the Constitution of România, the right to information is set forth by art. 31. Therefore paragraph 1 admits that "the person's right to have access to all information of interest public may not be restricted" whereas paragraph 2 states that "public authorities (...) are obliged to ensure accurate information of citizens in relation to public affairs and issues of personal interest".

The laws adopted on decisional transparency are: Law no. 52/2003 regarding decisional transparency, Law no. 161/2003regarding on measures to ensure transparency in the exercise of public dignity, public functions and business environment, prevention and sanctioning of corruption, Law no. 544/2001 regarding free access to information of public interest, Law no. 182/2002 regarding access to classified information and Government Ordinance no. 564/2006 regarding participation of public to decisions on environment. This work aims to focus exclusively on the sector of decisional transparency as regulated by Law no. 52/2003.

Law 52/2003 regarding decisional transparency in public administration has been initiated by the Ministry of Public Information, prepared and improved with the support of non-governmental organisations and has rapidly gone through the parliamentary procedure: it was filed with the Chamber of Deputies in early June 2002, approved by the Parliament in its final form on 19 December 2002, promulgated by the President of România on 20 January 2003 and published in the Official Gazette of România no. 70 of 3 February 2003. It started to take effects on 4 April 2003.

The democratic principles recognised to citizens by the transparency law should not be confused with democratic principles recognised to citizens by the law of free access to information of public interest[10] or with direct democracy. In contrast to the law of free access to information of public interest, which allows access of the citizen to public information managed by local or central public institution, the transparency law[11] offers the citizens the possibility to actively participate to the process of preparing some regulations, by suggestions addressed to public administration. Additionally, contrary to direct democracy, in which the final decision belongs to the citizens, the transparency law does not confer this privilege to the citizens, as this role

[5] Treaty on European Union, Journal of the European Union C 326/13, consolidated version as of 26.10.2012
[6] Treaty on European Union, Journal of the European Union C 326/13, consolidated version as of 26.10.2012
[7] The Chart of Fundamental Rights ofthe European Union, 2012/C 326/02
[8]Treaty on European Union, Journal of the European Union C 326/13, consolidated version as of 26.10.2012
[9]*Openness* –implies an active communication on one's own activity and the decisions made;
Participation – ensuring participation in all stages of a public policy, from initiation to implementation and evaluation.
Accountability – clarification of the roles played by different institutions and taking responsibility by each individual institution.
Effectiveness–public policies need clear objectives, an evaluation of the future impact and use of the previous experience in what is required at the right time
Coherence– public policies should be coherent, easy to understand and consistent. This is a need all the more so as the context of the political interventions is more and more complex.
[10] Law 544/2001 regarding free access to information of public interest, published in the Official Gazette no. 663/23 October 2001
[11] Law 52/2003 regarding decisional transparency in public administration, published in the Official Gazette of România no. 70 of 3 February 2003

will further be assumed by public administration authorities, which will decide whether they include in their bills the information and suggestions received from citizens, non-governmental organisations or business associations.

Transparency provides each citizen with the right to be informed on the decisions of public interest and creates the reference framework for the obligation of the public administration to respect this right. The decisional transparency represents an instrument easy to use in order to increase the efficiency and efficacy of the public administration.

The literature identifies several dimensions of the concept of transparency:

1. The first dimension is closely related to the free access to information of public interest, the latter representing an essential condition in achieving transparency.
2. The second dimension includes transparency in the decisional process – namely the possibility for citizens to understand the procedures used, the motivation, the vote considered when making a decision.
3. The third dimension refers to the possibility of actively participating to the decisional process, for instance through consultations.
4. The fourth dimension involves the compulsoriness of the public institutions to disseminate information ex officio.

The principle of decisional transparency creates the premise for monitoring the activity of the public administration both by citizens interested and by organisations of the civil society. On the other hand, the decisional transparency protects the individual rights as it allows the citizens to know the reason of the administrative decisions and implicitly facilitates the contestation process of such decisions by citizens in case their rights are harmed. Decisional transparency creates the legal framework which enables the citizens affected by an administrative act (or an administrative decision) to be informed with regard to its content and to know the reasons for which they were issued. Last but not least, decisional transparency represents an important means to be used in implementation of the rule of law and of the principle of accountability of public institutions[12].

The role of transparency is to prevent the actions threatening the public integrity (corruption) and to evaluate the performance of the public administration (administrative capacity).

Transparency in parliamentary activity is established by Article 12, paragraph 1 of Law no. 96 of 21 April 2006 on the Statute for Deputies and Senators, "Deputies and Senators must show transparency in parliamentary activity". This principle - of decisional transparency - joins the other principles laid down in the aforementioned normative act, namely the principle of national interest (Article 10), the principle of legality and good faith (Article 11), the principle of loyalty (Article 14). So, Parliament is the main institution of a strengthened democracy, and in its decision-making, it is concerned not only with respecting national interest, human and citizen rights, economic prosperity, sustainable development, but also transparent and open parliamentary work, so any interested person, any public institution can actively take part in the adoption of normative acts. Outside of organisms and structures created within the two Chambers of Parliament, which have the role of implementing the principle of transparency of the dignitaries' activity. The draft normative acts are brought to the knowledge of the interested public through the Prefect Institutions, which have established Committees on different levels of the society (social dialogue, elderly persons) or who through the activity of leading the deconcentrated services at the level of the counties, can coordinate the activity of analyzing, completing, modifying draft normative acts or, more than that they can submit to the Government proposals for modification or supplementing certain normative acts in effect.

2. Presenting the Law on Decisional Transparency

The transparency law implies collaboration between two partners: central and local public administration/public institutions/public services, on the one hand, and the addressees of the regulations prepared by the former, on the other hand, namely citizens, non-governmental organisations, business associations.

One knows two mechanisms by which the transparency law ensures the openness of the activities carried out by central and local public administration to citizens:

d) Participation of citizens/non-governmental organisations/business associations to the process of elaboration of regulations;
e) Participation of citizens/non-governmental organisations/business associations to the process of making decisions[13].

This law sets forth that local public authorities shall give the public the drafts of regulations prior to adopting them. Afterwards, the citizens have the possibility to formulate suggestions and recommendations on the regulations presented as drafts. Such suggestions will be analysed by the initiating authorities who will decide on the necessity to include them in the final text of the regulations. With regard to the participation of citizens to the decision making process, the laws provides for the possibility of

[12] Cobârzan, B., Dragoş, D., and Neamţu, B, Decisional Transparency in România , Accent Publishing House, Cluj - Napoca, 2008

[13] Romanian Agency for Transparency – Transparency Internațional România ”Decisional Transparency in Public Administration” – guide to citizens and administration. Laura Stefan and Ion Georgescu, Project Coordinator Oana Zabava., Ed. SC AFIR SRL Bucuresti, 2003, page 6

the parties interested to express their opinions within meetings with public authorities.

One has to admit that the transparency law confers benefits to both public administration and beneficiaries of such regulations adopted in compliance with this law:

The public administration:

a) gratuitously obtains additional information on sectors of activity which are to be affected by the regulations proposed;
b) explains the necessity of the regulations proposed;
c) removes the issues encountered in relation to the implementation of regulations due to the fact that the addressees do not know them;
d) removes the issues encountered in relation to the implementation of regulations due to deficiencies in preparing the texts;
e) gains the trust of the public opinion.

The beneficiaries of regulations:

a) gratuitously offers the public administration information on the decisions to be made;
b) acknowledge the drafts of regulations proposed by the public administration;
c) express their views on such drafts[14].

Therefore, active participation of citizens, defined as civic participation, to the act of preparing regulations, is the process by which the concerns, needs and values of citizens are incorporated into the process of decision making within public administration[15].

The transparency law sets forth in article 1 par 2 the objective considered by the lawmaker when elaborating this law:

a) to increase the level of accountability of public administration in relation to the citizen, as beneficiary of the administrative decision;
b) tostimulate active participation of the citizens to the process of making administrative decisions and the process of elaborating normative acts;
c) to increase the transparency level of the entire public administration.

In article 2, the transparency law sets the principles on which preparation of this law relies:

a) persons are previously informed ex officio on the issues of public interest which are to be debated by the central and local public authorities and on bills of normative acts;
b) upon initiative of public authorities, citizens and duly set up associations are consulted on the process of preparing normative acts;
c) active participation of citizens to making administrative decisions and to the process of preparing normative bills, in compliance with the following rules:

1. Meetings of authorities and public institutions concerned by the present law are public, according to conditions provided by the law;
2. Debates will be recorded and made public;
3. Minutes of such meetings will be registered, archived and made public, according to conditions provided by the law.
4. Some important explanations should be provided with regard to subjects of the transparency law laid down in article 4.

This article refers only to public authorities and excludes from its scope the legislative power and the judiciary power. Therefore, according to this article, the following are obliged to observe the decisional transparency law:

a) authorities of public administration: ministries, other central bodies of public administration under the Government or the ministries, their decentralised public services and autonomous administrative authorities;
b) authorities of local public administration: county councils, local councils, city halls, public institutions and services of local and county interest.

Central public authorities include: ministries (except Government), other public administration bodies reporting to the Government or ministries, decentralised public services and autonomous administrative authorities. Some clarifications are necessary in relation to such institutions:

− The Government is not mentioned in this enumeration, even though the initial draft contained provisions thereon. The argument was that all and any normative act adopted by the Government is the outcome of an initiative of a ministry and therefore the obligation for transparency is incumbent on the initiating authority to which the law refers. Consequently, even though the Government is not explicitly mentioned among the addressees of this law, the laws adopted by this body will be subjected to public debates by courtesy of the initiating institution.

− The reference to decentralised public services is excessive due to the fact that these institutions do not have responsibilities in relation to adopting such normative acts.

− The reference to autonomous administrative authorities is salutary in light of the possibility to render their activity transparent with regard to adopting of some regulations which will have an impact on a large category of individuals or legal persons.

Local public authorities include: county councils, local councils, city halls, institutions of public services of local or county interest.

[14] Romanian Agency for Transparency – Transparency Internațional România ”Decisional Transparency in Public Administration” – guide to citizens and administration. Laura Stefan and Ion Georgescu, Project Coordinator Oana Zabava., Ed. SC AFIR SRL Bucuresti, 2003., page 6

[15] Definition taken over from Eric Chewtynd and FrancesChewtynd, *Civil Participation to Improvement of Decisional Process in Local Public Administration*, Research Triangle Institute—Assistance Programme for Public Administration in Romania, Bucharest 2001

In our opinion the terms citizens and duly set up associations may only be defined in correlation with provisions of other normative acts:

a) The citizens are all citizens of România, as provided by the Constitution and the Law on Romanian citizenship, i.e. Law 21/1991[16];
b) The duly set up associations represent "all and any civic, union, employers' group or any other associative group of civic representation".

Therefore, according to the law, a duly set up association is:

- all and any non-governmental organisation set up in accordance with Ordinance 26/2000[17] regarding associations and foundations or with previous law in this matter ("Marzescu" Law, no. 21/1924). They include, for instance, employers' associations, landlords' associations, etc.
- unions, confederations, union groups regulated by Union Law no. 62/2011 – Law on Social Dialogue[18];
- other associations acknowledged by the law, such as Chambers of Commerce or associations with legal personality created in compliance with procedure of the Romanian Fund for Social Development.

The transparency law provides in article 5 exceptions from its application, namely in case of a) information on national defence, national security and public order, economic and political strategic interests of the country as well as deliberations of authorities, provided they fall under classified information, according to law; b) values, deadlines and technical and economic data of commercial or financial activities, provided their publication brings prejudice to loyal competition, according to law; c) personal data, according to law.

In our view the far too general content of the provisions of this article with regard to classified information and personal data may hinder or create difficulties upon its enforcement, as one may easily see a nonsense – rigours of this law do not apply for cases set forth in article 5, yet the information is found in these normative acts which are published in the Official Gazette and thus become public.

In the two sections of Chapter II – Procedures on participation of citizens and duly set up associations to preparation of the normative acts and to decision making - the law provides for the participation of the citizens to the process of preparing normative acts and the involvement of the citizens in adopting such act. Actually, this distinction should be clearly stipulated. The first stage consists in the procedure which occurs prior to transposing the proposal into a normative act. The second stage implies a process by which the decisional body sets that the proposal should become a binding normative act.

The law provides for the two main means by which citizens may participate to the decisional process: (1) organisation of structured citizen-authority debates and (2) their presence to public meetings of the parties directly concerned in the decisional process. In terms of differences between preparing and adopting normative acts, the law distinguishes two types of public meetings: 1. public debates and 2. meetings (regularly local or country council meetings) during which the decisional body represented by public authorities deliberate while the citizens may intervene (Articles 7-10). Whereas the latter forms part of the adopting process, the former may only be organised upon written request of the citizens interested in expressing their opinions. Both in the initial form and in the revised version of the law, minutes of such meetings should be published without delay after they are drawn up.

The transparency law reserves only one article in which sets the provisions regarding participation to the process of preparing normative acts. In accordance with article 7 of transparency law, the institutions should publish all proposals on normative acts minimum 30 days prior to subjecting them to ''analysis, drafting and adopting". The notice will include: date of publication, substantiation report, memorandum of reasons, endorsement report for the necessity to adopt the normative act proposed, an impact study and/or feasibility study, if required, the complete text of the normative act draft, as well as the deadline, the venue and the method for the parties interested to convey their proposals, suggestions, opinions valued as recommendations regarding the draft of the normative act. The notice on the preparation of the draft of a normative act which is relevant for the business environment is conveyed by the public authority to business associations and other duly set up associations, in relation to specific domains of activity, within 30 days. Upon publication of the notice, the public administration authority will set a timeframe of minimum 10 calendar days for the normative act drafts to receive proposals, suggestions and opinions concerning the draft subjected to public debate. The proposals, suggestions or opinions on the draft subjected to public debate will be recorded in a register, mentioning the date of receipt, the person who submitted the proposal, the opinion or the recommendation and his/her contact information. The persons or the organisations interested in remitting written proposals, suggestions or opinions on the draft of the normative act subjected to public debate will specify the article or the articles in the draft to which

[16] Republished in accordance with art. 21 of Emergency Ordinance of Government no. 5/2010 regarding setting up, organising and functioning of the National Authority for Citizenship, published in the Official Gazette of România, Part I, no. 93 of 10 February 2010, approved as amended by Law no. 112/2010, published in the Official Gazette of România, Part I, no. 405 of 17 June 2010, the texts were numbered differently. The law on Romanian citizenship no. 21/1991 was published before in the Official Gazette of România, Part I, no. 98 of 6 March 2000.

[17] Ordinance 26/2000 was published in the Official Gazette under no 39 of 31 January 2000

[18] Law no. 62/2011 was published in the Official Gazette of România, Part I, no. 322 of 10 May 2011.

they refer and will mention the date of remittance and the expeditor's contact information. This type of notice should be provided on the website of the institution, in a visible and easily accessible place, and "conveyed through local and central mass media". The information of public interest may be accessed by any person interested. The institutions have the responsibility to send information with regard to legislative proposals to all persons who have requested this in writing. All persons interested may send suggestions, opinions and comments on such proposals of normative acts within a set timeframe which is evidently mentioned in the notice. Nevertheless, the timeframe should not be shorter than 10 days of publication of the notice on the organisation of the public debate for the proposal. Within 30 days the citizens or the civil society may request organisation of a public debate on the basis of the proposal issued, debate which should be announced 10 days beforehand. The public authorities should delegate a person within the organisation to be responsible for the relation with the civil society. This person will deal with collecting recommendations, suggestions and opinions on the draft proposed by the parties interested.

The public authority concerned is obliged to decide on the organisation of a meeting to publicly debate the draft of the normative act provided this meeting was requested in writing by a duly set up association or another public authority. The public debates will be conducted in compliance with the following rules: a) the public authority responsible, by the person appointed, will organise the meeting, will publish on their own website and will post at their head office, along with documents mentioned in par (2) of article 7, the manner in which recommendations will be collected, the manner in which the entities may request to hold a speech, the speaking time and any other details on how the right to freedom of expression of any citizen interested will be guaranteed; b) the public debate will close only when all requesters who registered to speak have expressed their recommendations only in relation to the draft under discussion; c) it is mandatory for the initiator(s) of the normative act within the institution or local public authority, the experts and/or the specialists involved in the preparation of the substantiation report, memorandum of reasons, endorsement report for the necessity to adopt the normative act proposed, the impact study and/or feasibility study, if required, and the draft of the text, to participate to the public debate; d) within 10 calendar days from the completion of the public debate, public access to the website and the head office of the public institution responsible will be granted for the following documents: the minutes of the public debate, the written recommendations collected, the improved versions of the draft in various stages of preparation, endorsement reports and the final version of the normative act adopted. In all cases in which public debates are organized, they will be conducted within maximum 10 calendar days from publication of the date and the venue of the meeting. The public authority concerned should analyse all recommendations referring to the draft under discussion. In case a situation should be regulated due to exceptional circumstances which impose adopting immediate solutions in order to avoid serious prejudices to the public interest, the drafts of normative acts are subjected to adoption by expedited procedure in accordance with the legal provisions in force.

In terms of legal provisions of transparency law regarding participation of the citizens or duly set up associations to the decision-making process, we see a real preoccupation of the law maker in establishing some clear norms which are easy to implement. Therefore, articles 8-13 set the rules which must be observed by public administration authorities in order to enable access of citizens or duly set up associations to the decision-making process. The public authorities conduct the meetings publicly and offer the possibility to participate to all parties interested (within the limit of the seats available in the room, granting priority to parties interested in the agenda of the public meeting), who were notified on organisation of this meeting (date, hour, venue, agenda) minimum three calendar days prior to the date of the actual meeting.

We also find similar norms in the law regarding local public administration, which expressly provides that the local county meetings are public and any person interested may attend them. Moreover, the citizens, the duly set up associations and other parties interested have rights of access to decision drafts and agenda of the local county meetings, whereas local public authorities and public servants of administrative-territorial units are obliged to inform them appropriately and in due time with regard to subjects debated in the local council.

The authorities of the local public administration regularly post the notice at their head office, in an accessible area, and more rarely on the official website page of the public authority.

Despite guaranteeing the access to these meetings of all parties interested, due to lack of a suitable space (appropriate meeting rooms), this norm is many times impossible to observe. It is necessary to regulate in detail on how access to the meeting room is possible, on mandatory conduct of the participants, on penalties applicable in case of improper behaviour, etc.

All these should be included in the internal organisation regulations applicable to procedures on public debate as part of the process of preparing and adopting decisions which are to be made public to attendants, who are obliged to observe them.

The public authorities should ensure access to decisions adopted by publishing them in accordance with legal provisions in force, by uploading them on the official website page, by posting them at the head office, in an area visible to the public and/or or by disseminating them through central or local mass-media, if required, as well as by other methods set by the law.

The law on local public administration provides that decisions and orders of normative nature take effect upon notification of the public, by publication or posting in public spaces, whereas the decisions and orders of individual nature – upon communication to the persons concerned. The persons in charge of informing the public with regard to decisions adopted and orders issued is the registrar of the local council.

We can conclude that the process of making an administrative decision places the public administration in the position to establish contacts with various administrative authorities and public servants, political power, pressure groups, other participants, including civil society and citizens so as to understand some entities' tasks and some other entities' desires in order to determine the subject of the decision. In other words, in most cases, the initiative of an administrative decision is to be found not inside the public administration, but outside it[19].

Another important aspect in the economy of this normative text is the one revealed by article 12, according to which public authorities are obliged to prepare and make public an annual report on decisional transparency. This report will include at least the following elements:

a) total number of recommendations received;
b) total number of recommendations included in the drafts of the normative acts and in the content of the decisions made;
c) number of participants to public meetings;
d) number of public debates organised in relation to drafts of normative acts;
e) status of the cases when the public authority was sued for failure to comply with provisions of the present law;
f) own assessment of the partnership with citizens and their duly set up associations;
g) number of meetings which were not public and the justification for restricted access. The annual report regarding decisional transparency will be published on the website of the institution, posted at the head office of the institution, in a visible area, or presented in a public meeting.

There is an increasingly higher interest of the citizens in such reports. On the other hand, the public administration authorities have on their official websites a special section where information which is mandatory to be posted is uploaded, in accordance with transparency law.

In reference to breach of Law no. 52/2003, the law provided that all and any citizen who considers that an act adopted violated his/her rights and failed to comply with legal procedures, may file a complaint with the competent court of law.

3. Analysis of Relevant Cases in the Matter of Decisional Transparency

The analysis relies on court judgments made public in courts in relation to substance causes, in appeals or by the Constitutional Court in cases where public authorities failed to observe legal provisions regarding decisional transparency.

One of the main obstacles in enforcing the law on decisional transparency is excepting the ordinances and the laws approved by expedited procedure. As a result, the legislative proposals may be adopted without observance of public debate procedure, whether they are laws or emergency ordinance. Art. 7 (13) of Law 52/2003 allows such a situation when the public authorities encounter exceptional circumstances which require immediate action in order to "avoid serious harm to public interest". One domain in relation to which courts have decided to allow enforcement of this "emergency" clause is the legislative proposals which aim to harmonise the Romanian legislation with requirements of the European Union.

3.1. Civil Sentence 3401/2004 delivered by Bucharest Court of Appeal:

By Civil Sentence 3401/2004, Bucharest Court of Appeal[20] stated in relation to lawsuit filed by the Romanian Association for the Defence of Human Rights – the Helsinki Committee (APADOR) against the Ministry of Justice. In this case, APADOR had responded to the notice posted on the website of the Ministry of Justice on 7 May 2004 concerning the preparation of the bill regarding execution of sentences, accompanied by the text of this bill, with the mention that the observations and proposals thereon may be remitted in writing within 10 days, to the address of the Ministry. The plaintiff filed a written material on their observations and proposals for this particular hearing, yet the plaintiff noticed at a later date that the bill had been already adopted in the Government meeting of 14 May 2004 and remitted to the Senate on 18 May 2004.

In addition, the plaintiff showed that, by doing so, the ministry was in breach of the terms and procedures provided by article 6 of previous regulation of Law no. 52/2003 regarding preparation of normative acts. The plaintiff also indicated that the government failed to observe the legal requirements on decisional transparency by the ministries reporting to them (according to article 115 of Constitution).

In the letter of defence filed with the court, the representative of the ministry invoked lack of passive capacity to stand trial and claimed that the law provides for the obligation to consult the citizens with regard to the bill only by the authority who initiated it (i.e. Ministry of Justice); in capacity of colleague-like decision-making body, the Government is not accountable thereof. In terms of the case merits, the plaintiff stated that the bill was submitted to the Senate

[19] Corneliu Manda, Science of Administration, University Course, Lumina Lex Publishing House, Bucharest, 2004, page 236
[20] Civil Sentence 3401/2004, Bucharest Court of Appeal, www.portal.just.ro

for adopting it by expedited procedure grounded on provisions of article 76 par (3) of Constitution. Therefore, it was no longer required to go through the consultation procedure provided by decisional transparency law, by virtue of article 6 par (9) of the same law. In addition, the Ministry of Justice sustained that the bill under discussion formed part of the process of harmonisation of legislation with the legislation of the European Union and that, pursuant to Regulations of the Chamber of Deputies, such laws are adopted by expedited procedure. The court considered these arguments to be grounded and denied the petition filed by APADOR. This decision was subsequently maintained by the Court of Cassation and Justice.

3.2. The Decision of the Constitutional Court no. 737/2012[21]:

Before the Constitutional Court, the Ombudsman informed the Court on the provisions of the Emergency Ordinance no. 27/2012 regarding some measures in the sector of culture. This effect of this ordinance was the transfer of the Romanian Culture Institute under the parliamentary control, by transferring the authority to regulate the organisation and functioning of this institution to the Senate. The plaintiff claimed that the ordinance is in breach of art. 115 (4) and (6) of the Constitution regarding legislative delegation which sets forth that "(4) the Government may adopt emergency ordinances only in exceptional situations of which regulation may not be delayed and has the obligation to motivate the urgency in their table of contents". Moreover, "(6) Emergency Ordinances may not be adopted in the domain of constitutional laws, may not affect the regime of the fundamental state institutions, the rights the freedoms and the obligations set by the Constitution, the electoral rights and may not aim at measures regarding forced transfer of goods to public property."

In support of the exception of unconstitutionality, the Ombudsman contested the urgency nature of the ordinance, stating that "the urgency of the regulation was inappropriately justified by the Government and one may not speak of an extraordinary situation, despite the fact that the Government […] presented this situation as extraordinary, of which regulation could not be delayed." As a consequence, the ordinance is in breach of the provisions of art. 115 paragraph (4) and (6) of Constitution. In addition, the Government stated that the ordinance under discussion approached aspects which do not represent deficiencies in the manner the Romanian Culture Institute functions. Only deficiencies representing "an extraordinary situation that need to be settled by a Government Emergency Ordinance" would be eligible for a special procedure. In support of the exception of unconstitutionality, a further statement is made in the sense that this ordinance provisions do not regulate aspects related to the manner in which the institution functions, which would be in the position to remedy an urgent issue. It explains that "it does not operate amendments referring to principles, objectives or responsibilities of the Romanian Culture Institute, but only insignificant amendments and supplements of organisational nature and which do not correct potential dysfunctionalities which may have represented an extraordinary situation and which should have been remedied by the Government through an expedited procedure". Finally, the Ombudsman considered that the emergency procedure indirectly violated Art. 115 (6) of the Constitution which sets that "Emergency Ordinances may not be adopted in the matter of constitutional laws, they may not affect the regime of the fundamental institutions of the state, the rights, the freedoms and the responsibilities provided for by the Constitution, the electoral rights and may not aim at measures regarding forced transfer of goods to public property". By reference to Law 52/2003, the Ombudsman argued that one may not consider the fundamental rights of the citizens to have been respected in the absence of the right to transparency and participation to the decisional process.

The Senate and Government representatives considered the exception of unconstitutionality groundless as the emergency ordinance was adopted with a view to observing general provision of art. 111 paragraph (1) of the Constitution, according to which "the Government and the public administration bodies are subjected to parliamentary control". Therefore, the legality was restored by transfer of authority in relation to organisation and functioning of the Romanian Culture Institute from the President to the Parliament.

The Constitutional Court agreed with the arguments presented by the Government in the background note of the ordinance and showed that the regulations in force forbid subordination of an independent authority, such as the Romanian Culture Institute and the President. Moreover, the Court claimed that the situation previous to the issuance of the ordinance generated obvious and profound dysfunctionalities, which, by their nature, constituted an extraordinary situation of which regulation could not have been delayed. Therefore, the Court considered grounded the justification of the Government according to which "failure to adopt the measures proposed by the emergency ordinance under criticism [...] would create "the prolongation of the profoundly negative effects of some states of affairs which tend to permanently affect the feeling of belonging to the Romanian nation of the people who temporarily settled down elsewhere, in other countries, or further dysfunctionalities referring to the manner in which the Romanian Culture Institute is organised and functions". With regard to the claims of the Ombudsman on the "right to decisional transparency", the Court finds "invocation of art. 115 paragraph (6) of the Constitution to be irrelevant, as there is no indication that a fundamental right or

[21] Decision of the Constitutional Court no. 737/2012 on rejection of the exception of unconstitutionality of provisions of Government Emergency Ordinance no. 27/2012 regarding some actions in the cultural domain (http://lege5.ro/Gratuit/gmzdsnrtg4/decizia-nr-737-2012

freedom was affected", whereas Law no. 52/2003 does not apply to this case.

Therefore, the Court decided that, in the absence of an express constitutional provision on transparency, such right may not be inferred.

In addition to the excessive use of the expedited procedure in the process of adopting laws, failure to observe transparency-related requirements does not generate sanctions in itself even in situations when the regular procedure is used in adopting laws in the Parliament. This is due to the fact that the Romanian legal system allows cancellation of a law or an ordinance only by decision pronounced by the Constitutional Court.

3.3. The decision of the Constitutional Court no. 44 of 2013:

Impossibility to attain the principle of decisional transparency procedure was confirmed by the Decision of the Constitutional Court no. 44 of 2013[22], when the institution was requested to state on the constitutionality of the Government Emergency Ordinance no. 109/2011 regarding corporate governance of public companies, raised in relation to file no. 1848/2/2012 of Bucharest Court of Appeal - Section VIII contentious administrative and fiscal, with plaintiff Hidroelectrica Hidrosind Branch. Among the main reasons of invoking the exception of unconstitutionality against provisions of this ordinance was lack of conformity with provisions of art. 14 of Constitution: "Given the regulating scope of the emergency ordinance under criticism, the Government should have requested the endorsement of the Economic and Social Council". In addition, the action was also grounded on art. 115 (4); the author of the exception considered that "the condition regarding an extraordinary situation is not complied with"; this condition should have supported the legislative delegation; the author also considered that "by the emergency ordinance the objective is not to protect a general interest, but the private propriety of the state."

With regard to criticism of unconstitutionality by discordance with art. 115 (4), the Court decided that the reasoning provided by the Government was sufficient to prove "existence of an objective state of affairs, quantifiable, independent of the Government will, which jeopardises a public interest", according to criteria elaborated in their previous decisions.

The Court notes that the Government reasoned the urgency as being determined, among others, by: "1. the current economic context which imposes taking rapid measures to create legislative and administrative premises [...], 2. the fact that the public companies – autonomous administrations and trading companies in which the state owns shares as majority or 100% shareholders – represent an important segment of the national economy [...]; 3. the fact that the current legislative framework presents significant gaps relating to good governance of autonomous administrations and influences their economic performance and competitivity in a negative manner [...]; 4. the fact that improvement of the corporate governance of state-owned companies represents an objective assumed by the Government of România [...][23]"

In terms of invoking provisions of art. 115 paragraph (4) of Constitution, the Court considered that "there is subjective state of affairs, quantifiable and independent of the Government will which led to adopting the emergency ordinance under criticism", therefore the ordinance complies with the urgency-related exigencies.

As regards the criticism referring to non-observance of provisions of art. 6 of previous regulation of Law no. 52/2003 regarding decisional transparency in adopting the ordinance under discussion, "the Court acknowledges that it may not be admitted". As the Court already stated in connection with previous decisions, the Court analyses the constitutionality of a law only in relation to constitutional provisions and not to other laws in force: "in the constant jurisprudence, the constitutional contentious court stated that examination of the constitutionality of a text of law takes account of the constitutionality of such text in line with constitutional provisions allegedly violated and not comparison of several legal provisions and reporting the conclusion drawn from such comparison to provisions of principles of the Constitution."

Therefore, even though the legislative provision under criticism had not been adopted by expedited procedure, it would have still been rejected by the Constitutional Court as long as the principle of decisional transparency is not included in the Constitution.

3.4. Civil Sentence no. 41/P/14.02.2005 stated in Timișoara Court of Appeal:

In reference to acts of lower rank, such as Government Decisions, a relevant example is the civil sentence no. 41/P/14.02.2005 pronounced by Timișoara Court of Appeal[24], by which a Government Decision was cancelled due to the fact that the adopting process was not in line with requirements of Law 52/2003. In this case, the plaintiff was OTMAS (Organisation for Measuring Technique) and the defendants were the Romanian Bureau of Legal Metrology and the Ministry of Economy and Commerce. OTMAS requested cancellation of the Government Decision no. 862/2004 for failure to observe, in the adopting process, Article 6 (old form) of

[22] Decision of Constitutional Court no. 44/2013 referring to rejection of the exception of unconstitutionality of provisions of Government Ordinance no. 109/2011 regarding corporate governance of public companies, http://lege5.ro/Gratuit /decizia-nr-44-2013

[23] Decision of Constitutional Court no. 44/2013 referring to rejection of the exception of unconstitutionality of provisions of Government Ordinance no. 109/2011 regarding corporate governance of public companies

[24] Timișoara Coourt of Appeal, civil sentence. 41/P/14.02.2005, www.portal.just.ro

Law no. 52/2003. OTMAS showed that the Romanian Bureau of Legal Metrology or the Ministry of Economy and Commerce failed to publicly notify the elaboration of the draft for this Government Decision, as provided for by the law.

The court accepted the plaintiff's argument and decided that "the Government Ordinance no. 862/2004 […] was in breach of all legal provisions comprised in Article 6 of Law 52/2003 regarding procedure of elaborating normative acts". As the content of the Government Decision no. 862/2004 did not have an individual character and was not subjected to exceptions set forth by Art 6(9) of Law 52/2003 for legislation adopted by expedited procedure, the court decided to annul the act.

Even among acts which are universally applicable there is an important sub-category which may not be subjected to requirements of transparency as laid down by Law 52/2003. It is the case of letters (written communications) remitted by the Government which accompany bills referred to the Parliament. When issuance of these acts was contested in court, the argument to reject such actions was that the acts are of a "political nature" and are not subjected to the transparency law. According to the law of Contentious Administrative (554/2004), the acts issued by a public authority which concern such authority's relation to the Parliament may not be appealed in contentious administrative.

3.5. Civil Sentence 2889/2010 delivered by the High Court of Cassation and Justice:

By Civil Sentence 2889/2010 the High Court of Cassation and Justice[25] rejected the appeal filed by plaintiffs Foundation C.R.J., the Association for Defence of Human Rights - the Helsinki Committee, the Romanian Association for Transparency, the Institute for Public Policy, the Romanian Journalists' Association, the Romanian Federation of Journalists M., He Centre for Independent Journalism, the Romanian Press Club, Press Monitor Agency, the Centre for Assistance of Non-governmental Organisations – C., the Romanian Association of Audiovisual Communications, Resource Centre for Public Participation, P.D. Association, against sentence no. 2855 of 3 July 2009 of Bucharest Court of Appeal. The action of the NGOs abovementioned was initiated against defendants – Government of România and Ministry of Justice. The defendants contested the letters to the Government relating to amendment of the four codes (Civil, Criminal, Civil Procedure and Criminal Procedure) for adoption by the Parliament. This action aimed to have these letters annulled and the procedure of law to be adopted by the Government redone, due to non-observance of the provisions of the transparency law.

The Court had to decide on the category of acts in which these letters should be included. The plaintiffs claimed that the communication acts exchanged between the Government and the Parliament represent administrative normative acts which are subjected to the transparency law. On the other hand, the plaintiffs stated that the letters concern relations between the Government and the Parliament and may not be appealed in contentious administrative, according to Law 554/2004. Additionally, the plaintiffs claimed that the court should decide whether the acts appealed may be subjected to the contentious administrative procedure. Otherwise, it may not even be set whether their adopting observed the procedures set forth by Law 52/2003 or not. The High Court of Cassation and Justice accepted the defendants' arguments and rejected the reasoning of the plaintiffs.

Another category is represented by the administrative acts of individual nature which, as indicated above, include decisions concerning a single person or a group of persons well-defined as subjects. These acts are exempted from observing the requirements of the transparency law. The solution chosen by the lawmaker is logic as these acts do not target the community in its entirety and do not have to be subjected to debate. Sometimes, due to their strictly personal nature, these acts do not even have to be communicated to the public. However, this classification was in some cases contested, when the nature of the act was doubtful.

3.6. Civil Sentence 44/F/9.12.2011 delivered by Brașov Court of Appeal:

By Civil Sentence 44/F/9.12.2011, Brașov Court of Appeal[26] pronounced upon the nature of the order of restructuring the National Agency for Fiscal Administration (ANAF), ordered issued by the Manager of this institution. The Court had to decide whether the act mentioned is of normative or individual nature. The measure was taken in the context of fiscal austerity policies implemented by the Government, which generated re-organisation of the state institutions and layoff of some staff. In this case, several persons laid off appealed the acts by which ANAF was reorganised. They claimed, among others, that the order setting the new organisational chart has a normative nature as it was opposable to more than one person (it referred to all ANAF employees) and it would have been valid only if it had been adopted by procedure laid down by Law 52/2003. ANAF argued that the act has an individual character as it refers to a limited and well-specified number of subjects.

The Court analysed the legal provisions which set forth the organisation of ANAF and concluded that the order abovementioned has a normative character. It refers to ANAF organisation and is of public interest. Therefore, the Court admitted the appeal of the plaintiffs and annulled the order. The Court stated that the order failed to observe conditions provided for adopting normative acts, among which publication in

[25] High Court of Cassation and Justice, Civil Sentence 2889/2010, www.portal.just.ro
[26] Brașov Court of Appeal, civil sentence no. 44/F/9.12.2011, www.portal.just.ro

the Official Gazette and observance of the procedures set forth by Law 52/2003.

4. Conclusions and Recommendations

This work concludes on some causes which render implementation of decisions transparency law difficult and even impossible:

1. The main causes which prevent public authorities from implementing the decisional transparency legislation may be: failure to acquire and understand decisional transparency by representatives of public authorities; public authorities may lack or have insufficient financial, technical, human resources/means.
2. Among the main causes which trigger non-implementation of the decisional transparency legislation due to lack of real involvement of citizens/duly set associations into the decisional process we may enumerate: the citizens are not aware of their rights to information, consultation, participation to the process of preparation and adopting decisions; lack of real and ongoing communication between authorities and citizens; lack of the administration's confidence in collecting opinions from citizens in order to improve public decision, while the citizens do not consider it is worth getting involved in the decisional process as most of them consider that their opinion is disregarded.

To support the public administration authorities or civil companies interested in the decisional process, we present below some recommendations that we consider important in the process of implementing the concept of decisional transparency in România:

1. The law should provide a deadline, similar to the deadline for submitting balance sheets (e.g.: last day of the first semester of the following year), by which ministries/public authorities should publish their annual decisional transparency report on the official website of the institution. In addition, the law should lay down clear penalties for failure to observe this requirement. This situation may be regulated through initiation by the Government Secretariat, which is the institution responsible for enforcement of Law 52/2003, of a normative act in which clear deadlines and penalties should be set for failure to observe such requirement. Such measure would intensify/amplify enforcement of this law and would diminish the current lack of information.
2. After consultations with the civil society, the Government Secretariat should prepare a set of assessment criteria on how Law 52/2003 was enforced throughout a calendar year, set which should result in a standard model of fields to include in the annual decisional transparency report. Such standard model would ensure comparability of the information provided by public institution with regard to enforcement of Law L52/2003 and would enable a comparison to this effect. The staff appointed, in charge of enforcing Law 52/2003, should regularly improve their skills and expertise in sessions conducted to provide training on enforcement of this law. [27]
3. In reference to the public servants responsible for the dialogue with the civil society within institutions which fulfil this requirement, such personnel have to carry out, in addition to this responsibility, a much high number of other tasks. Such approach of the public institutions is deficient and limits application of Law 52/2003 in its entirety, transforming the process in a strictly formal one. The complexity of the application of this law requires appointment and raising awareness of minimum one full-time person within these institutions, so that notable results may be seen.

References

- Bianca Cobârzan, , Dacian Dragoș, , and Bogdana Neamțu, Decisional Transparency in România , Accent Publishing House, Cluj - Napoca, 2008
- Corneliu Manda, Science of Administration, University Course, Lumina Lex Publishing House, Bucharest, 2004
- Eric Chewtynd and Frances Chewtynd, Civil Participation to Improvement of Decisional Process in Local Public Administration, Research Triangle Institute—Assistance Programme for Public Administration in Romania, Bucharest 2001
- Romanian Academic Society, www.sar.ro , Implementation of the decisional transparency principle in România, 2014
- Http://iup.oug/PDF/punlications/democracy en.pdf – Parliament and democracy in the twenty-first centuy: a guide good practice
- Laura Stefan and Ion Georgescu, Project Coordinator Oana Zabava , Romanian Agency for Transparency – Transparency Internațional România "Decisional Transparency in Public Administration" – guide to citizens and administration, Ed. SC AFIR SRL Bucuresti, 2003
- Treaty on European Union, Journal of the European Union C 326/13, consolidated version as of 26.10.2012

[27] Romanian Academic Society, www.sar.ro , Implementation of the decisional transparency principle in România, 2014, page 18

- Treaty on European Union, Journal of the European Union C 326/13, consolidated version as of 26.10.2012
- The Chart of Fundamental Rights of the European Union, 2012/C 326/0
- Treaty on European Union, Journal of the European Union C 326/13, consolidated version as of 26.10.2012
- Law 544/2001 regarding free access to information of public interest, published in the Official Gazette no. 663/23 October 2001
- Law 52/2003 regarding decisional transparency in public administration, published in the Official Gazette of România no. 70 of 3 February 2003
- Law 21/1991- Republished in accordance with art. 21 of Emergency Ordinance of Government no. 5/2010 regarding setting up, organising and functioning of the National Authority for Citizenship, published in the Official Gazette of România, Part I, no. 93 of 10 February 2010, approved as amended by Law no. 112/2010, published in the Official Gazette of România, Part I, no. 405 of 17 June 2010, the texts were numbered differently. The law on Romanian citizenship no. 21/1991 was published before in the Official Gazette of România, Part I, no. 98 of 6 March 2000.
- Law no. 62/2011 was published in the Official Gazette of România, Part I, no. 322 of 10 May 2011
- Ordinance 26/2000 was published in the Official Gazette under no 39 of 31 January 2000
- Decision of the Constitutional Court no. 737/2012 on rejection of the exception of unconstitutionality of provisions of Government Emergency Ordinance no. 27/2012 regarding some actions in the cultural domain (http://lege5.ro/Gratuit/gmzdsnrtg4/decizia-nr-737-2012
- Decision of Constitutional Court no. 44/2013 referring to rejection of the exception of unconstitutionality of provisions of Government Ordinance no. 109/2011 regarding corporate governance of public companies, http://lege5.ro/Gratuit /decizia-nr-44-2013
- Decision of Constitutional Court no. 44/2013 referring to rejection of the exception of unconstitutionality of provisions of Government Ordinance no. 109/2011 regarding corporate governance of public companies
- Civil Sentence 3401/2004, Bucharest Court of Appeal, www.portal.just.ro
- Timișoara Coourt of Appeal, civil sentence. 41/P/14.02.2005, www.portal.just.ro
- High Court of Cassation and Justice, Civil Sentence 2889/2010, www.portal.just.ro
- Brașov Court of Appeal, civil sentence no. 44/F/9.12.2011, www.portal.just.ro

HUMAN RESOURCES IN THE CURRENT ECONOMIC AND SOCIAL BACKGROUND

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Abstract

The increasing demographic decline in the recent years creates major malfunctions on the Romania and the European Union labor markets. The social and economic consequences of the demographic phenomenon are increasingly reflected in the structure of the labor market, actual level of families' income and in the sustainability of medium and long term governmental social and economic policies. Such evolution requires a re-establishment of public policies, education system, a reorientation of the knowledge-based economy, and the awareness of the increasingly important role of the business environment not affected by the presence of politics.

Keywords: *demographic decline, migration, social policies, social protection, economic policies, economic growth.*

1. Introduction

The economic activity is characterized, as well known, by the existence and functioning of the production, distribution, exchange and consumption. But the way these components change in relation to the movements and structural changes of the main actors, people, they represent the main subject of this article. Furthermore, human resource, in its continuous movement, influences the richness of a country and public policies, the wealth of a nation and the insurance, pension or healthcare and education system.

Specialized literature in the economic, social, politic, mathematics and history field has available a great number of examples on the overwhelming discrepancy between a growing population with more or less real needs and a planet depleted natural resources or more and more rare or hard to exploit resources.

The movement of the population as a numerical dimension and volume change has been studied since 1662 when London merchant John Grant wrote paper "Natural and Political Observations Made upon the Bills of Mortality, particularly with reference to governance, religion, trade, growth, air, disease etc. in early modern London". In this paperwork, the author estimates the population of London based only on the bills of mortality.

Edmund Halley continued Grant's steps and established life table, as mortality table of Pierre Wargentin had been drawn up in Sweden in the 18th century since 1766.

Thomas Robert Malthus (1766 – 1834) with his famous Malthusian movement whereby he demonstrated the need to limit the number of births or Achille Guillard, who attempted a mathematical approach of demography in 1885, all of them were approaches targeting the continuous and Brownian movements of the population depending on the influence of economic, social or political environment.

In the 20th century, the persons who stood out were Alfred Lotka (1934 – 1938) by the general theory of population dynamics and Adolph Laundry (1934) by the explanatory diagram of development called demographic "revolution" or "transition".

During the same period, Vladimir Trebici also made himself conspicuous (father of Romanian demography) who, in 1979, studied human populations delimited by space and classified by social significance, size and spatial distribution, their structure according to demographic, social and economic features, evolution, direct factors which determine the evolution of the population: fertility, mortality, migration, as well as social and economic factors that influence demographic phenomena, in order to highlight the regularities in which they occur.

If Vladimir Trebici tried to note certain regularities or identical features with a certain repeatability, nowadays we note that negative demographic evolution creates major malfunctions both in social terms and in terms of the economic development of any state. If sociologists tried to find a common denominator to which they could relate and which could be anticipated or controllable, then the current evolution of the population exceeds the predictions, thus recording an oscillating trend on the edge of the abyss. The evident aging trend of the developed country population overlapping the low-skilled labor force exodus in developing countries triggers major changes within the labor markets in developed countries. We are currently witnessing an

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obvious acceleration of urbanization in most of the world's countries, to an almost generalized decrease of birth rates, a massive population exodus from the poor to the richest countries and last but not least, the aging of the population in many developed and developing countries. The social and economic consequences of these events shall be reflected in the structure and dynamics of the labor market, the size of the population income and level of competitiveness of the educational system.

Not all the population carefully analyzed by demographers counts in our approach, but only one fifth of it, the rest of four-fifths being made up of children, elderly persons, persons who are unfit for work (sick or disabled persons), housewives, teenagers who are enrolled in study programs, individuals working in their households or unemployed persons. This fifth of the population that really counts, called by economists "employed population" represents the labor force human resources of any country. There are persons actually engaged in work, with a bilateral contract in this respect, thus carrying out a constant (even temporary) activity within an organized framework and by collecting a remuneration in this respect, namely small taxpayer and active taxpayer, without which no other element of the economic activity (large taxpayer) could function.

The management was shaped as an integral part of the economic activity as of the 20th century, due to the increased industrialization and the emergence of increasingly complex and highly specialized professions. If the economists were searching for laws, regulations and principles to live together, the managers are searching for laws and actual modalities to work together. The field of the management came to the fore by the contributions of certain authors such as Frederic W. Taylor or Henri Fayol, who are considered the initiators of scientific management. But human factor represented the core of the activity for neither of them, they being especially organized by the organization of the work, efficiency, productivity, prediction or control. Elton Mayo (1880-1949) and Fritz Roethlisberger (1898-1974), both with representative researches for School of Human Relations began to be interested in human study.

2. Labor resources and their current status within the European Union

Thinkers and scientists have always convincingly argued that no society can exist and function outside the creative work of individuals in the sphere of material and spiritual production. The internal evolution of the society points out that the patrimony of the national wealth of every society depends on the quantity and quality of the social work, the level of organization and efficiency of all forms of human activity. The overall development of any society depends in part on the multitude of organizations that emerge, develop and contribute by means of their work to the achievement of the national wealth. But no organization can operate without the essential and creative contribution of the people. Work means people, physical and intellectual human resources involved in any type of activity. Without the presence of the individuals who know what, how much, how and for who to produce[1], it would be impossible for the organizations to reach their goals.

Furthermore, human resources behave differently in the production process, each individual having its own perceptions of work as a whole and of the way it can be performed in particular. Normally, people act and react differently, ask questions and try to find solutions. This is why, leading people is the most difficult activity within the organization, incomparable with solving any work duty that does not involve the study of moral and legal aspects of human behavior. Therefore, a frequent mistake made by managers[2], especially by those of human resources department, is that they make individual decisions in terms of managing or engaging labor resources. The perception of a sole person is subjective and cannot reach the full range of distinct personalities that he leads and coordinates. Regardless of the way we try to find the most appropriate answer depending on the work and life style within the organization, it can happen to be wrong.

Under these terms, talking about human resources means starting from the fact that these are and shall remain the most valuable investment of any organization due to the following: human resources produce and reproduce objective factors of production; create and stimulate the means of production and influence the effectiveness of material and financial resources use[3].

According to traditional approaches, labor force is a special resource the creation in time of which needs special care demonstrated by training which entails certain costs that cannot be neglected.

In order to fulfill their goals, the organizations are and were bound to face challenges to ensure and maintain their competitive success on the market. This is why the organizations include goals on the management of the personnel and the personnel's performances in the long-term strategic objectives[4]. The strategies in the field of human resources became, in the last decades of the last century, a priority area of modern enterprises, including in the countries under communist domination, where, let's not forget, the

[1] Gheorghe Creţoiu, Viorel Cornescu, Ion Bucur, „Economie", edition II, C.H. Beck Publishing House, Bucharest 2008
[2] Cătălina Bonciu, „Managementul resurselor umane", Credis Publishing House, Bucharest, 2007, p. 9.
[3] Iulian Ceauşu, „Dicţionar enciclopedic managerial – enciclopedia managerială", vol 2, Academică de Management Publishing House, Bucharest, 2000
[4] ALMAS - Managementul resurselor umane - Bucharest, 2003, module I

concept of work is totally different from the Western countries.

According to some authors, to lead human resources is an expression of personnel practice[5] and represents a process of acquiring, allocation and use of human resources within the organization. But above all, to lead and coordinate labor resources means vision, motivation, training and concern for people, often even against their will.

Labor resources market is a true barometer of economic developments, being strongly influenced both by internal and external factors. On the background of employment drop, fluctuations of occupational nature can be noted depending on gender, age, residence, as well as on forms of ownership, field of activity, occupational status etc.

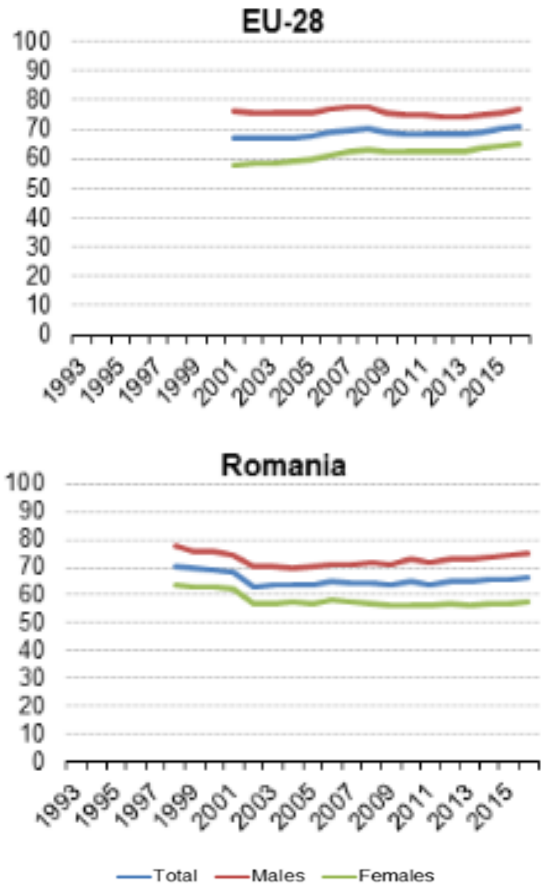
The demographic profile of the European Union labor market has significantly changed over the last few years. The percentage of employed women has increased in the last decade so that the gender gap in the labor market has fallen to 11.9% in 2011, compared to 17.1% in 2000. The migration is a factor that influences this market and the rise of the new member states which used the free movement of people to encourage changes in the ethnic and national profile on the European labor market. The demographic changes in connection with the aging of the labor force have led to the need to introduce new incentives to encourage older employees to continue working for a longer period of time[6].

The analysis of the distribution of employed population by gender does not reveal major disparities. In 2016, the employment rate within the European Union, for persons between 20 and 64 years old,[7] was of 71.1 %, being the higher annual average recorded for the EU. Notwithstanding, behind these averages, big differences can be noted between the countries. The only member state with a rate higher than 80% is Sweden (81.2%). This is also valid in case of AELS states Island (87.8%) and Switzerland (83.3%). The following countries are part of the group of countries with rates at the level of 70% United Kingdom, France and Germany. The group comprises an area ranging from Ireland to the West, to Hungary, to the East, including the three Baltic States, Finland and Portugal.

Countries with rate of 60 percentage points form two clusters: West-Mediterranean / Adriatic (Spain, Italy and Croatia), and the other at the EU's eastern border, from the southern end of the Baltic Sea to the southwest end of the Black Sea (Poland, Slovakia, Romania, Bulgaria). Furthermore, this group of countries also include Belgium. Finally, we find a South Balkan/Caucasian group with rates below 60% (former Yugoslav Republic of Macedonia, Greece and Turkey).

Image 1 shows the evolution of employment rate for men and women since 1993. One of the most prominent features is the reduced gap of the employment rates regarding men and women. In most of the cases, this result from the increase of the women employment rates (for example, in Spain and the Netherlands), but there are also cases where the reduced gap comes especially from the drop in the men employment rates (Greece and Cyprus). Furthermore, in a group of countries, the evolution of employment rates for men and the employment rates for women reflect each other, by creating a stable gap between employment rates for women and men. The employment rates are lower among women than among men in all years and in all countries, with two exceptions: in Latvia and Lithuania, in 2010, after a sharp fall in employment rates among men and a more modest fall of employment rate among women[8].

Image 1. The evolution of the employment rate among men and women between 1993-2015 in EU (28) and in Romania



Source: Eurostat (lfsi_emp_a)

[5] I. Beardwell, l. Holden, „Human Resource Management. A Contemporary Perspective", Pitman Publishing, London, 1997, p. 6-10

[6] Sorina Enache - Interdependența dintre piața muncii și șomaj în economia postcriză, Economie teoretică și aplicată, Volume XX (2013), No. 8 (585), pp. 92-101

[7] as measured within EU investigation on labor force (LFS of EU),

[8] http://ec.europa.eu/eurostat/statistics-explained/index.php/Employment_statistics/ro

The analysis also shows that the labor market situation over the period for which Eurostat data is available varies widely from country to country. The largest group of countries recorded a slight and stable increase in the employment rate (Belgium, Germany, France, Luxembourg, the Netherlands, Austria, Finland, Sweden, United Kingdom and Turkey). Other countries remained on a flat trajectory, in other words, they recorded a stable rate (Denmark, Italy, Portugal, Slovenia, Slovakia, Norway and Switzerland). Another important group showed important fluctuations, but it had a higher rate in 2016 compared to different starting points (Bulgaria, Estonia, Ireland, Spain, Latvia, Lithuania and Poland).

In Romania of the latest 20 years, on the background of the decrease of the number of employed population, there is also a constant decrease of the share of young population in the total employed population. An analysis of their employment shows that inactivity and unemployment are related to younger people aged between 15 and 24. As a rule, young people are less present on the labor market because a large part of them is enrolled in the education system. On the other hand, the low share of young persons in the total of employed population is also determined by the difficulties they faced in the employment process, especially due to employers' requests on their work experience and skills, but also job offers inadequacy with their expectations. Long-term migration is also widespread and steadily increasing among young people, a phenomenon that will continue to adversely influence the evolution of working age population [(9)]. The employment and respectively unemployment rates among women aged between 15 and 24 is another aspect that has to be taken into account due to the fact that in 2015 the employment rate barely reached one quarter of the working age population. For the respective categories, the active measures of employment must take into account their inclusion and maintenance on the labor market, while fulfilling the principle of equal opportunities.

Global crises, political instability and the economic crisis at national level have influenced the efficiency of employment policies. The main constraints refer to the reduced institutional capacity of central and local public institutions, to limited interinstitutional collaboration, insufficient financing of actions, low implication of private sector in qualifications development process. Therefore, the past few years insisted on stimulating the creation of new quality jobs, fighting informal economy[10], regional development and creating jobs in small villages and towns, appropriate correlation of the educational offer with the requirements of the labor market, implementing active aging policies and lifelong learning, increasing the degree of inclusion on the labor market, improving cooperation between main actors on the labor market, modernization of the National Employment Agency, improving analysis and forecasting skills for efficient employment policies etc.

By returning to the analysis in Romania in the year of 2015, it can be noticed that employees showed a downward trend on the background of the increase of the number of self-employed workers. The number of employers in 2015 is a very modest one, which indicates a troublesome consolidation of market relations, but also the presence of a low entrepreneurial spirit.

Self-employed workers and family workers represent the majority in the informal employment, which, in its turn, reaches about 30% of total employment in agriculture, construction, services. They are particularly affected by precarious working conditions and are often outside of the scope of the labor law, which does not fully regulate non-standard forms of work with regard to seasonal work, short-term work at home, etc., thus perpetuating informal labor relations.

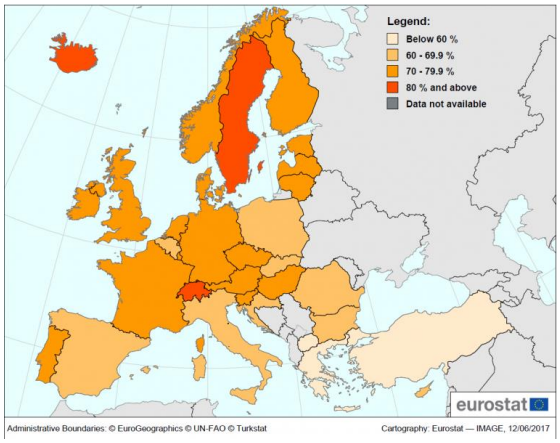
Unfortunately, at the moment, the economic imbalances seriously worsened have led to a reduction in the volume of investments in long-term tangible assets, causing Romania's economy to offer less and less employment opportunities.

Uneven distribution of age categories can be also noted at the European level. Therefore, we note from Eurostat analysis that the employment rate among people aged between 25 and 54 has remained basically the same since 2001 and until present, while in case of elderly persons (aged between 55 and 64) the rate has increased significantly, and for younger persons (aged between 15 and 24) the rate decreased significantly.

[9] Nicolaas de Zwager, Ruslan Sinţov. *Inovaţie în migraţia circulară - Migraţie şi dezvoltare în Moldova: Studiu de piaţă*. NEXUS Moldova Intern. Agency for Source Country Information (IASCI), Centrul de Analize şi Investigaţii Sociologice, Politologice şi Psihologice (CIVIS). Chişinău, 2014

[10] The informal sector includes: 1. Unregistered employees, namely persons carrying out their activity within an economic or social unit; 2. Individuals in the absence of a contract or persons employed in unregistered non-agricultural family units; 3. Persons employed in agricultural holdings who sold more than 50 percent of the production, so they are active on the market.

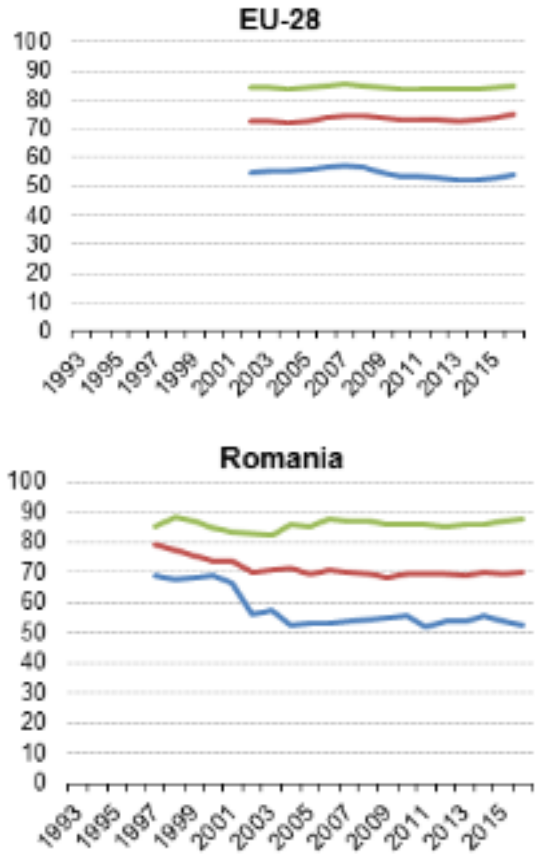
Image 2. Employment rate, category of age between 20 and 64, 2016 (%)



Source: Eurostat (lfsi_emp_a)

The employment rates significantly varies depending on the level of studies (see Image 3). The rates analyzed depending on the level of studies are based on the category of age between 25 and 64, since younger persons may still be enrolled in a form of education, especially in tertiary education, and such thing can be reflected in the employment rates. In 2016, in the European Union, the employment among persons aged between 25 and 64 who graduated tertiary education institution [short cycle tertiary education, bachelor, master or PhD. studies (or other equivalent studies)], was of 84.8%, much higher than the employment rate of persons who graduated at most a primary or lower secondary education institution (54.3%). The employment rate of persons with upper secondary or post-secondary non-university education was of 74.8% within the European Union. Apart from the fact they are already experiencing the lowest change of finding a job (among these educational level categories), the persons who graduated at most a lower secondary education institution were also the most affected by the crisis: the employment rate of this category decreased by 5.1% between 2007 and 2013, while the corresponding number of high-school education persons was of 1.7%, and for higher education persons was of 1.8%. As we can note in Image 3, it is very important that persons graduate at least high-school studies in order to have the opportunity to find a job in Belgium, Bulgaria, Czech Republic, Lithuania, Poland and Slovakia, but less in Denmark, Estonia, Greece, Cyprus and Luxembourg[11].

Image 3. The employment rate according to the level of studies



-Less than primary, primary and secondary education (levels 0-2)

-Upper secondary and post-secondary non-tertiary education (levels 3 and 4)

-Tertiary education (levels 5-8)

Obviously, the largest professional category in the European Union in 2016 is represented by the employers in the field of personal services and sales, representing 9.5 % of the labor force or 21.4 million persons. These figures exceed the total number of the eight categories of occupation with the smallest share, which, among others, include all works in the agricultural and food processing industry field and members of the armed forces. The category of service and sales workers is followed by the officials that are again followed by administrative and commercial function experts[12].

3. The main factors of impact on the labor market in the current background

The labor market of Romania is strongly influenced by internal and external social and economic factors, and in this background the quality of the work force has an overwhelming importance. Educational

[11] http://ec.europa.eu/eurostat/statistics-explained/index.php/Employment_statistics/ro
[12] http://ec.europa.eu/eurostat/statistics-explained/index.php/Employment_statistics/ro

systems must be adjusted to the requirements of the labor marker, so that to generate human resources with a high degree of adaptability to the rapid changes of the European labor market and to the increasingly diverse demands of employers. In this background, we will analyze the factors with a major influence on work demand and supply, and the influences on the business environment and labor market institutions.

a) Factors of impact on work demand

Labor work, being a derivate component of the goods and services market, is also an inseparable part of the economic system and fully reflects the tendencies of its development. This is why, an important condition for the recovery of the labor market would be, first of all, the improvement of the economic situation on the labor market, especially in the real sector of the economy, which generates new jobs. Therefore, the main challenges in terms of labor demand in Romania are the following:

- the unfavorable environment for economic growth and the creation of sustainable and quality/attractive jobs: the existence of the paradigm of the economic development based on consumption; the high level of informal economy; the lack of priorities to promote productive transformations and support for growth potential sectors and sectors which can create sustainable jobs; unsustainable economic growth with limited potential for jobs creation; asymmetric economic growth; the extension of activities in "subsistence agriculture"; the lack of genuine social dialogue on macroeconomic measures and policies, low work productivity;
- the shortage of appropriately qualified labor force, especially in the rural environment, both for technological agriculture and for the development of the business in non-agricultural sectors;
- the slow progress in improving business climate (started in 2016) was seriously affected by legislative changes of 2017 (the modifications of the Tax Code, the modification of the minimum age without correlating it with labor productivity etc.).

b) Factors of impact on work supply

In what concerns labor supply, this was strongly influenced by the evolution of demographic indicators, but also by the level and quality of professional training of human capital. The continuous decline of population affects labor market by reducing the number of active population and aging of the labor force, thus generating an increase in the dependency ratio of elderly people, as well as in the economic dependency ratio. The level and quality of employment depends to a large extent on its professional training, which generates the degree of adaptability and employability on the labor market.

In order to develop employment policy and strategy to identify and provide coordinates for a certain period, it is required the existence of correctly identified and reviewed data and information, and in order to correlate labor demand with supply, it is required the development of a solid platform of social dialogue between all the actors involved in this process (Ministry of Labor and Social Justice, Ministry of National Education, Ministry of Business, Trade and Entrepreneurship, Ministry of Economy, other educational institutions, economic agents, business associations, sectoral committees and social partners), in order to produce the most accurate forecasts under which the state demand for different jobs/professions will be established.

c) The factors of influence on social dialogue on the labor market

The increase of the awareness of social dialogue importance, as well as its development in order to conduct consultations and exchange of information in the field of social and economic policies are critical for strengthening mutual trust and cooperation between employers, employees, central specialized bodies of the government and local government authorities.

One of the problems that we have to face in this field is the poor capacity to create partnerships, especially at the local level, the lack of constructive local dialogue among the main actors with potential to contribute to community development (local government, private sector, civil society, donors, community, including migrants).

d) Institutions and mechanisms on the labor market

One of the key-conditions to obtain a sustainable increase of the employment rate with impact both on individuals and on the national economy as a whole is the consolidated institutional capacity of all actors involved in the development and performance of public policies in the field, as well as the existence of appropriate mechanisms to ensure the implementation of public policies. An important role must be played by the increase of the institutional capacity of the local government authorities. Regional/local authorities have a critical role in the economic and social promotion and development of regions. The institutional capacity of the National Employment Agency needs to be continuously consolidated and adapted to labor market requirements in order to comply with the policies in the field and to achieve the development of modern labor market, to enable the increase of employment opportunities and to ensure a sustainable integration of the persons within the economic circuit.

From the perspective of the institutions and mechanisms available on the labor market, the following challenges were identified:

1. Low institutional capacity of the relevant actors on the labor market: low institutional capacity to issue, implement and assess employment policies; the need to modernize Public Employment Service nationally and locally; low institutional capacity to implement active employment measures, including by offering equal opportunities to women; low capacity to control the fulfillment of labor law, as well as to implement the provisions of employment policies on the labor law. Private sector has low capacity to contribute to the development of qualifications, and this is something that must be remedied;

2. The low level of wages, especially of the minimum wage. Despite all current measures taken for wage increase, if this is not correlated with an appropriate labor productivity, it can turn into a burdensome expense for any government. The high number of unproductive jobs is one of the causes of low wages. Another identified problem is the high share of undeclared salaries and the removal of the gap between minimum wages for the budgetary sector and the real sector of the economy;
3. the existing pressure within the social protection system generated by aging of population with consequences on human capital and social security system; the demotivating nature of the social security system; the high level of poverty and social exclusion, especially in rural areas; inefficient social inclusion measures, including on the labor market, for vulnerable persons.

4. Migration - a complex phenomenon of influences on labor force

Not only in our country, but also at European level in the current economic background, the situation of labor force is generalized. „The new challenges brought by the decline and aging of population will require objective, detailed and complete reconsiderations of many existing economic, social and political existent programs and policies. Such reconsiderations shall include a long-term perspective. Critical issues to be approached by these reconsiderations: (a) appropriate retirement age; (b) level, type and nature of retirement and healthcare benefits for the elderly; (c) participation in the economic activity; (d) appropriate level of pension and health contribution for an increasing elderly population; (e) policies and programs on international migration, in particular replacement migration and the integration of a large number of recent migrants and their descendants[13]".

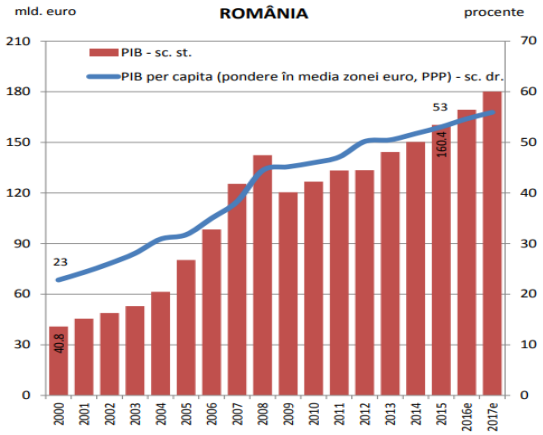
The migration crisis will lead to reconsiderations and adjustments of immigration policies in developed European countries and potentially to reconsiderations of development strategies. Governments are expected to undertake programs and measures to increase the participation of inactive national population in economic activities (alongside measures already taken to increase standard retirement age and length of service for full retirement). The reserves are important if we take a look at the employment rates of working age population (15-64 years old): values of 72-74% in Germany, United Kingdom, Sweden, the Netherlands, Denmark and values lower than 65% in most of the other countries (61% in our country) (Eurostat, 2016b). On the other hand, this year in February, the employment rate reached 10.2% in France, 11.7% in Italy, 12.3% in Portugal, 20.4% in Spain, 24% in Greece, 21.7 millions of unemployed persons being recorded in the European Union (Eurostat, 2016c; 2016d)).

However, migration will continue to be indispensable for developed economies, but changes are expected in terms of the level of the phenomenon and the flows origin. An expectation period is foreseen after the great wave of 2015 and its unknown consequences and implications[14].

5. Labor force in Romania

Although in the last 15 years the GDP increased 4 times, from EUR 40.8 billion in 2000 to EUR 160.4 billion in 2015; Despite this, the increase of the GDP does not effectively show the welfare of the persons and how good the quality of the environment is (Eurostat – section GDP and beyond).

Image 4. Evoluția PIB - 2000 - 2017



Sursa:http://www.bnr.ro/DocumentInformation.aspx?idInfoClass=6885&idDocument=22336&directLink=1

The Romanian economy recorded a cyclical growth between 2014-2015, so that in 2016, the economic growth reached the peak in relation to the post-crisis period (4.9%), a situation generated by a strong domestic demand on the background of pro-cyclical tax policies. The economic growth is projected to remain stable during the term used for forecasts, namely of 3.7% in 2018. The current account deficit broke down in 2016 and is expected to be worse, as strong domestic demand led to increased imports. Private consumption continued to increase, by being encouraged by strong wage increases and by the decrease of indirect taxes. While private investments

[13] Coleman, David. 2010. Who's afraid of low support ratio? A UK response to the UN Population Division Report on "Replacement Migration", Expert Group Meeting on Policy Responses to Population Ageing and Population Decline, Population Division, United Nations, New York, 16-18 October 2000

[14] Vasile Ghetau – Polupația Uniunii Europene și migrația. http://www.contributors.ro/global-europa/populatia-uniunii-europene-si-migratia/

benefited from low interest rates and a stable level of investors trust, public investments were reduced in 2016 due to a low level of EU funds absorption. The employment slightly decreased in 2016 and it is expected to grow at a moderate pace[15].

The Romanian balance sheet on labor market, education and social reforms is heterogeneous. Progress in reforming public employment services was initially slow, but accelerated significantly in 2016, being catalyzed by the efforts of Romania to meet the preconditions for obtaining EU funds. The repeated requests to extend the area of active policies in the field of labor force and to increase their efficiency received an appropriate answer in 2016, by legislative amendments, the integration of national budgets and of the European Social Fund, as well as by means of a better coordination between employment and social care services. The recommendations specific to each country (RST) which were successively formulated in order to find solutions for the problems regarding employment among young people and the high percentage of young persons who are not professionally enrolled and do not attend any educational or training program found their answer in a more integrated approach, which was proposed in 2016, including by granting a central role to the National Employment Agency. Salary tax was reduced, but no specific objective was envisaged. Repeated requests to fight undeclared work generated limited progress, highlighted by joint inspections carried out by tax administration and Labor Inspection in 2016.

Furthermore, so far, there has been limited progress on the set up of a mechanism for the establishment of the minimum wage, the decisions made not being based on objective criteria. In what concerns social inclusion, the Law on minimum inclusion income was adopted in 2016 and will become effective throughout this year. During 2016-2017 the reorientation to the introduction of integrated services for disadvantaged groups started and could have an important impact if fully enforced and extended nationally. There has also been modest progress in improving the quality and access to pre-school children education and care by introducing social vouchers for poor families, including for gypsy people. Early school leaving strategy was adopted although nothing was improved in this respect in 2016, but it will be essential to speed up implementation on the field in order to decrease school dropout rate. The registration of certain results in the field of vocational and technical education was intended (VET) by adopting a VET strategy and by re-introducing vocational schools, but these measures were inadequately correlated with the labor law.

6. Conclusions

The access to decent work for all citizens is a priority for labor market policies across the European Union because this is the basic mechanism of social inclusion. The diagnosis of the labor market situation shows profound social dislocations caused as a consequence of the transformation of the economic structures after 1990: the decrease of the number of active population and employed population until 2006, the high share of the agriculture in the structure of the employed population by activity sectors, seasonal nature of the labor market, etc. In relation to the European statistics, there is a gap between the Romanian labor market and the European markets. While in the urban environment, labor market is in line with the European general model, with a sub-representation of entrepreneurs (business owners and self-employed workers), in the rural environment, the labor market rather follows the model existing at the beginning of capitalist societies, the majority of the population works in own households and is not connected to the mechanisms of the market economy[16].

The evolution of the employment and social situation in Europe: the analysis of 2017 shows positive trends, but points out high pressure on young persons[17]. The employment rate has never been so high in the EU, by being in fact 234 million persons with job and, at the same time, the unemployment rate is the lowest since December 2008. As of 2013, 10 million jobs have been created in the EU. However, beyond social and economic progress, there is evidence showing the existence of a great pressure on younger generations. In this context, Marianne Thyssen, the European Commissioner for Employment, Social Affairs, Skills and Labor Mobility declared: "This annual review shows once again that we are firmly on the path towards more jobs and growth. However, today's young and their children may end up worse off than their parents. This is not what we want. Swift action is needed. With the European Pillar of Social Rights we want to preserve and improve our social standards and living conditions for future generations."

The report that the European Commission draw up last year showed that, despite the steady improvement in EU living standard, young people do not benefit from this positive evolution as much as elderly. Furthermore, the share of younger persons in labor income decreased over time. These challenges affect the decisions of young couples, including the decision of having children or buying a house. In its turn, this can have adverse effect on fertility rates and, therefore, on the sustainability of pension systems and economic growth. Furthermore, the working age population is projected to decline by 0.3% each year until 2060. This means that a lower number of

[15] https://ec.europa.eu/info/sites/info/files/2017-european-semester-country-report-romania-ro.pdf

[16] Presidential Administration, Presidential Commission for the Analysis of Social and Demographic Risks – Social risks and inequities in Romania, September 2009, pp.30

[17] European Commission – Press release on employment and social developments in Europe (ESDE). Bruxelles, July 17th 2017

employed persons will have to ensure the maintenance of current growth trajectory and, at the same time, a lower number of taxpayers will contribute to pension systems – often with lower and/or irregular contributions as they will not be corresponding to full-time and/or standard work- while more pensioners will depend on them. Today's young workers and future generations therefore seem to face a double burden stemming from demographic change and the need to ensure pension systems' sustainability.

Policy makers can prepare for and mitigate these evolutions in several ways. First of all, we need to make full use of our human potential on the labor market, by activating and equipping with the right skills all generation groups and making sure there is a proportionate link between the duration of working lives and life expectancy. Policy efforts resulting in higher fertility and efficient migration management can also help, as well as supporting innovation and increasing efficient spending on investment in young and old people's skills and their education. Lastly, social partners can make a major contribution to bridging the gap between younger and older workers to promote a fairer labor market for both. This includes promoting lifelong learning, the provision of social protection benefits and contributing in the design and implementation of employment protection legislation and active labor market policies. Investing in people and empowering them to harness quality job opportunities is exactly at the heart of the 'New Skills Agenda for Europe'. It has the aim to support the development of citizens' skills to prepare them for the changing world of work.

According to the study drawn up by KeysFin, Romania had, in 2016, an employed population of 8.45 million[18] (private & public system), compared to 9.35 million in 2007. If in 2007 our country had 5.19 male employees, in 2016 the number was of 4.8 million. A similar decrease, but even more pronounced, is registered among women. "The statistical data partly confirms the Romanians' exodus towards the West. Since the EU accession in 2007, many Romanians have chosen to leave to developed countries, searching for better paid jobs, better living", the analysts explained. The highest labor demand is among experts (17,731 jobs), almost double compared to 2009, but remains under the record level of 2007 (22,295 jobs). Statistical data shows that there is also a high demand of service workers (8,205 jobs), along with facility and machinery operators/machines and equipment assemblers (7,035) and qualified workers (6,904 jobs). Overall, on the background of the economic growth, the demand for qualified workers in the economy has evolved over the last few years, but remained under the value of 10 years ago", KeysFin analysts state.

Despite the attempts to remedy labor force situation, the crisis of 2009-2010 strongly hit private initiative, which shows that the number of entrepreneurs decreased in 2016 to 1.6 million compared to over 2 million in 2007. More than 400,000 businesses were swept away by the crisis. Take a look of this number from the point of view of business relations horizontally in the economy and you shall have the real dimension of the socio-economic impact", KeysFin experts explained. According to the data of the National Prognosis Commission, it is estimated that the labor market will not record significant increases in the future. The estimation of the National Prognosis Commission shows that the average number of employees will increase until 2020 to 5.6 million, compared to 4.95 million in 2017, out of which 4.6 million will be in the private area, the rest will be employed with the state. The perspective of the authorities on salary evolution until 2020 provides the increase of the net average wage of over EUR 130 (RON 590) from RON 2274 in 2017 to RON 2864 in 2020.

The following are among short and medium term actions which can stimulate employment growth among young persons, especially in case of our country[19]:

- support for young persons to create and develop micro-enterprises, aiming to strengthen entrepreneurship among young persons;
- tax incentives for enterprises using indefinite labor agreements or for turning temporary agreements in indefinite labor agreements;
- consolidation of professional training courses, advice on setting up small businesses;
- promotion of professional information, guidance and counseling services;
- promotion of the training on the job for low skilled and unskilled young persons; Perspectives of Romanian labor market on the background of the European strategy 2020 243

On the long term, we believe that a significant impact would be represented by the launch of investment programs (minimum 2% of the GDP) for the development of educational systems.

The Romanian labor work is nowadays strongly affected by the government actions of 2017 which aimed the modification of the tax code, the level of the minimum wage and salary law. The Romanian business environment is severely distorted by these measures which did not have sufficient impact-based studies.

[18] Teodora Cimpoi "Cum arată economia românească a muncii, la 10 ani de la aderarea la Uniunea Europeană", România liberă May 1st, 2017

[19] Lucian-Liviu Albu, Petre Caraiani, Marioara Iordan - Perspectivele pieţei muncii din România în contextul Strategiei Europa 2020 - pp. 242-243. http://www.cnp.ro/inovatie/docs/seminar-studii-25-06-2012/Rezumat%20studiu%20Piata%20muncii.pdf

References

- Lucian-Liviu Albu, Petre Caraiani, Marioara Iordan - Perspectivele pieţei muncii din România în contextul Strategiei Europa 2020
- Coleman, David. 2010. Who's afraid of low support ratio? A UK response to the UN Population Division Report on "Replacement Migration", Expert Group Meeting on Policy Responses to Population Ageing and Population Decline, Population Division, United Nations, New York, 16-18 October 2000
- Vasile Ghetau – Polupaţia Uniunii Europene şi migraţia. http://www.contributors.ro/global-europa/populatia-uniunii-europene-si-migratia/
- Gheorghe Creţoiu, Viorel Cornescu, Ion Bucur - Economie, edition II, C.H. Beck Publishing House, Bucharest, 2008
- Cătălina Bonciu - Managementul resurselor umane, Credis Publishing House, Bucharest, 2007
- Iulian Ceauşu - Dicţionar enciclopedic managerial – enciclopedia managerială, vol 2, Editura Academică de Management, Bucharest, 2000
- I. Beardwell, l. Holden - Human Resource Management. A Contemporary Perspective, Pitman Publishing, London, 1997
- Sorina Enache - Interdependenţa dintre piaţa muncii şi şomaj în economia postcriză, Economie teoretică şi aplicată, Volume XX (2013), No. 8 (585)
- Nicolaas de Zwager, Ruslan Sinţov. Inovaţie în migraţia circulară - Migraţie şi dezvoltare în Moldova: Studiu de piaţă. NEXUS Moldova Intern. Agency for Source Country Information (IASCI), Centrul de Analize şi Investigaţii Sociologice, Politologice şi Psihologice (CIVIS). Chişinău, 2014
- Teodora Cimpoi - Cum arată economia românească a muncii, la 10 ani de la aderarea la Uniunea Europeană, România liberă May 1st, 2017
- ALMAS - Managementul resurselor umane - Bucharest, 2003, module II
- Presidential Administration, Presidential Commission for the Analysis of Social and Demographic Risks – Social risks and inequities in Romania, September 2009
- Eurostat. 2015. First population estimates. EU population up to 508.2 million at 1 January 2015
- http://ec.europa.eu/eurostat/statistics-explained/index.php/Employment_statistics/ro
- https://ec.europa.eu/info/sites/info/files/2017-european-semester-country-report-romania-ro.pdf
- Eurostat.2016b. European Union Labour Force Survey (//ec.europa.eu/eurostat/web/lfs/data/database)
- European Commission – Press release on employment and social developments in Europe (ESDE). Bruxelles, July 17th 2017

FACTS AND PERSPECTIVES OF SOCIAL POLICIES

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Abstract

This study aims to present a short review of the facts and perspectives of the social policies under the terms of the economic, social and political conditions of 2018. After a complicated year, both politically and economically, with deep changes in terms of legislation, 2018 promises to be full of challenges in what concerns the economic, social and political area. The economic and political events of last year (the negotiations on the Brexit, USA paradigm changes, governmental uncertainty in Germany, still visible manifestations of Russia, the still uncertain situation in the European area, etc.) shall have an impact on the evolution of the Romanian economy and on the governmental policies. We hereby intend to analyze the facts and the main potential evolutions regarding the situation of the reforms of the social policies area from the perspective of Romania and of the European Union.

Keywords: *social policies, social protection, economic policies, welfare theory, pension and social securities system.*

1. Introduction

This paperwork seeks to find answers regarding the sustainability of the long-term social policy system. Social policies are measures and actions undertaken by the state (strategies, programs, projects, institutions, legislation, etc.) which address the needs of social protection, education, health, habitation etc. In other words, social policies aim at promoting and, as far as possible, supporting the welfare. Social policies aim to change the characteristics of the social life of the community in a direction considered acceptable. The central element is the welfare of the individual, family, collectivity and generally, of the society.

Despite this, the state is just one of the welfare providers, human welfare having multiple sources. Humans are superior and unique beings, whose welfare can be brought by the richness and variety of products on the market, by the income from work (salaries or profit), private income (rent, insurance, loan, etc.). Another source of welfare is represented by social status, family, neighbors, friends, work colleagues and everyone who perceives you as an individual within a community. Finally, another source of welfare relates to the functioning of state institutions, NGOs, foundations or associations which every individual resorts to in his/her current work. Therefore, individuals' welfare cannot be measured by means of a single template, but depending on every individual, his/her desires, aspirations and interests.

Therefore, the main consequence of state social policies is social protection of population, but this is achieved under the joint efforts of all the involved factors – economy, labor market, non-governmental sector, community, state.

Social policies are part of public policies. Public policies consist of the state policies in all the areas relevant for the functioning of a society: economic policies, demographic policies, tax policies, salary policies, policies in the field of environmental protection, urbanization policies, etc. Therefore, social policies represent a set of programs, activities and measures aimed at addressing (elementary) human social protection needs, education, health, habitation and – generally – the social welfare increasing by means of (re) distributing important resources of money, services and time.

Social policy at EU level consists of[1] a set of complementary policies, which have developed and multiplied over time and which act in those sectors of activity affecting or generating the level of individual and social welfare. The permanent concern of the European community on social policy – started with the Treaty of Rome (1957) - has, over time, led to the creation of an "European social model". One of the most important moments of the evolution of this model is around 2000, when the transition from an approach based on the mitigation of adverse social consequences of structural changes, to an approach that aims at modernizing the European social system and investing in human capital occurs – in other words, the transition from a quantitative approach (mitigation of consequences) to a qualitative one (investments in individual). Furthermore¸ an important characteristic of social policy is the delegation of responsibilities regarding the fulfillment of community targets to Member States.

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[1] Politica socială – Institutul European din România 2003, seria Micromonografii – Politici Europene.

The goal of the European Union is to ensure the protection of fundamental rights in the creation, application and construction of EU law. Fundamental rights of EU, in their classic function of defense rights, protects the individuals against public power intromissions of EU institutions. The main values of the European Union: the rule of law, democracy and human rights introduced in its founding treaties, were consolidated by the adoption of a series of documents, which facilitated the fulfillment of certain stages. Furthermore, by means of every step whereby new regulations were established, which led to the development of the Union, new guarantees on human rights were granted[2] .

The Community, and later the European Union, by means of its initial structure as an economic construction and by the modality of making the decisions, succeeded in building an unit and an ability to act which is superior to other European cooperation organizations. The process of integration of this space was achieved by establishing four categories of fundamental freedoms for the European Union Market (free movement of goods, persons, services and capital), to which the following were added: the removal of barriers, the harmonization of legislations, as well as the establishment of an intergovernmental and democratic process of decision-making, in which the application of the acquis communautaire is critical[3]. For the first time in the history of Europe, the Charter of Fundamental Rights of the European Union sums up in a single document the whole area of civil, politic, economic and social rights. The fundamental legal regulations were acknowledged, reaffirmed and developed in the content of the Charter, which fulfills the competences and duties of the Union, but also the principle of subsidiarity. These rights result especially from constitutional traditions and joint international obligations of Member States, from the European Convention on Human Rights and Fundamental Freedoms and the case law of the Court of Justice of the European Union and of the European Court of Human Rights.

The Charter is structured in a Preamble and 54 articles, grouped in six charters: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights and Justice. Therefore, in the 7 chapters, different from traditional constitutions, the Charter makes an explicit distinction between citizens' rights and the rights of all individuals residing in the EU. At the same time, the Charter is an innovation by its content, being much broader than that of the European Convention on Human Rights and Fundamental Freedoms[4] (Fuerea, 2006).

In Romania, social policy is a concerted policy, coordinated by the Ministry of Labor and Social Justice and supported by the activity of other ministers, such as the Ministry of Health, Ministry of National Education and Ministry of Research and Innovation. The fields of activity of the national social policy are the following: **1.** Labor force market (including unemployment) and salary policies; **2.** Pensions and other social insurance rights; **3.** Social assistance and family policies; **4.** Labor relationships, health and safety at work.

2. Labor force market

The labor market trust index of Romania[5] shows that more than 60% of the country population believes that 2018 will represent a year of economic downfall due to the following grounds: • 61% of the employees do not expect a salary increase over the next six months • 64.5% feel a greater stress at work • 60% want to change their job in the following year.

The legislative changes in the field of salary, tax and contributions from the beginning of 2018 make Romanian employees to lose confidence in what concerns their future on the labor market. Along with elements perceived to be negative, specific to the companies they work for, these changes make the employees to await a year with more work, more stress and lower income.

According to the answers given within the survey carried out by Undelucram.ro, the largest platform dedicated to Romanian employees, 2018 will bring a massive labor migration between companies operating in Romania.

Not less than 60% of the respondents said they wanted to change their jobs in 2018. The decisions to leave the current job appear to be voluntary, given that 48.3% of the employees are not afraid of being laid off in the next six months. In order to successfully make the step towards a new job in the following year, 61.86% of the respondents said they are willing to take part in advanced courses. 40.9% of the survey respondents declared their ability to be relocated to a different city than the one they are living in order to start a new career. Even so, most survey respondents acknowledge that it will be difficult for them to find a job according to their training and expectations. 44.8% considers that at the time being, there are fewer job opportunities than in mid-2017.

The decision of the employees to search for new opportunities in 2018 is fueled by several factors which, in their opinion, affected and will affect both the income and the professional development. The pessimism that manifests itself in the labor force is, first of all, linked to salary. 61% of the employees do not expect any salary increase in the following six months. Almost 70% of them expect an adverse evolution of income, believing that their salary will lower as a consequence of transferring the contributions from the employer to the employees. Neither the other

[2] Moroianu Zlătescu Irina, Drepturile omului – un sistem în evoluție, IRDO Publishing House, Bucharest 2008, p. 119-120
[3] Peers Steve, Ward Angela, The EU Charter of Fundamental Rights, Hart Publishing Oxford and Portland Oregon, 2004, p.64
[4] Augustin Fuerea, Manualul Uniunii Europene, edition III revised, Universul Juridic Publishing House, Bucharest, 2006, p. 72-73
[5] Radu Ghițulescu, Pesimism pe piața forței de muncă pentru 2018, December 13th, 2017 in http://www.marketwatch.ro

components of the income make the employees feel more confident. 52.8% believe that, in addition to the lower wages they will have in 2018, they will also be affected by a decreasing bonus.

If at the end of 2016 the employees were already planning the holidays for 2017, currently 55.3% of them stopped doing this, saying that they expect to afford less leisure time.

In addition to the lower income, Romanian employees believe that work environment is gradually coming down. 64% claim that during the last six months, the workload has increased, while the support provided by the company or colleagues for the performance of the activity remained the same (51%). Even with a higher workload, work environment, procedures or efficiency remained the same (41.6%), or got worse (41.8%). This leads to a greater stress, felt by 64.5% of the employees. Despite the fact they have evolved professionally in the companies they work for (56.7%), only 18.7% believe that they can advance on the hierarchical scale of the current job. The aforementioned elements make 40.3% of the employees lose their trust in the future of the companies they work for.

3. Pension system

For those directly involved in studying, calculating and granting pensions (National Fund of Public Pensions, the Ministry of Public Finance,

Ministry of Labor, Family and Social Protection, National Commission for Prognosis and even the Presidential Commission for the Analysis of Social and Demographic Risks) - the pension system involves a great volume of material, technical and human resources. Furthermore, pensions are always a favorite subject for electoral campaigns; the politicians always promise higher pensions to an electorate they reward or buy. If the issue of pensions and especially the high number of retirees worry the authorities all over the world, in Romania the situation is quite dramatic due to multiple conditions which split the working population. Unfortunately, the intervention of politics in the economy life and structure affects decisively this fragmentation of the population.

The Romanian pension system, as in case of most of the European countries, originates from the system designed by Bismarck about 125 years ago, being "step-by-step" systems.

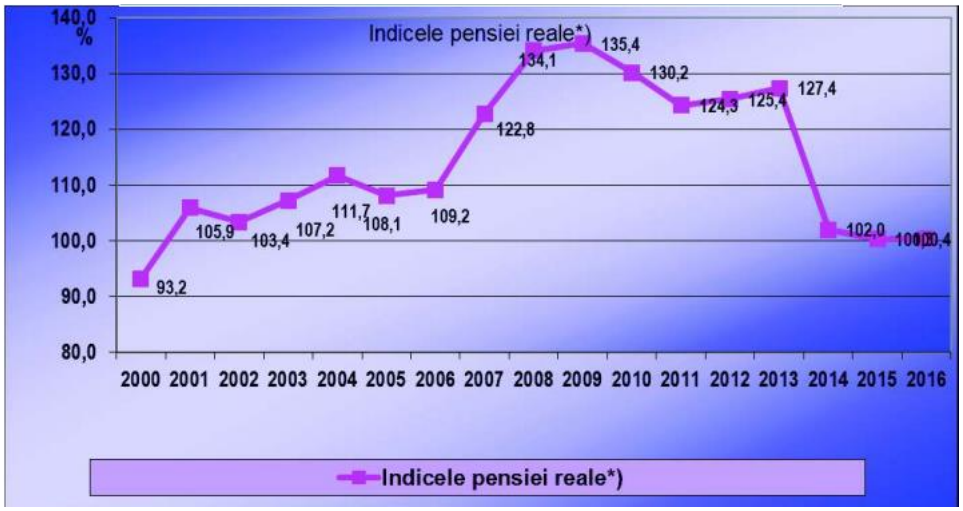
The most important observation for this system is that it has a compulsory nature, which is related to individual labor agreements. The system is supported by three parties: employer, employee and state.

Western Europe took over the Bismarckian system, thus becoming the alternative model to the Beveridgean or Anglo-Saxon insurance system. It is used in many EU Member States such as France, Germany, Austria, Belgium, the Netherlands and Romania.

The characteristics of this model are the following:

- the financial resources are mainly represented by compulsory contributions paid by employees and employers;
- furthermore, there are resources coming from state budget (local or national) allowances or other types of allowances;
- the institutions managing the insurance funds are nonprofit;
- the management and use of insurance funds are made nationally and by means of local tax administration departments.

Image 1. The evolution of real average pension throughout 2000-2016 (%)



Source: Constantin ANGHELACHE, Alexandru MANOLE, Marius POPOVICI, Emilia STANCIU - Analiza statistică a situaţiei pensionarilor, Revista Română de Statistică - Supliment nr. 12 / 2016, pp.176.http://www.insse.ro/cms/sites/default/files/field/publicatii/buletin_statistic_lunar_7_2016_0.pdf

At the level of the European Union, including in countries located in Central and Eastern Europe, pension systems are mainly organized as state pension systems, financed and supported by the state budget, a

modality of organization with special effects on public finance. Furthermore, when we speak about the way of organizing and financing different types of public pension systems available in the European Union Member States, but especially when we speak about their financial sustainability, we have to take into account the increasingly trend of population aging in conjunction with financial constraints. In order to classify pension systems, the following determinants must be taken into account:

First of all, according to financing means, the following categories are outlined a) pay as to go (PAYG) systems which operate on the principle of social solidarity, namely the employee pays, as long as he/she is active, a contribution which will become the pension of future generations and b) systems privately financed or managed by the contribution of the employee or the employer;

According to legal basis and establishment modality, the following categories are outlined: systems established by law or by collective labor agreement;

According to the participation in the system, they are compulsory and voluntary;

According to the types of benefits: systems where the obtained benefits vary depending on the results of the investment of the assets of the participant's funds and systems where a certain benefit is established and the contributions for reaching the respective benefit are calculated. The great majority of the European countries fall under the scope of this last type of defined benefits, except Germany, Slovakia and Romania where points system is available.

Within the European Union, pension system is supported on three pillars: the first pillar belongs to the pensions regulated under the law, totally financed by shares – social insurance contributions of the participants to the public pension system. It is a pay as to go (PAYG) system under the scope of which fall countries such as Bulgaria, Estonia, Lithuania, Latvia, Hungary, Poland, Slovakia and Romania. The second pillar consisting of pensions established under the labor agreement (by collective or individual provisions) called occupational pensions, strictly connected with the workplace in countries such as ca Bulgaria, Poland, Hungary, Romania or Slovenia. The third pillar, of the individual provisions, with no connection with the occupation. The members are largely employed, without this being absolutely required, under the possibility of collective membership (by trade unions or associations). The participation is not mandatory under the law, the employers or the state can contribute to this system.

Despite all these, in the assessment of the pension plans, we have to take into account what happens in practice and it was noted that the amount saved by the population is relatively stable in a certain period. If a certain saving system is required, the amounts saved by other means will decrease. Therefore, the economic increase should not be connected to the specific arrangements for the constitution of pension systems, to the existence of the accumulation funds, even if they represent important investment sources. Furthermore, the largest part of pension funds is placed, in order to avoid investment risks, in government bonds, therefore in public debts. Indeed, we expect that the management of private pension fund to be a prudential one, therefore, to avoid failure, but relatively small accumulations of system contributions will result. The perception of the differences in the addressing of pension reforms by the World Bank and the European Union is important to us, given that in the treatment applied to World Bank (supported by the International Monetary Fund, in what concerns the low level of income, generally speaking, therefore the level of the pensions, as a modality to control the inflation by reducing consumption). It is obvious that not only Romania has suffered such an influence, but also other former European socialist countries. It should be noted that the differences noted hereby between EU and the World Bank are not directly disputed, but rather by mutual ignorance of the projects of each of the parties. Therefore, in the studies of the World Bank, public pension schemes are deemed inappropriate, difficult to reform and represents a deadlock for the economic growth and the governments of the assisted countries not to repeat "the costly mistakes of industrialized countries".

On the other hand, the scope within the EU is that the reform of the pension system is not performed to the detriment of current beneficiaries, therefore not by diminishing the role of the public system, which is the most widespread and will remain the main system, but which, despite this, is not the only solution. By means of reform measures, which could also involve reductions in the amount of public pensions (very generous in certain countries), a fair intergenerational balance, a satisfactory level of pensions, sustainability and modernity should be reached.

Therefore, a retiree can have one or more pensions, financed from a single source or from several sources. Theoretically speaking, the more the pension sources are multiplied, the more likely it would be to cover the requirements of an acceptable standard of living. However, this does not happen automatically, if the amount of the pensions from each source is low, the optimal level of financial resources may not be reached. The most disadvantageous situations, not at all impossible, would be those by which, although there are available several sources of pensions and several types of pensions, the target population is not covered and/or a combined amount of the pensions is provided which would have been provided by a single system / single pension. Normally, it would be desirable to seek high performances in delivering income to beneficiaries within each system/source/pension. If two or more systems do not exceed the cumulative performance that would be achieved by a single one, their introduction is not justified, given that this would

imply a higher level of administration costs compared to the operation of a single one.

Table 1: Romanian private pension system (pillar II)

ROMANIA	Retirement age: 65 men / 60 women (in 2015)
THE ORGANIZATION OF PRIVATE PENSION SYSTEM	Pillar I - Compulsory: ▪ PAYG type –the system of pension points; Pillar II – Compulsory/optional (2007): ▪ Defined contributions, individual accounts, Contributions of 2.5 % (of 10.5% of gross salary) – 5.1% as of 2015. In December 2017, it was reduced to 3.75%. ▪ There is separation between the manager and the fund. ▪ Compulsory for those under 35; ▪ Optional for the other employees (35-45 years old). ▪ Private pension systems – Pillar II - accumulated, throughout 2007-2017, total funds of RON 38 billion in the accounts of over 7 million participants, thus achieving an average annual yield of 9.1%, Pillar III – Optional: ▪ Optional pensions, contributions of no more than 15% of income, individual accounts. ▪ In December 2017, the number of participants in Pillar III reached 446 thousand.
SYSTEM GUARANTEES	Relative performance guarantee Minimum level of rate of return, calculated on risk levels. Absolute guarantee: The total amount due for private pension cannot be lower than the value of the contributions paid, reduced by transfer penalties and legal fees. Other security elements: Romania has available the widest range of risk control tools: assets separation, actuarial reserves, depository verification, guarantee fund, audit, minimum rate of return. The guarantee fund is intended to cover unpredictable risks and which are not covered by technical provisions.
DEVELOPMENT OF THE MARKET AT PILLAR II LEVEL (2009)	4.57 mio. participants – Pillar II. 12 managers. RON 25.94 billion (about EUR 6 billion), representing 3.70% of the GDP in 2015. In December 2017 the number of participants in Pillar II had reached 7.043 mio. participants. Maximum limits for investments: 20% in money market instruments, 70% government bonds, 30% securities issued by local public administrations, 50% shares, 5% corporate bonds, 5% mutual funds. Maximum fees allowed: Max. 2.5% of contributions. Max. 0.05% / month of net assets.

Source: Adapted after Dan Zăvoianu – Comparation between private pension systems pillar II and the world states market - Communication Department – CSSPP, Bucharest, July 2010

In Romania, in the short term, the risk of breakdown of the pension system was removed, in medium and long term, but its sustainability is still questioned. On the background of an unfavorable employment rate, on the background of a rapid population aging and of a demographic involution which is predicted to be disastrous (the National Institute of Statistics predicts that the population will decrease by 2060 by about seven million persons), the pension system will no longer be able to provide the necessary social protection for future retirees and will become a cornerstone of the economy by affecting investment in productive sectors and increasing taxation). After recalculating the pension system in 2010, it became more equitable, being relatively simply to apply and easier to understand. In this context, the measures in recent years have favored sustainability.

In our country, the current pension system is based on three pillars, the same as in case of the European Union Member States:

Pillar I public budget of pension pay as you go with defined benefits, regulated by law 263 of 2010 according to which the contribution of the employee is of 10.5% of the gross salary income and the contribution of the employer of 20.8% in relation to the employee's gross salary.

Pillar II compulsory pension fund, regulated by law 411 of 2004 characterized by:

- mandatory contribution for employees under 35 and optional for those between 35 and 45;
- contribution (in 2013) of 4% of the gross salary income of the employee is a part of the contribution due to Pillar I;
- minimum investment guarantees – actual amount of all contributions minus management fees.

Pillar III of optional pension fund, regulated by law 204 of 2006, where the contribution is optional, is privately managed and the income cannot be guaranteed, it is also optional. The contribution in this pillar is of no more than 15% in connection with gross income, is a contribution jointly paid by the employee and the employer and is encouraged by tax deductibility.

Several studies have emerged in the recent years which relate in detail to public policy alternatives in the field of pensions. Therefore, in 2012 Expert Forum published Working Paper 3 called “Cine va plăti pensiile „decreților” în 2030? Situația României în contextul comparativ UE și 7 scenarii de evoluție ale sistemului public de pensii” (Who will pay the pension of the children of the decree in 2030? Romania's situation in the comparative EU context and 7 evolution scenarios of the public pension system).

Therefore, according to the most plausible scenario, if the legislation in its current form remains in force, pension fund deficit shall be of no more than 2.5% of the GDP in 2019. In 2042, the fund will reach a deficit of about 1.2 % of the GDP. The pension as a percentage of gross average salary, which is currently of 37%, will decrease to 24 % in 2031. The conclusion of the study is that depending on the alternation of political parties with left or right ideology, the emphasis will be placed either on the social component or on the reduction of the deficit in GDP. In case of the social component, the shares of the contributions directed to pillar II increase to 10%, the deficit of GDP may increase by 0.62% compared to initial scenario, but the replacement rate improves by 2%. If the GDP deficit is to be reduced, the retirement age will be increased to 65 years and as a consequence of a fund deficit of no more than 2% of the GDP in 2019, the fund will be balanced. However, the pension system will be the test stone of any government for 50 years of now on, this is the conclusion of another study called "Riscuri şi inechităţi sociale în România" (Social risks and inequities in Romania) published in 2009 by the Presidential Commission for the for the Analysis of Social and Demographic Risks[1].

According to the respective study, the retired population (aged 65 and more) is in a continuous growth while the number of employees decreases dramatically:

- since 2008, few generations have started to enter the labor market, and the number of employees will not increase much, even in the event of a steady economic growth. As a consequence, the use of immigrants will become a necessity in five or six years, when young labor force inputs will be very low and will be reduced by the increase in the share of students in every group and by the departure of young people (whose number is already very low) to better paid jobs in the West;
- as of 2030-2035, the children born by the transition generation, likely to be less numerous, will enter the labor market. Only the recovery of the fertility rate (which should reach from 1.3 to at least 1.5, the EU average in the medium term and to 1.7-1.8 in the long term), correlated with the regulation of the migratory flows would reduce this process;
- the issue of the elderly without pension and health insurance will be visible especially after 2025, when persons who work illegally or do not work at all reach old age without benefiting from pension or health insurance, and the costs of the minimum services related to them shall be incurred by the social assistance system.

Table 2: Polish private pension system (pillar II)

POLAND	retirement age: 65 men / 60 women
ORGANIZATION OF PRIVATE PENSION SYSTEM	Pillar I - Compulsory: ▪ Pay as You Go, Defined contributions, virtual accounts (system reformed in 1999); ▪ Occupational public pension schemes. Pillar II – Compulsory: ▪ Defined contributions, individual accounts; ▪ Contributions of 7.3% of the gross salary; ▪ Compulsory for those under 30; ▪ Optional for those between 31 and 50 years old (introduced in 1999) Pillar III – Optional: ▪ Defined contributions, Occupational optional plans introduced in 1999; ▪ Personal optional schemes introduced in 2004; ▪ Reserve funds, demographic bases;
SYSTEM GUARANTEES	Minimum relative performance guarantee Minimum rate of return – the lowest value of the following: ▪ the average market yields over the past 3 years minus 4 percentage points; ▪ 50% of the rate of return annualized weighted average of the last 3 years; ▪ the reserves of the manager must cover potential deficits. If the manager goes bankrupt, the resources of the National Guarantee Fund are used. The amount which cannot be covered by this fund shall be covered by the state treasury.
DEVELOPMENT OF THE MARKET AT PILLAR II LEVEL (2009)	14.36 mio. participants – Pillar II. 14 managers. EUR 43.76 billion net assets. 14.11% share in GDP Maximum limits for investments: 40% shares; 40% mortgage, municipal or corporate bonds; 20% deposits. Statistically speaking – 31% of the assets are invested in shares. Maximum fees allowed: 3.5% of the contributions, as of 2010. Fees depending on the size of the fund: 0.54%/ year of net assets for small funds and 0.06% / year of net assets, depending on yield – transfer of EUR 23 – 42 (<2 years)

Source: Adapted after Dan Zăvoianu op. cit. CSSPP, Bucharest, July 2010

The first stage of pension fund nationalization in Poland was performed in 2013, when the money of the government bonds was moved from Private Pillar to Public Pillar. Polish state left a period of time where

[1] the report of the Presidential Commission for the for the Analysis of Social and Demographic Risks, led by professor Marian Preda PhD, called "Riscuri şi inechităţi sociale în România" (Social risks and inequities in Romania), published in September 2009.

everyone can "choose" to keep the rest of the sums in private Pillar II or to go to state Pillar I. Despite this, at that time, the authorities forbade pension managers to advertise in order to attract participants**,** and who did not make a choice within a certain time was automatically directed to Pillar I[1].

The Government of Warsaw announced in 2016 the largest restructuring of the pension system of the past two decades, and, as a consequence the authorities are going to abolish privately administrated pensions, the so-called Pillar II, as of 2018. (Reuters news agency). The money shall be transferred to a Reserve Fund and several private mutual funds. Polish government will transfer about a quarter of the assets of about PLN 140 billion, (about $ 35.2 billion), currently held by private pension funds to a single investment manager called the Demographic Reserve Fund, and OFE private funds will be closed[2].

Table 3: Hungarian private pension system (pillar II)

HUNGARY	retirement age: 62 men / 62 women
ORGANIZATION OF PRIVATE PENSION SYSTEM	Pillar I - Compulsory: ▪ Pay as You Go (system reformed in 1995); Pillar II – Compulsory (1998 - 2010). Optional after 2011. ▪ Defined contributions, individual accounts, Contributions of 8% of the gross salary (potentially 2% extra); ▪ Compulsory for those under 35 years old; ▪ Optional for the other employees. Pillar III – Optional (1994): ▪ Defined contributions, individual accounts. Pillar IV – Optional (2007): ▪ Intended for occupational pensions.
SYSTEM GUARANTEES	No performance guarantees, only indirect guarantees. ▪ Hungary has a special fund to protect capital accumulation, financed by mandatory quarterly contributions, between 0.3 and 0.5% of the contributions ▪ Special fund protects total benefit of retirees and the accumulated capital of taxpayers in case of insolvency. Performance goals must be established, but the failure has no consequences.
DEVELOPMENT OF THE MARKET AT PILLAR II LEVEL (2009)	3.02 mio. participants - Pillar II.19 managers. EUR 9.63 billion net assets. 10.34 % in GDP Maximum limits for investments: 50% shares, 30% bonds, 25% mortgage bonds, 10% in real estate funds, 5 % in hedging funds. Maximum commissions allowed: 4.5% of the contributions, 0.66% per month of net assets – management fee.

Source: Adapted after Dan Zăvoianu op. cit. CSSPP, Bucharest, July 2010

In 2010, the authorities of Budapest used the justification of the anti-crisis fight to take over in the accounts of the state both the government bonds held by the pension funds, thus canceling a significant part of the public debt, and their share portfolio. At that point in time, the value of the total assets of private pension funds of Hungary amounted to about EUR 15 billion.

In 2011, Hungary nationalized private pension system. By means of the new pension legislation, EUR 11 billion passed from pillar II to public pension budget, endangered by collapse. The employees were no longer bound to contribute to private pensions and acquired the right to choose the pension system to contribute at.

As part of the compulsory pension insurance, Hungary operates a so-called mixed system consisting of 2 levels. The first level (pillar) operates as a pay-as-you-go service and represents a proportion of 3⁄4. Level II is a private pension scheme which operates based on the principle of capitalized contributions under a private pension system and represents 1⁄4. The minimum insurance term within pillar I is of 15 years for partial pension and 20 years for full pension[1]. There is no minimum term established for pillar II. The contribution of the insurants in level I of social insurance is of 8.5% and for the members of the private pension scheme is of 0.5%. Insured persons shall be entitled to disability pension in the following situations:

- have lost 67% of their work capacity as a result of health deterioration due to a physical or mental illness and no improvement is expected for one year.
- have fulfilled the required service/insurance years;
- do not work regularly or have a salary that is considerably lower than the salary before the invalidity;

[1] http://www.contributors.ro/economie/ce-nu-se-spune-despre-banii-din-pilonul-ii-de-pensii-cine-are-acum-1-000-de-euro-acumulati-poate-avea-peste-25-000-de-euro-la-varsta-pensionarii/

[2] http://adevarul.ro/economie/business-international/polonia-desfiinteaza-pilonului-pensii-banii-vor-transferati-fond-rezerva-mai-multe-fonduri-mutuale-private-1_577b63e05ab6550cb8925659/index.html

[1] https://www.pensiata.ro/pensia-europeana-si-internationala/pensia-in-ungaria/

the minimum insurance period required is different depending on age.

4. Social assistance

A short history of social insurance of Romania reveals[2] that the pension system dates back to 1895 when Mines Act was implemented and the first rules of social assistance were legalized. The workers' rights were in a first stage granted by mutual support between them. Once with the emergence of Mines Act, the introduction of compulsory social insurance for miners and workers in the oil industry was established. On this occasion, both the right to pension and the right to compensation in case of work accidents were institutionalized, a mutual aid fund and a pension fund were established and were supported by the mutual contributions of employers and workers. Later, in 1902 by means of Missir Law, due to the organization of professions, a social insurance system for various categories of craftsmen was established. Subsequently, Nițescu law places on legal basis the principle of compulsory insurances for accidents, illness and old age of all employees in corporations. In the interwar period, the first private social insurance systems emerge, operating in parallel with the compulsory state social insurance system. While state system belonged only to the holders of labor agreements and craftsmen, private system attracted various social categories such as the Romanian Orthodox Church and the members of the creation unions. After the great economic crisis of 1929-1933, Ioaniţescu law unified social insurances throughout the entire national territory. The law establishes the principle of contribution and solidarity, sets the contribution rate to 6% of the salary and guarantees the state pension system. Before the outbreak of World War II in 1938 a new law which tried to keep insured persons under surveillance was adopted.

From the legislative point of view, communist system focused on the modification of previous laws, by Decree 409 of 1945 which provided the increase and indexation of pensions. The last law on social insurances which was adopted by the communist power in 1977 established restrictions on insurance rights.

After 1989, a difficult period of legislative changes in the field of social insurances started, the following being included:

- Law Decree no. 70/08.02.1990 – whereby changes were made to the age pension regime;
- Law Decree no. 118/1190 amended and republished – on granting rights to persons persecuted for political reasons by the dictatorship established as of March 6th, 1945, as well as to those persons deported abroad or prisoners;
- Law 42/1990 – for honoring martyr heroes and granting rights to their successors, wounded persons and persons who fought for the victory of the Revolution of December 1989;
- Law 73/1991 – for establishing social insurance rights and for the amendment and supplementation of regulations of social insurance and pension legislation;
- Law 1/1991 amended and republished – on the social protection of unemployed persons and their reintegration into employment.

The effects of all these contradictory evolutions can be summarized as follows:

- the increase of the total number of retirees from 3.58 million in 1990 to 5.401 million in November 2013 (+50.8%) under the decrease of the number of employees from 8.156 million in 1990 to 4.378 million in September 2013 (- 46,32%);
- dependency rate[3] decreased from 3.43 in 1990 to 0.92 in 2101 and 0.93 in 2013;
- the effective retirement ages were below standard retirement ages: in 2009 the differences were between 5 and 7 years[4];
- dramatic decrease of real net average pension (1990 – 100%) throughout 1990 - 2000 (minimum value of 44.3% in 2000), slight increase throughout 2001-2006 (57-58% in 2006), than the spectacular growth over 2007-2009 (the maximum value being reached in 2010 at 123.8%) and relative stabilization of 2011 - 2012 around the value of 117%;
- replacement rate[5] calculated based on the average pension for normal retirement age and average net salary increased from 48.6% in 2000, to 65.3% in 2010 and 58.2% in 2013 (based on the average net salary of the first 9 months of the year).

Despite all these, we believe that the real reform of state social insurance starts with law no. 19 of 2000, which determines the possibility of access to the social insurance system of all income-producing persons, without being limited to labor agreement holders.

5. Work relationships, health and safety at work

Many of the jobs created in the global economy of today[6] are ecologic jobs, the so-called green jobs, as well as jobs in industries created to mitigate adverse impact on the environment, by developing and

[2] www.filbuc-caa.ro Scurt istoric al asigurărilor sociale în România Apariţia sistemului de securitate socială în România. Sfârşitul secolului XIX – Primul război mondial.

[3] The dependency rate is the ratio between the average number of employees and the average number of retirees.

[4] Mihai Șeitan, Mihaela Arteni, Adriana Nedu, Evoluţia demografică pe termen lung şi sustenabilitatea sistemului de pensii, Ed. Economică Bucharest, 2012, p. 28

[5] Replacement rate is the ratio between the value of the pension (average simple, average value for the normal retirement age and full term of contribution) and the value of average salary (gross or net), in other words how much of the gross / net average salary is replaced by the average pension

[6] National strategy in the field of the occupational health and safety for 2017-2020

implementing alternative technologies and practices. While green jobs are welcome because they offer new employment opportunities, it is important to be set up and monitored so that new potential dangers and risks to be known and eliminated or mitigated.

Education also plays an important role in the development of knowledge/skills in the field of hygiene, body health and integrity, for those integrated in the education system of Romania.

The health and safety at work is perhaps the most important chapter of EU policy on employment and social affairs[7]. The fundamental goal of this chapter is to prevent potential malfunctions within labor system, so that human resource activity can work with maximum efficiency. Human resource is at the forefront, the most important goal being the protection of life, integrity and health of human resource, as well as the prevention of accidents and occupational disease risks.

It is well-known that the scope of the "Community strategy 2007-2012 on health and safety at work"[8] was the continuous, sustainable and homogeneous reduction of work accidents and occupational diseases. Despite this, within the European Union:

- Every year, over 3 million employees suffer a work accident involving absence of more than 3 days from work and around 4000 employees die in the same type of accidents;
- 24.2% of the employees believe that work can affect their health and safety;
- A quarter of the employees consider that their work affect their health[9];
- Over 3% of the gross domestic product of EU represents the level of direct and indirect costs generated by medical leave;
- Last but not least, social insurance costs that can be related to occupational diseases or work accidents are very high.

By taking into account all these aspects, "National strategy on health and safety at work for 2017-2020" is correlated with EU strategic directions and with the "European Pillar of Social Rights"[10], a document that takes into account the dynamics of recent changes at EU level as well as the changes in the labor market. Therefore, according to the pillar, workers are entitled to a high level of protection of their health and safety at work.

In this context, general goals of National strategy on health and safety at work for 2017-2020 are the following:

- a better implementation of the legislation on health and safety at work, especially in microenterprises and SMEs;
- the improvement of the safety and of the protection of workers' health, especially of those from economic activities of risk, in the priority areas of action, with emphasis on the prevention of occupational diseases;
- the simulation of joint actions with social partners, by the awareness and involvement in the management of health and safety issues at work and the materialization of an efficient social dialogue;
- the appropriate management of the issue of older workers in the context of the general phenomenon of population aging, respectively of active labor force.

The specific goals of the National strategy on health and safety at work for 2017-2020 are the following:

- the improvement of the legal background of the health and safety at work;
- the support of the microenterprises and of the small and medium sized enterprises in terms of the compliance with the legislation on health and safety at work;
- the improvement of the process of observing the legislation in the filed of health and safety at work by actions of the authorities with duties in the field;
- the approaching of the phenomenon of labor force aging and the improvement of occupational disease prevention;
- the improvement of the collection of statistic data
- the consolidation of the coordination with national partners to reduce accidents at work and occupational diseases.

These specific goals shall be achieved according to the National actions plan for the implementation of the national strategy on health and safety at work for 2017-2020 which is an integral part of this document.

6. Conclusions

As shown above, the trends in the evolution of population structure in our country are negative, and we will see an accelerated aging of the population. Currently, the population over 65 is of 3.3 million people, namely 16% of the total population. In 2020. the retirees will account for 3.6 million, namely 17% of the total population of the country and by following the same upward trend, by the middle of this century, the retirees will account for 30% of the total. Simultaneously with the aging of the population, we are witnessing the decrease of the birth rate and the increase of the dependency ratio of the elderly[11].

[7] Policy substantiated on article 137 of E.C. Treaty.

[8] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of February 21st, 2007 called "Improving quality and productivity at work: Community strategy 2007-2012 on health and safety at work" [COM(2007) 62final].

[9] European Working Conditions Survey, 2010

[10] European Pillar of Social Rights, CE 2017, cap.2

[11] proiectarea populației active la orizontul anului 2050 (projection of the active population in the horizon of 2050) – INS, 2013

By taking into account this situation, it is noted that the current level of social contribution is unsustainable in the long term. In this context, Romania proposes that between 2014 - 2020, according to the Partnership Agreement with the European Commission: "70% of the population between 20 and 64 years old must be employed" - in what concerns the employment rate, a key element in supporting a viable pension system; and "the number of persons exposed to poverty and exclusion risk must decrease by 580 000 (compared to the levels of 2008).[12]"

2018 started with the enforcement of certain legislative changes[13] affecting most of the population, but also the business environment. The most important changes aim the following: the transfer of the social contributions (pensions, health) from the employer to the employee, the amounts being retained and transfer by the employer; the increase of the national gross minimum wage from RON 1450 to RON 1900; the decrease of the income tax from 16% to 10% and the decrease of the pension contribution share to Pillar II from 5.1% to 3.75%.

Therefore, the level of the contributions calculated to a gross salary decreases by 2 percentage points, from 39.25% to 37.25%. Out of this amount, 35% is incurred by the employee, 25% for pensions and 10% for health. On the other hand, the employers should increase the gross wages by about 20%, so that the net income of the employees remain unchanged or should offset this difference by amounts representing extra pays or bonuses. Self-employed persons, such as lawyers, journalists, writers, notaries or physicians will pay social contributions calculated at the level of the national minimum wage, not related to the amounts earned from the activities carried out, as before. The share of social health insurance (CASS), established as of January 1st, 2018 to 10%, shall be due by natural persons who have the status of employees or have the obligation to pay the contribution. Those who are not exempt will pay CASS if they receive annual earnings amounting to at least 12 minimum wages (namely RON 22,800 to a minimum wage of RON 1,900), from one or more sources of income, such as independent activities, rental or leasing activities, investment (interest, dividends etc.), agricultural activities, association with a legal person or other sources. If the threshold of RON 22,800 was exceeded, the taxpayer must submit to ANAF, until January 31st, 2018, form 600, where the taxpayer will mark that the threshold was exceeded and will pay CASS contribution for 2018 in a fixed amount of RON 2,280, paid in 4 quarterly installments. The contribution is calculated by applying CASS share of 10% to the equivalent threshold of 12 minimum gross wages of RON 22,800. The payment deadlines for each installment amounting to RON 570 are March 26th, June 25th, September 25th and December 21st, 2018. Child raising allowance will increase from RON 1,233 to RON 1,250, being related to the Social Reference Index (ISR), instead of the minimum wage. Minimum allowance is established to the equivalent of 2.5 ISR, and the maximum allowance to RON 8,500.

Despite all these, the legislative changes of the beginning of 2018 were performed without a thorough study of the impact on the Romanian socio-economic environment, thus generating new problems on the labor market, in the sustainability of social programs and in the predictability of business environment.

References

- Moroianu Zlătescu Irina, Drepturile omului – un sistem în evoluție, IRDO Publishing House, Bucharest, 2008
- Peers Steve, Ward Angela, The EU Charter of Fundamental Rights, Hart Publishing Oxford and Portland Oregon, 2004
- Augustin Fuerea, Manualul Uniunii Europene, edition III revised, Universul Juridic Publishing House, Bucharest, 2006
- Constantin Anghelache, Alexandru Manole, Marius Popovici, Emilia Stanciu - Analiza statistică a situaţiei pensionarilor, Revista Română de Statistică - Supplement no. 12 / 2016
- Mihai Şeitan, Mihaela Arteni, Adriana Nedu, Evoluţia demografică pe termen lung şi sustenabilitatea sistemului de pensii, Editura Economică Bucharest, 2012
- Ileana Pascal, Ștefan Deacon, Politici sociale și ocuparea forței de muncă, București. București: Centrul de Resurse Juridice: 2002
- Ion Mărginean, Politici de reformă în domeniul pensiilor, Calitatea vieţii, XVIII, no. 3-4, 2007
- Dan Zăvoianu –Comparaţie între sistemele de pensii private de tip pilon II şi pieţele statelor lumii - Direcţia Conumicare – CSSPP, Bucharest, July 2010
- Radu Ghițulescu, Pesimism pe piața forței de muncă pentru 2018, December 13th, 2017 in http://www.marketwatch.ro
- Politica socială – Institutul European din România 2003, seria Micromonografii – Politici Europene
- *** The report of the Presidential Commission for the for the Analysis of Social and Demographic Risks, led by professor Marian Preda PhD, called "Riscuri şi inechităţi sociale în România" (Social risks and inequities in Romania), published in September 2009

[12] Partnership Agreement proposed by Romania for the programming term 2014 - 2020, 2013

[13] https://www.news.ro/economic/anul-2018-inceput-schimbari-importante-populatie-firme-trecerea-contributiilor-sociale-sarcina-angajatilor-cresterea-salariului-minim-brut-reducerea-impozitului-venit-aplicarea-sistemului-split-tva-1922401001002018010617538463

- ***Strategia națională în domeniul securității și sănătății în muncă pentru perioada (National Strategy for Health and Safety at Work) for 2017-2020
- ***Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of February 21st, 2007 called "Improving quality and productivity at work: Community strategy 2007-2012 on health and safety at work" [COM(2007) 62final]
- ***European Working Conditions Survey, 2010
- ***European Pillar of Social Rights, CE 2017, cap.2
- ***Proiectarea populaţiei active la orizontul anului 2050 (Projection of the active population in the horizon of 2050) – INS, 2013
- http://www.insse.ro/cms/sites/default/files/field/publicatii/buletin_statistic_lunar_7_2016_0.pdf
- http://www.contributors.ro/economie/ce-nu-se-spune-despre-banii-din-pilonul-ii-de-pensii-cine-are-acum-1-000-de-euro-acumulati-poate-avea-peste-25-000-de-euro-la-varsta-pensionarii
- http://adevarul.ro/economie/business-international/polonia-desfiinteaza-pilonului-pensii-banii-vor-transferati-fond-rezerva-mai-multe-fonduri-mutuale-private-1_577b63e05ab6550cb8925659/index.html
- https://www.pensiata.ro/pensia-europeana-si-internationala/pensia-in-ungaria
- www.filbuc-caa.ro Scurt istoric al asigurărilor sociale în România Apariţia sistemului de securitate socială în România. Sfârşitul secolului XIX – Primul război mondial

BRIDGING THE COMPETING VIEWS OF EUROPEAN CULTURAL INTEGRATION: THE TRANSFORMATIVE VIEW OF CULTURE AS A MEANS TO PROMOTE GROWTH, EMPLOYMENT AND SOCIAL COHESION

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Abstract

The concept of a European culture became very complex with the enlargement of 2004 towards the East, when the EU, as Delanty pointed out, moved "beyond postnationality to an encounter with multiple civilizational forms," multiple histories and competing visions of European integration. The "unity-in-diversity" paradigm turned into a huge challenge for the European institutions. On the one hand, achieving a European image of cultural unity without excluding all the local, regional and national cultures is a very complex, if not impossible, task. On the othe hand, culture remains an ambiguous term in European institutions due to the lack of a full-fledged European cultural policy. This paper focuses first on how in the early 1970s the EC/EU started to be concerned with defining the role of culture, and second on how since the year 2000 culture has progressively acquired a new status with potentially transformative powers to bridge the competing views of cultural integration. Programmes, such as the "2014-2020 Creative Europe" programme, focus on culture as a creative accelerator and promotor of different forms of cultural participation and production. Culture generates "smart, sustainable and inclusive growth", and contributes to "high employment, high productivity, and high social cohesion."

Keywords: *Employment, European Culture, European identity, European integration, Unity-in-diversity paradigm.*

1. Introduction

Abundant research has been carried out on the complex relationship between culture and European integration[1]. The concept of European integration itself carries multiple competing meanings,[2] depending on the theoretical perspective applied to it (federalism versus intergovernmentalism, functionalism versus constructivism, etc.). When the adjective cultural is added to European integration, the latter becomes highly controversial, as it deals with the societal level[3].

With successive enlargements, the cultural factor was seen as an essential tool to bring the European project closer to the citizens, an instrument capable of creating a sense of belonging to the EU. However, there are multiple menings of culture. Apart from culture defined as a normative model focusing on universal norms of democracy, freedom and human rights, culture can also be understood as communication[4], i.e. what we communicate through language and symbols whose meanings are learned and inherited from one generation to the other. With the process of enlargement, the EU is faced with with a multiplicity of meanings and symbols that are communicated in multiple ways. Furtehr, culture can refer to social behavior as social relations[5]. Culture understood a social construction would entail the construction of a new order on the basis of a new vision of European society. The problem is that there are multiple visions of European society and this explains the ambiguity of the concept of culture in EC/EU documents from the 1970s onwards.

In this paper we will demonstrate that there is another dimension of culture which has been the target of a number of supranational initiatives. This dimension is the area of cultural or artistic production, the cultural sector, defined by the European Commission in 1977 as "the socio-economic whole formed by persons and undertakings dedicated to the production and distribution of cultural goods and services[6]". We will see how the EC/EU institutions

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[1] Delanty, "Integration through Culture? The Paradox of the Search for a European Identity," in *European Citizenship: National Legacies and Transnational Projects*, ed. Klaus Eder & Bernhard Giesen (Oxford, Oxford University Press, 2001).

[2] Thomas Diez indicates that there is a number of competing meanings of integration, due to the "proliferation of names, and conceptualizations of what the name 'EU' means." Thomas Diez, "Speaking 'Europe': The Politics of Integration Discourse", In *The Social Construction of Europe*, ed.Thomas Christiansen, Knud Erik Jørgensen and Antje Wiener (London, Sage, 2001), p. 289); see also Thomas Diez, "Europe as a Discursive Battleground: Discourse Analysis and European Integration Studies". *Cooperation and Conflict* no. 36 (1), pp. 5-38. Interesting is also Vogt's idea according to which "different conceptualizations of European integration find support only through the national domain of discourse. Support for the integration process is formulated in terms of advancing the national interest and not in European categories of thought". Carlos R. Vogt, "Reconsidering the Normative Implications of European Integration: Questioning the Optimism about Post-National Communities in Critical International Theory. Conference Paper, Danish Network on Political Theory, Aarhus, May 22-24, 2003, p. 13.

[3] G. Delanty, "Social Integration and Europeanization: The Myth of Cultural Cohesion," in *Europeanization: Institutions, Identities and Citizenship*, ed. Robert Harmsen and Thomas M. Wilson (Amsterdam, Atlanta, 2000).

[4] G. Delanty, "Integration through culture", pp. 76-86.

[5] See Clifford Geertz, *Interpretations of Culture* (New York, Basic Books, 1973).

[6] "Community action in the cultural sector", Commission Communication to the Council, Bull. EC, supplement 6/77, 1977, p. 5.

have evolved in their approach to culture from an application of the EC Treaty to the cultural sector to culture as a creative accelerator; culture as capable to promote "smart, sustainable and inclusive growth", and contribute to "high employment, high productivity, and high social cohesion", in an effort to build a cultural space including the local, the regional and the national dimensions.

2. A cultural space in the making

2.1. Pre-Mastricht initiatives

Member States have traditionally been reticent to the intervention of the Community in cultural affairs, which explains the lack of a clear European cultural policy. The EC/EU had to wait until 1992 to introduce the so called article on culture in the Treaty of Maastricht, now article 167 of the TFEU[7], allowing the development of cultural action at supranational level.

Before that, however, increasing awareness that the economic, social and political goals were not sufficient basis for the creation of a European Polity led the institutions to publish resolutions and declarations about the potential of culture to unite people, as well as to promote social and economic development. In 1973, at the Copenhagen Summit, the European Council approved a declaration on European identity, defined as "the diversity of cultures within the framework of a common European civilization, the attachment to common values and principles, the increasing convergence of attitudes to life, the awareness of having specific interests in common and the determination to take part in the construction of a United Europe." Democracy, the rule of law, social justice, respect for human rights, and the wish to participate in world affairs were other principles included in the definition of European identity[8].

In 1974, the European Parliament, in an effort to materialize the Unity-in-diversity paradigm, adopted a broad resolution[9] for the protection of Europe's cultural heritage, including other areas of action such as harmonization of copyright legislation and in the field of tax laws relating to culture. It also advanced action in the fight against theft and illicit trafficking of works of art. A year later, in 1975 Leo Tindemans' Report on the European Union[10] encouraged greater Community involvement in people's everyday life. Statements reflected the self-imposed distance from culture and the awareness of the difficulty to achieve a balance between the objectives deriving from the application of the EEC Treaty and those relating to the protection of national heritage. As the member States resented the Institutions' involvement in matters of culture, the Commission limited the scope of their involvement in culture to "the socio-economic whole formed by persons and undertakings dedicated to the production and distribution of cultural goods and services", the objective being to create "a more propitious economic and social environment in support of cultural activities at the European level[11]."

In 1976 and 1979 the Commission formally submitted proposals[12] for the treatment of culture at the invitation of the European Parliament. In January 1976 the European Commission submitted a document articulating the need for coordination of cultural activities, and at the end of 1977 it published a communication insisting on the Community's economic and social responsibilities towards the cultural sector as a socio-economic whole, facilitating the free movement of cultural goods and the improvement of the living and working conditions of cultural operators. The activities on heritage protection were also justified on an economic basis, culture being a great potential capable of generating economic activity in fields such as tourism, art publishing, monument maintenance and scientific research. As for cultural exchanges a "natural area" to the Community's action, they were legally justified on the basis of the last objective set in Article 2 of the EEC Treaty, which is to "quicken the will to unite the nations of Europe[13]." The Unity-in-diversity paradigm was seen as fundmental for integration, and the concept of national heritage gradually transformed into a new concept of "Community heritage," expanding to new domains.

In 1983 the Heads of State signed a Solemn Declaration on the EU[14], encouraging the ministers of culture to promote cultural cooperation in the areas of cultural heritage, as well as cooperation between artists and writers from the Member States. The Declaration called for the integration of cultural activities within the framework of cooperation with third countries. For the first time, the audio-visual media was particularly stressed, and the possibility of introducing some kind of legal framework was envisaged. The Council discussed more and more cultural related issues and the Ministers of culture ffairs adopted a series of resolutions within the Council in order to support ad hoc cultural and artistic actions. This context

[7] Art. 128 TEC, until 1999, and Art. 151 EC from 1999 to 2009.

[8] See Declaration on European Identity, Bull EC no. 12, 1973.

[9] See Resolution of the European Parliament of 13 May 1974 on measures to protect the European Cultural heritage, OJ C79, 5/4/1976.

[10] Leo. Tindemans, "Report on the European Union", Bull EC, supplement 1/1976

[11] "Community action in the cultural sector", Commission communication to the Council, Bull EC, 1977, supplements 6/77.

[12] Resolution of the European Parliament of 8 March 1976 on *Community action in the cultural sector*, OJ C79, 5/4/1976; Resolution of the European Parliament of 18 January 1979 on *literary translation in the Community*, OJ C 39, 12/2/1996.

[13] "Stronger Community action in the Cultural Sector" Commission communication to the Parliament and Council, Bull EC, 1982, supplement 6/82.

[14] SOLEMN DECLARATION ON EUROPEAN UNION European Council Stuttgart 19 June 1983 Reproduced from the Bulletin of the European Communities, No. 6/1983. http://aei.pitt.edu/1788/1/stuttgart_declaration_1983.pdf

favourable to culture finally led to the creation of the European Council of Culture.

In spite of the previous efforts, the 1984 European Parliament elections stressed a weak public attachment to the political project. This lack of public support led to the 1985 Adonino Report for a People's Europe suggesting symbolic measures such as the promotion of European sport competitions and literary awards, the creation of a European Youth Orchestra, the selection of an emblem and flag, the organisation of a Euro-lottery and circulation of stamps with designs inspired by the Community. The launch of programmes in education and the establishment of a common audio-visual area with a European multilingual television channel were also suggested. [15]

The Single European Act did not assign any cultural powers to the Community, but the Commission published *A fresh boost for culture in the European Community*[16], in an effort to convince the Member States that Community cultural activity was necessary both politically and economically in order to complete the market by 1992 and to progress from a people's Europe to EU. Whereas the Commission the stressesd the European construction through unity of European culture as shown by the history of regional and national diversity, the Parliament focused on diversity and on the efforts needed to move toward the creation of a European Culture or a culture of cultures[17].

From 1984 to 1986 the European Council adopted a number of resolutions including piracy fighting, European films distribution, audio-visual products treatment, the establishment of the European cultural capital, networking of libraries, youth participation in cultural activities, the creation of international cultural itineraries, protection and conservation of heritage, and the promotion of literary works translation. 1987 saw another important advance: the European ministers of culture officially established the Council of Ministers of Culture and the ad hoc Commission for Cultural Issues, and the European Parliament adopted another important document, "Initiating cultural activities in the EC[18]."

2.2. Post-Mastricht initiatives

In 1992, the Treaty of Maastricht introduced the so-called "culture article", which brought culture fully into the action scope of the EC/EU. It is the first real attempt at defining common cultural policy, though it does not aim at any harmonization of the cultural identities of the Member States, one of the main objectives being the protection of national and regional diversity. It has become Article 167 of the TFEU and is formulated in the following way:

1. The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.
2. Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:

– improvement of the knowledge and dissemination of the culture and history of the European peoples,

– conservation and safeguarding of cultural heritage of European significance, — non-commercial cultural exchanges,

– artistic and literary creation, including in the audiovisual sector.

3. The Union and the Member States shall foster cooperation with third countries and the competent international organizations in the sphere of culture, in particular the Council of Europe.
4. The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.
5. In order to contribute to the achievement of the objectives referred to in this Article:

– the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonization of the laws and regulations of the Member States,

– the Council, on a proposal from the Commission, shall adopt recommendations[19].

It is worth stressing that this Article stated that the Community should take cultural aspects into account in all its actions under other provisions of the Treaty, and that all decisions about culture should be adopted unanimously. It is also the only Article of the Treaty that explicitly refers to the audio visual sector as part of the artistic and creative arts in general, the plurality of which is to be safeguarded with a view to protect the Members Statess' democratic, social and cultural needs.

There was a positive response to the inclusion of this article on culture. It encouraged the Commission in 1996 to publish a document presenting all existing instruments and activities of the Community in the field of culture; it benefitted cultural networks and professional organizations as well as cultural communities, and contributed to the promotion of cultural cooperation. Moreovert, the fact that culture

[15] See Second P. Adonino Report for a People's Europe, Bull. EC (1985), Supplement 7/85.

[16] European Commission, A fresh boost for culture in the European Community. https://publications.europa.eu/en/publication-detail/-/publication/cee0214a-9caa-406f-a399-fd540b7793ac/language-en

[17] See Resolution of the European Parliament of 17 Feb 1989 on a fresh boost for Community action in the cultural sector, OJ C69, 20/3/1989.

[18] Initiating cultural activities in the EC, Adopted by the European Parliament on 17 November 1989.

[19] Consolidated Version of the Treaty on the Functioning of the European Union, http://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:12012E/TXT&from=FR

should play a role not only in the context of EC policy itself but also in society in general increasingly engaged legal and economic experts in cultural activities.

In the years following 1992 a number of papers and studies analyzed the importance of the inclusion of Article on culture in the Maastricht Treaty[20]. The cultural sector was becoming increasingly important, as the new international reality was favouring a new economy based on intense trade of cultural goods and services, though some scholars like Niedobitek[21] or Schlinder[22] insist that, on the one hand a clear definition of culture is still lacking, and on the other that the practice of the EU institutions is still far from meeting the needs of European citizens, particularly those of the workers of the cultural sector.

In the year 2000, Ruffolo Report on cultural cooperation[23] came at a key moment in the debates about the role of culture and cultural policies in the EU after the inclusion of the Article on culture in the Maastricht Treaty. He defended a movement beyond economic interests toward a clear political goal, i.e he supported a cultural policy model that would give all Member States the same equal opportunities for the promotion of cultural diversity. The unity-in-diversity paradigm was stressed as a tool for cohesion rather than a ground for division.

In spite of all the debates on culture at different levels, the 2005 Constitutional Treaty proposal, though it did not add any radical changes to the treatment on culture, was rejected by two of the founding members, France and the Netherlands. It was obvious that the EU was not ready to become a real Union. The Draft Constitution actually made clear the Member States's willing that Culture should remain only marginally present in the EU Treaty and the acquis communautaire.

2. Cultural cooperation and the economy sector

As seen before, the Maastricht Treaty represented a real attempt to define the role of culture in the process of European integration. Nevertheless it was not able to generate a real European cultural policy. But the institutions elaborated strategies to provide cultural institutions and cultural operators throughout Europe with financial resources for projects aimed at fostering creativity and promoting dissemination of cultural content throughout Europe. Cultural cooperation at European level between Member States was becoming strategic, and to this end the European Commission's Directorate General Education, Audiovisual and Culture (DG EAC) elaborated support instruments. The will to give access to and enable participation of a greater number of citizens in cultural activities led the Council and the Commission to support the creation of major cultural networks and cultural events on a large scale.

The first large-scale cultural projects supported by European funding to give concrete visibility to the contents of the article on culture in the Maastricht Treaty were adopted between 1996 and 1999: Kaleidoscope[24], Ariane[25] and Raphaël,[26] all three concentrating on tangible aspects of culture. With a total budget of ECU 36.7 million, Kaleidoscope was designed to promote awareness and dissemination of European culture, particularly in the fields of the performing arts, visual arts and applied arts. This project included important actions such as support of events and cultural projects carried out in partnership or through network: large-scale cooperation actions involving third countries; the European city of culture and European cultural month; and actions aiming at improving cultural cooperation between professionals in the cultural sector. Ariane aimed at increasing knowledge and dissemination of literary works and European history, as well as improving the citizens' access to these. With a total budget of ECU 11.3 million, it included funding support for the following actions: translation of literary works, cooperative projects, on-going training for professionals, particularly translators, and European literary and translation prizes. Raphael, with a budget of ECU 30 million, concentrated on European cultural heritage protection, comprising events and dissemination initiatives of a European dimension in favour of the preservation and increased awareness of a European cultural heritage, cooperation in developing thematic networks between European museums, further training and mobility of professionals in the field of European cultural heritage preservation, cooperation in research, preservation and enhancement of decorated facades in Europe, and cooperation proposals to study, preserve

[20] See for example Kaufman and Raunig's detailed analysis of the Culture Article. T. Kaufman and G. Raunig, *Anticipating European cultural policies* (European Institute for Progressive Cultural Policy, Vienna, 2002).

[21] M. Niedobitek, *The cultural dimension in EC law* (Kluwer Law International, New York, 1997).

[22] Jörg M. Schlinder, *Culture, Politics and Europe: en route to Culture-Related Impact Assessment*, 2012, p..2, http://www.culturalpolicies.net/web/files/222/en/Culture,_Politics_and_Europe(1).pdf..

[23] See Report: on cultural cooperation in the European Union (2000/2323(INI)), Committee on Culture, Youth, Education, the Media and Sport, Rapporteur: Giorgio Ruffolo,

http://www.europarl.europa.eu/sides/getDoc.do;jsessionid=730677AFCB8F09FE473261E87C97DFD2.node2?language=EN&pubRef=-//EP//NONSGML+REPORT+A5-2001-0281+0+DOC+PDF+V0//EN.

[24] Decision 719/96/EC of the European Parliament and the Council of 29 March 1996 establishing a programme to support artistic and cultural activities having a European dimension (Kaleidoscope), OJ L 99, 20/4/1996.

[25] Decision 2085/97/EC of the European Parliament and the Council of 6 October 1997 establishing a programme of support, including translation, in the field of books and reading (Ariane), OJ L 291, 24//10/1997.

[26] Decision 2228/97/EC of the European Parliament and the Council of 13 October 1997establishing a Community action of support in the field of cultural heritage (the Raphael programme), OJ L 305, 8/11/1997.

and enhance the European pre-industrial heritage. Raphael "supported nearly 360 projects involving more than 1,500 operators from throughout Europe. European heritage laboratories were also supported[27]."

Apart from the cross-border element, i.e. the implication of operators and organizations from several Member States, other important eligibility criteria for all three projects included the innovative nature of the activities, their capacity to spread Member States' cultures and the creation of economically sustainable cultural resources. The financial focus of these projects continued with the "Culture 2000" programme[28], which supported cooperation projects in all artistic and cultural sectors (performing arts, visual and plastic arts, literature, heritage, cultural history, etc) between cultural institutions in the EU states and accession candidates. With a budget of €236.5 million for a 5-year period, it aimed at promoting a common cultural area characterized by both cultural diversity and a common cultural heritage. In doing so, it also aimed at promoting social integration through arts. From 2000 to 2006, funding also addressed special cultural events with a European or international dimension.

After the "Culture 2000" programme, the "Culture 2007-2013" programme[29] represented a more coordinated approach to cultural cooperation. With a budget of € 400 million, it aimed at encouraging and supporting cultural cooperation at a European level with a view to encouraging the emergence of European citizenship. The programme mainly promoted "transnational mobility of cultural players, transnational circulation of artistic and cultural works and products and intercultural dialogue and exchanges[30]," and co-financing around 300 different cultural actions per year.

In the "Culture 2007-2013" programme, culture gained a significant role in an advanced, knowledge-based economy across the EU, particularly at regional and city levels. It meant not only is a new form to encourage the relationship between forms cultural production but also its relationship with the generation of economic value. The stress is laid not only on enhancing access of audiences to cultural products and experiences, but also on highlighting productive and entrepreneurial capacities in order to contribute to the macroeconomic level of activity.

3. Culture as a creative accelerator and promotor of new forms of experimentation and participation

Considered a new attempt at policy making[31], the "2014-2020 Creative Europe" programme[32] is economic in nature and supports supports the European cultural and creative sectors, becoming itself part of the goals of the Europe 2020 Strategy. Based on the concept of "cultural and creative industries", the new programme is meant to foster "smart, sustainable and inclusive growth", and to contribute to "high employment, high productivity, and high social cohesion[33]."

Creative Europe includes ten wide-scale projects:[34] "Should I stay or should I go? - A collective storytelling project," is a two-year interdisciplinary programme drawing together five theatre companies from Germany, Sweden, France, Austria and Slovenia to establish collective storytelling as a model of international cooperation and cultural exchange. The "European Citizen Campus" (EEC) aims at promoting student art projects carried out by 10 universities and student service organizations from six different countries. "The Uses of Art - on the legacy of 1848 and 1989" is a 5-year project aiming at developing a new European model for content-driven, sustainable collaboration in the field of museums. "Frontiers in Retreat", co-organised by eight art organizations working across eight European countries, encourages a multidisciplinary approach with a view to broadening the understanding of global ecological changes and their local impacts on European natural environments. In the project "Visualize the Invisible" organizations aim at implementing participatory art projects in Sweden, Croatia, Albania and Former Yugoslav Republic of Macedonia. Artists rely on different art techniques and forms to encourage co-operation with people in residential areas and places such as prisons and schools in order to provoke wider discussions on the role of arts in societal change. All participants, the artists and people they interact with, become part of an integrative artistic creative process. Another project within the "Creative Europe" programme is "LOCIS, an Artist-in-Residence Programme"[35] involving a rural local authority in Ireland, an arts centre in a large town in Poland and an arts organization in a suburb of a

[27] http://cordis.europa.eu/ist/ka3/digicult/non-research-programmes.htm#raphael

[28] Decision 508/2000/EC of the European Parliament and the Council of 14 February 2000 establishing the Culture 2000 Programme, OJ L 99, 3/4/2004.

[29] Decision No 1855/2006/EC of the European Parliament and of the Council of 12 December 2006 establishing the Culture Programme (2007 to 2013), OJ L 372, 27.12.2006.

[30] http://ec.europa.eu/culture/tools/culture-programme_en.htm

[31] Cornelia Bruell, *ifa-Edition Culture and Foreign Policy Creative Europe 2014–2020 A new programme – a new cultural policy as well?*, Ifa, 2013, http://www.ifa.de/fileadmin/pdf/edition/creative-europe_bruell.pdf

[32] Regulation (EU) No 1295/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Creative Europe Programme (2014 to 2020) and repealing Decisions No 1718/2006/EC, No 1855/2006/EC and No 1041/2009/EC Text with EEA relevance. OJ L 347, 20.12.2013, p. 221–237

[33] Cornelia Bruell, *op cit*. p. 13

[34] For more details see María Luz Suárez Castiñeira "The Role of Culture in the Construction of European Identity", In *Democratic Legitimacy in the EU and Global Governance. Building a European Demos*, ed. Beatriz Pérez de las Heras (Palgrave Macmillan, 2017), pp. 195-219.

[35] See http://www.creativeeuropeireland.eu/culture/projects/case-studies/locis-european-artists-in-residence-programme

capital city in Sweden. The project "CUNE Comics-in-Residence (CiR)" is an exchange programme for European comic artists. "Promoting Cultural Network SEE and connecting local projects in South-East Europe" aims at continuing and expanding the work of the project started in May 2012. The project "Outreach Europe" aims at encouraging social inclusion through cultural participation focused on researching the way museums, galleries and cultural institutions across Europe engage with an audience beyond the traditional means of outreach. Finally, "European Prospects" is a 24-month project involving collaboration between key arts organizations in Wales, Germany, Lithuania and France to create new platforms for photographers and lens-based artists from across Europe where they can produce and exhibit their work, articulating the idea of diversity of identity and experience in an enlarged EU.

These ten ongoing wide-scale projects encourage the development of two main objectives: (a) to protect, develop and promote European cultural and linguistic diversity while promoting Europe's cultural heritage, and (b) to encourage the competitiveness of the European cultural and creative sectors, in particular of the audiovisual sector. In its turn, the Culture Sub-programme is based on a number of priorities such as (a) supporting actions providing cultural and creative actors with skills, competences and know-how with a view to strengthening the cultural and creative sectors, and actions aimed at encouraging adaptation to digital technologies, testing innovative approaches to audience development and testing new business and management models; (b) supporting actions encouraging cultural and creative players to cooperate internationally, where possible on the basis of long-term strategies, which in turn will contribute to internationalizing their careers and activities within the Union and beyond; and (c) providing support in order to strengthen European cultural and creative organizations and encourage international networking in order to facilitate access to professional opportunities.

These objectives also reveal that the "Creative Europe" programme, unlike previous programmes, is fundamentally economic in nature, though the definition of the regulation states that "cultural and creative sectors" means all sectors "whose activities are based on cultural values and/or artistic and creative expressions, whether these activities are market- or non-market oriented[36]." The promotion of cultural diversity and intercultural dialogue is still an important idea but now "culture" is seen as "a catalyser for creativity" which should lead to growth and employment. Even the language has changed: the former cultural sector is now called the "cultural and creative sector". There is an emphasis on competitiveness, on growth, on artists as producers of works which must be distributed as widely as possible, on international trade and increased revenues for the sector, and on reaching wider audiences in Europe and beyond.

Thus the Creative Europe programme is characterized by innovation that not only leads to an expansion of the demand possibilities, but also, and mainly, an expansion of the creative potentalities. Access to production technology entails an increase of the number of producers, making it difficult to distinguish between cultural producers and cultural consumers. Traditional cultural markets are gradually challenged by new "communities of practice where members interact on the basis of non market-mediated exchanges – a change that is made possible by the scale and speed of connectivity among players that is being made possible by online platforms."[37]

Apart from promoting new forms of cultural and creative exchange, and new forms of experimentation and of project design, as well as structural inter-dependences between the cultural and creative sectors and the economic and social ones, this new progeamme forsters other key dimensions such sustainability, social cohesion, new models of entrepreneurship, lifelong learning, soft power and local identity[38].

4. Conclusion

This paper has shown that despite the problematic nature of culture for European identity and European integration, significant steps have been taken to bring culture into the scope of the European institutions. Introduced at the Supra-national level in the early 1970s, culture achieved a turning point with the Treaty of Maastricht in 1992 with the introduction of the Article on Culture that enabled the institutions to address culture in two ways: first, through the application of the EEC Treaty rules to the cultural sector, and second through the implementation of a series of cultural actions, which, viewed through the unity-in-diversity paradigm, focused primarily on heritage protection and cultural interaction, encouraging support for architectural and archaeological preservation, conservation of works of art and artefacts, sponsorship of cultural activities and translation of books, educational projects developed by the EU in Central, Eastern and Southern Europe as well as the Balkans since the 1990s.

The financial focus of the promotion of culture, however, developed in the late 1990s with the first wide-scale programmes, "Kaleidoscope", "Ariane" and "Raphael", which and merged with the "Culture 2000", a programme to support cooperation projects between cultural institutions in the EU states and accession candidates. From 2007 to 2013, the focus in cultural

[36] See Article 2 Definitions, p. 225

[37] EENC

[38] Pier Luigi Sacco, Culture 3.0: A new pwerspective for the EU2014-2020 structural funds programming. EENC paper, April 2011. http://www.interarts.net/descargas/interarts2577.pdf

support was on fostering the development of a European citizenship, encouraging cross-border mobility of cultural operators and works of art as well as intercultural dialogue. Funding was also allocated to literary translation, culture festivals and cooperation projects with third countries. In the 2014-2020 "Creative Europe programme", though the promotion of culture is still important, the emphasis is on culture as a catalyst for creativity and culture's potential for growth and employment within the 2020 strategy. Current developments show that the emphasis of the EU on cultural programmes is moving towards integrating the regions around the cities, and moving to new forms of non-market mediated exchanges where the cultural consumer and the cultural producer become blurred due to the development of high technology.

References

- Bruell, Cornelia. ifa-Edition Culture and Foreign Policy Creative Europe 2014–2020. A new programme – a new cultural policy as well?, Ifa, 2013, http://www.ifa.de/fileadmin/pdf/edition/creative-europe_bruell.pdf
- Declaration of the European Identity (Copenhagen, 14 December 1973), http://www.cvce.eu /content/publication/1999/1/1/02798dc9-9c69-4b7d-b2c9-f03a8db7da32/ publishable _en.pdf
- European Commission. Communication, A fresh boost for culture in the European Community, https://publications.europa.eu/en/publication-detail/-/publication/cee0214a-9caa-406f-a399-fd540b7793ac/language-en
- European Commission. Communication to the Council, *Community action in the cultural sector*, Bulletin EC, supplement 6/77, 1977
- European Commission. Communication to the Parliament and Council, *Stronger Community action in the Cultural Sector*, Bulletin EC, 1982, supplement 6/82
- Committee on Culture, Youth, Education, the Media and Sport, *Cultural cooperation in the European Union* (2000/2323(INI)), Rapporteur: Giorgio Ruffolo, http://www.europarl.europa.eu/sides/getDoc.do ;jsessionid=730677AFCB8F09FE473261E87C97DFD2.node2?language=EN&pubRef=-//EP//NONSGML+REPORT+A5-2001-0281+0+DOC+PDF+V0//EN
- Consolidated Version of the Treaty on the Functioning of the European Union, http://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:12012E/TXT&from=FR
- Crawfurd, Smith, R. "Article 151: status quo or unexplored potential?" Paper given at Annual Congress of the Academy of European Law, 3 - 4 December, 2004
- Decision 719/96/EC, European Parliament and the Council of 29 March 1996 establishing a programme to support artistic and cultural activities having a European dimension (Kaleidoscope), OJ L 99, 20/4/1996
- Decision 2085/97/EC, European Parliament and the Council of 6 October 1997 establishing a programme of support, including translation, in the field of books and reading (Ariane), OJ L 291, 24//10/1997
- Decision 2228/97/EC, European Parliament and the Council of 13 October 1997establishing a Community action of support in the field of cultural heritage (the Raphael programme), OJ L 305, 8/11/1997
- Decision 508/2000/EC, European Parliament and the Council of 14 February 2000 establishing the Culture 2000 Programme, OJ L 99, 3/4/2004
- Decision No 1855/2006/EC, European Parliament and of the Council of 12 December 2006 establishing the Culture Programme (2007 to 2013), OJ L 372, 27.12.2006
- Delanty, Gerard. "Integration through Culture? The Paradox of the Search for a European Identity," In *European Citizenship: National Legacies and Transnational Projects*, eds. Klaus Eder & Bernhard Giesen, Oxford, Oxford: University Press, 2001
- Delanty, Gerard. "Social Integration and Europeanization: The Myth of Cultural Cohesion," in *Europeanization: Institutions, Identities and Citizenship*, eds. Robert Harmsen & Thomas M. Wilson, Amsterdam, Atlanta, 2000
- Diez, Thomas. "Europe as a Discursive Battleground: Discourse Analysis and European Integration Studies" in *Cooperation and Conflict*, no. 36, 2001
- Diez, Thomas. "Speaking 'Europe': The Politics of Integration Discourse," in Thomas Christiansen, Knud Erik Jørgensen & Antje Wiener, Eds., *The Social Construction of Europe*, London: Sage, 2001
- European Parliament. Resolution of 13 May 1974 on *measures to protect the European Cultural heritage*, OJ C79, 5.4.1976, p. 6
- European Parliament. Resolution of 8 March 1976 on *Community action in the cultural sector*, OJ C79, 5.4.1976
- European Parliament. Resolution of 18 January 1979 on *literary translation in the Community*, OJ C 39, 12.2.1996
- European Parliament. Resolution of 17 Feb 1989 on *a fresh boost for Community action in the cultural sector*, OJC69, 20.3.1989, p. 180
- European Parliament. Regulation No. 1295/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Creative Europe Programme (2014 to 2020), OJ L 347, 20.12.2013
- Geertz, Clifford. *Interpretations of Culture*, New York: Basic Book, 1973
- Kaufman, T. and G. Raunig, *Anticipating European cultural policies*, Vienna, European Institute for Progressive Cultural Policy, 2002
- Niedobitek M. *The cultural dimension in EC law*, New York: Kluwer Law International, 1997
- Second Adonino Report for a People's Europe, Bulletin EC, Supplement 7/1985

- Schlinder, Jörg M. *Culture, Politics and Europe: en route to Culture-Related Impact Assessment*, 2012, http://www.culturalpolicies.net/web/files/222/en/Culture,_Politics_and_Europe(1).pdf
- SOLEMN DECLARATION ON EUROPEAN UNION in the European Council Stuttgart, 19 June 1983. Reproduced from the Bulletin of the European Communities, No. 6/1983, http://aei.pitt.edu/1788/1/stuttgart_declaration_1983.pdf
- Suárez Castiñeira, María Luz, "The Role of Culture in the Construction of European Identity", In *Democratic Legitimacy in the EU and Global Governance. Building a European Demos*, ed. Beatriz Pérez de las Heras, Palgrave Macmillan, 2017, pp. 195-219
- Tindemans, L. "Report on the European Union", Bulletin EC, supplement 1/1976
- Vogt, Carlos R. "Reconsidering the Normative Implications of European Integration: Questioning the Optimism about Post-National Communities in Critical International Theory. Conference Paper, Danish Network on Political Theory, Aarhus, May 22-24, 2003

ROLE ATTRIBUTED TO WOMEN IN ROMANIAN SOCIETY: THE PERSPECTIVE OF BOTH GENDER CATEGORIES

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Abstract

Both nationally and internationally the woman is regarded as a vulnerable group. The causes are multiple - from the roles attributed to women during their evolution, their low professional integration with that of the man, the differences in the occupational categories occupied by women and men, their dependence on the man, at least in the past, but also her need to be defended.

Women's roles in society have been different from one history to another, from one society to another, but they have had something in common - they have always put the woman in vulnerable groups. This was also the reason behind the development of special programs and aids for women. The programs aimed at either its professional integration or educational development, or even aids in cases of physical violence or other special cases.

At national level, things did not differ from other countries. Also in Romania the woman is regarded as a vulnerable group, her evolution was ascending, occupying different roles from time to time.

The purpose of this article is to analyze the current role of women in Romanian society and the professional evolution of women in Romanian society. As research methods, the quantitative ones were used: sociological inquiry based on questionnaire and qualitative methods: semi-structured interview and legislation analysis.

The importance of the article results from the fact that it provides new recommendations on the implementation of measures to reduce violence among women, their professional integration and giving them the necessary support for the problems encountered.

As novelty items we find: the problem addressed - the role of women in the Romanian society from a professional and social perspective, the application of interviews and the interpretation of the comparative results - on two different categories of people, both women and men.

Keywords: *women, woman in society, women's role, women's programs, women's social problems.*

Introduction

In Romanian society, at present, women are the center of important actions both in terms of social and social policies and programs. The problems that the woman is currently facing in Romania have given rise to active moves in order to make known all these problems, but also to increase their visibility at national and external level. are related to: domestic violence, discrimination between women and men in professional life, women's and men's pay inequalities have given rise to national policies and programs to diminish them. Not all, however, are promoted nationwide and not all have managed to achieve their established goals.

This research aims at: identifying the current role of women in society at national level, both from the perspective of women and men. The objectives of this research are: to identify the problems faced by women in Romania at present; identifying the degree of satisfaction with the programs and policies implemented for them and identifying the measures that public institutions should take to combat discrimination among women, reduce violence and reduce other problems they face from the perspective of the direct target group of women.

The research hypotheses are:

"Women's role in society is interpreted differently by women and men."

"Equalization of women's and men's rights in society has not been achieved."

"Women have higher social responsiveness than men at social level."

This research is of particular importance to public institutions with repudiation in the field because it identifies the main issues of women that can be a starting point for future programs and social policies. Also, the research presents the proposed measures for improvement for such programs and policies, but also the degree of satisfaction of the woman-on her role in society, putting her in the category of vulnerable groups. Another important element of the research is the analysis of men's perception of the woman's condition, thus identifying gender issues from both perspectives. This can be translated into an initiative to tackle gender discrimination and to solve problems between the two gender categories.

In Romanian society, the condition of the woman has experienced an important evolution from one period to another, being defined differently depending on the current socio-cultural context. (Liliana, P., 2004, p.20)

> The differences between the roles of the sexes within the society were constantly highlighted on the

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development of the society. In this sense, the women's emancipation movement started in the sec. XVIII. (Kraus, L., Hughey, S., (2003), pp.53-65.)

In the nineteenth century and the beginning of the twentieth century, the nuclear family system was highlighted, in which the husband ensured the economic security of the whole family, and the woman was the housekeeper.(Childs, Sarah, (2008), pp.725–736.)

Following the Industrial Revolution, women were allowed to participate for the first time in the history of society in the production of goods. Since then, she was not totally addicted to the man and has earned a slightly superior social position. Based on the Romanian sociological studies, the following changes occurred in the couple: redistribution of roles between partners in favor of the wife; democratization of authority relations; diminishing the dominant role of the husband; modeling the tasks assumed by each spouse.(Jhappan, Radha. 1996, pp. 15-63.)

Throughout history, several stages have emerged among women: (Bock Gisela, (2002), pp.65-89)

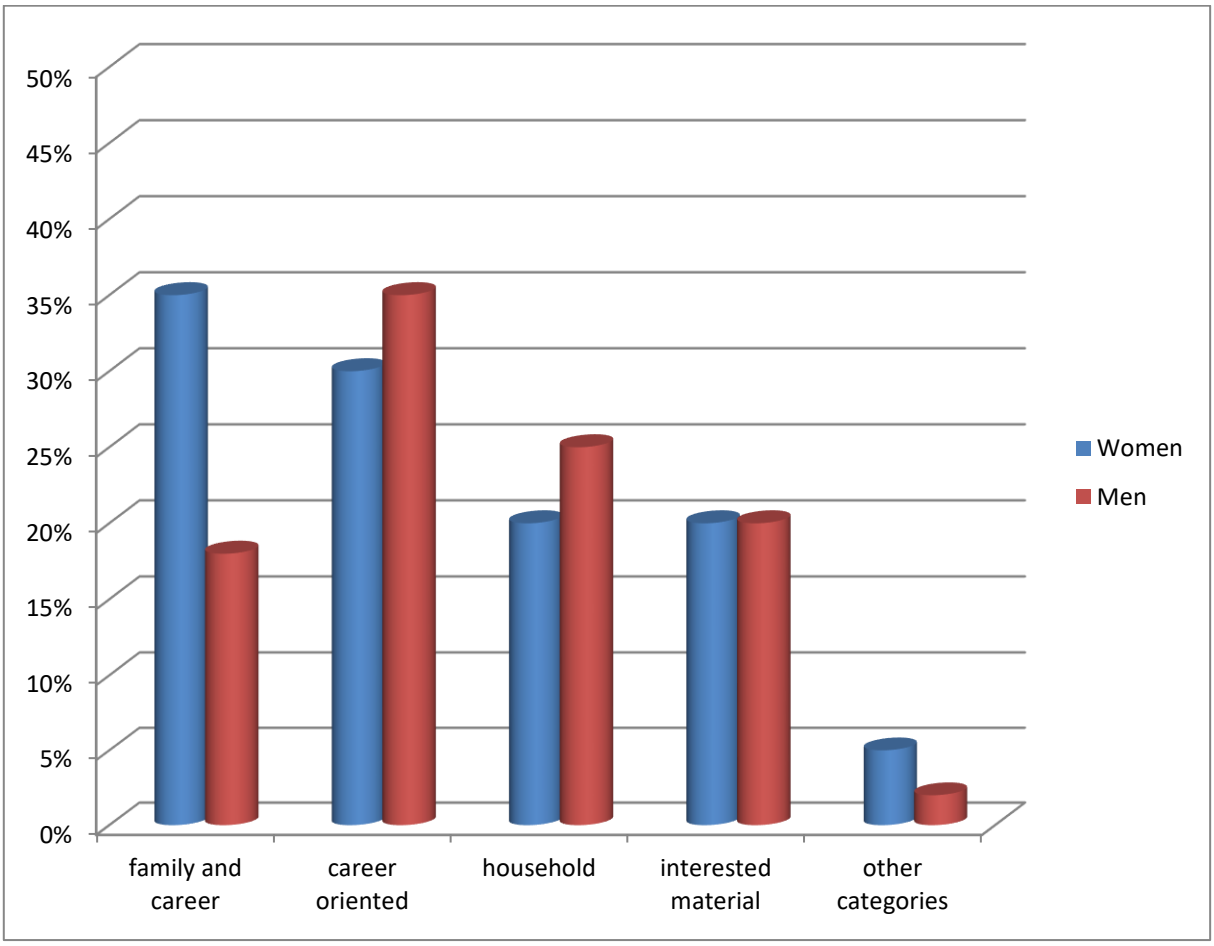
- Family rights and obligations fall almost exclusively on the wife's part, with a transfer of authority, "the family being concentrated around the mother."
- The existence of a tendency to equalize the positions of men and women. These changes in the position of women in society and family have led to a certain leveling of the status of men and women.
- The 1970s are marked by a resumption of female professional activity in all European countries and beyond. Entry into the labor market of middle-class women takes place.
- The transition from the matriarch to the patriarch was due to the man's awareness of his role in procreation.
- Another value attributed to women is maternity. - Woman's economic dependence on man will increase due to the woman's stay in the household.
- Although, in the course of time, there is a professional tendency towards equality, all lower positions in the professional hierarchy are occupied by women. Divorced women who care for children are facing major financial difficulties and low wages make them stand at home and with a little social help.()

1. Interpretation of quantitative methods - sociological inquiry based on the questionnaire

The questionnaire was applied to 230 women aged 30-45 years in the Bucharest-Ilfov area and a number of 170 same-age men in the same region.

To the first question to women, "From what category do you think you are part of these answers are found in the figure below.

Figure 1 : The category of women-women's and men's answers



It is noticed that the highest percentage is represented by women who also have a family and a career of 35%, followed by women oriented towards career development - 30%. A percentage of 20% is represented by both women who are domestic and those who fall into other categories, and as material 11%. The latter category records a fairly large percentage, compared to the other categories.

The same question states that 35% of the interviewed men responded that most women belong to the career-oriented women category, 25% - that most women are family-oriented, 20% - the most many women are in the category of women interested, 18% - that most women are in the category of women who combine career and family and only 2% - that most women are in categories other than those mentioned.

It is noticed that a higher percentage is recorded for men who consider that most women are today oriented towards the career, with a difference of 5% being those who consider that most women are family-oriented. A large percentage is also recorded for those males who consider that most women are interested in material-20%. It is an average percentage compared to the other recorded percentages.

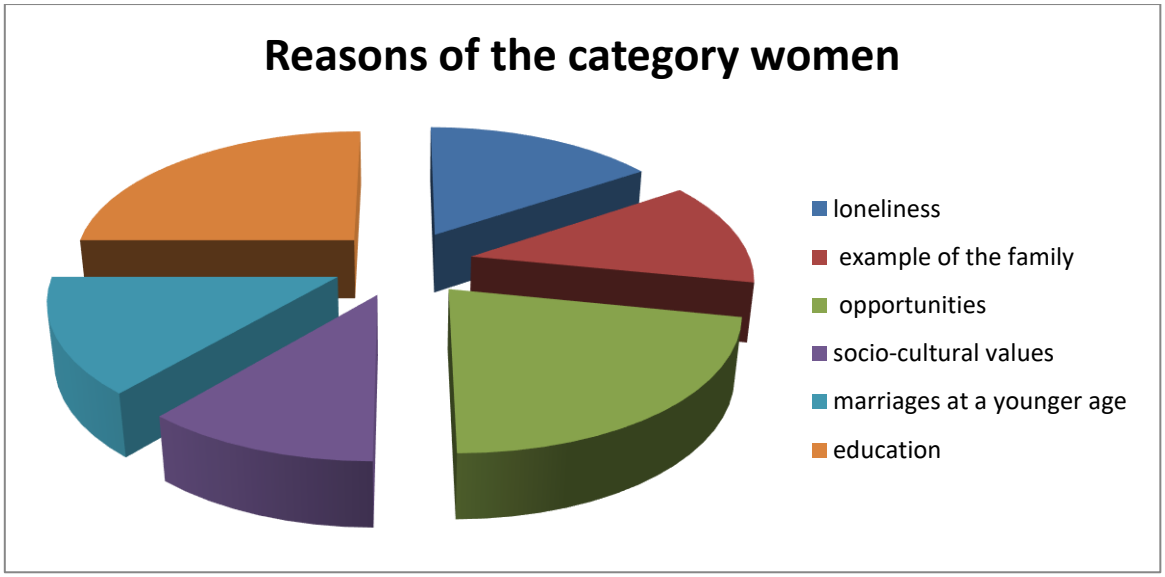
In this case, two of the assumptions of the research are confirmed, namely: "women's role in society is interpreted differently by women and men" and "Women have higher responsiveness than men at social level."

Also, 50% of women interviewed said they did not want to be part of these social categories, and 50% wanted to be part of them. Respondents who have responded that they do not want to be part of the social category they fall in have mentioned that they are part of this category for various reasons, such as:

- loneliness - being a reason that motivated them to focus on developing a career,
- the example of the family - being a reason behind the orientation to the family and assuming the role of the housewife,
- the opportunities at some point motivated them to focus on their careers, not having time to create a family,
- the education received was a good example of either the development of a career, the development of a family and the role of the housewife, or the combination of the two,
- the socio-cultural values of the past made them focus on the family, leaving professional life in second place, and the values that are currently being developed are to make an opposite sense of emphasis on the career, leaving the family in second place,

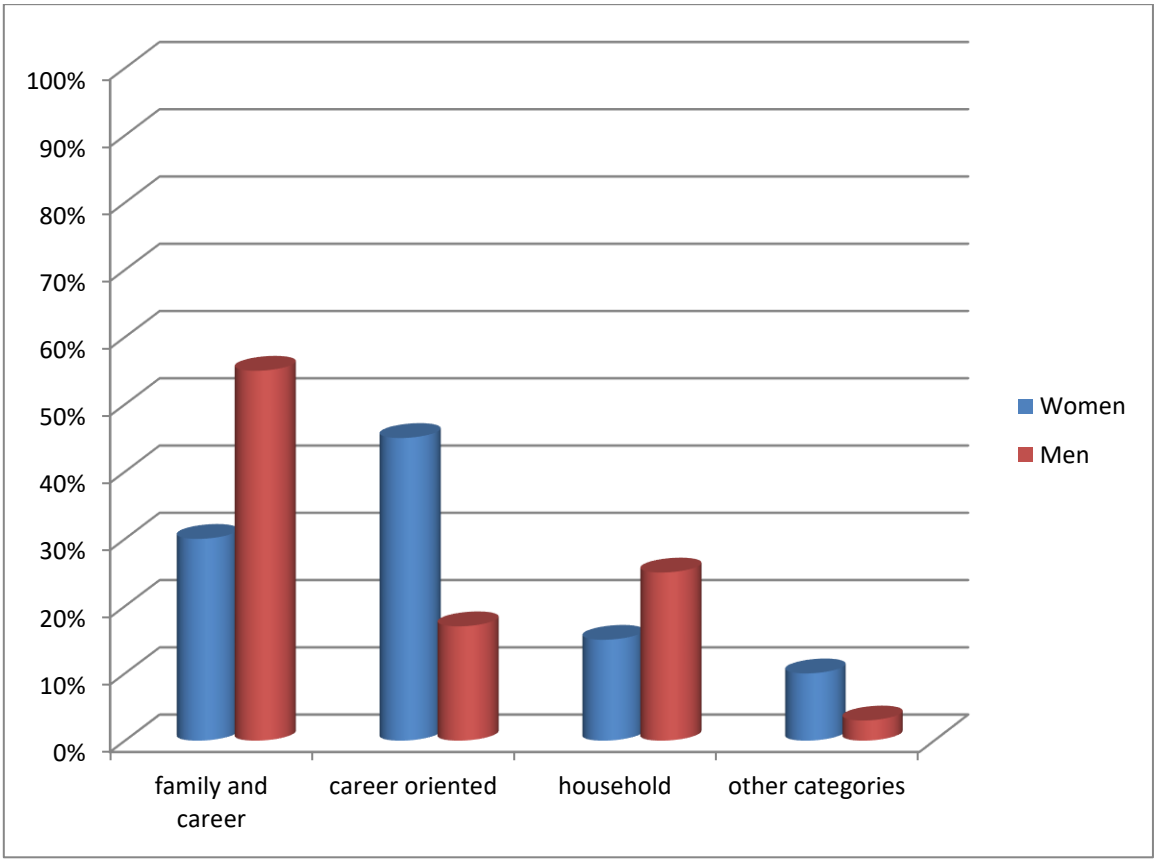
– marriages at a younger age and the rise of children prevented them from continuing their work and developing their careers, which is why they stayed home or with a medium-sized job.

Figure 2: The reasons for which women are in these categories



Both the women and the men to whom this questionnaire was applied were asked "what role should a woman have in today's society?" The answers given are found in the following figure.

Figure 3: The role that women have in today's society-women's and men's answers



It is noted that 45% of women responded that women should be more career-oriented, with only 17% of men considering it. Another major dwarfism is among men, who responded 55 percent that women should combine their career and family, while only 30 percent of women consider this. A lower percentage is reported among women who believe that the woman should be more oriented towards the family - with 15%, while 25% of the men consider this. A small percentage is also found among women-10% and men-3% who

believe that women should be in categories other than those already mentioned.

These differences are due to the different perceptions women have of their image and roles in society and of the men they have about the role and image of women in society. Differences in the image of women in society within the two sex categories also persist due to the following external factors: the familiar example, training and education, the perception of the socio-cultural values of society, its own experiences, personal relationships or even the set of own values formats.

On the basis of the answers provided, the two hypotheses are again confirmed: "women's role in society is differently interpreted by women and men" and "Women have higher social responsiveness than men at a social level."

When asked whether women should be part of vulnerable groups, the percentages of responses are similar for men (60% answered yes, it is fair that women are included in this group and 40% are not) women - 70% responding that - and 30% as not.

Figure 4: Women should be part of vulnerable groups?-women's and men's answer

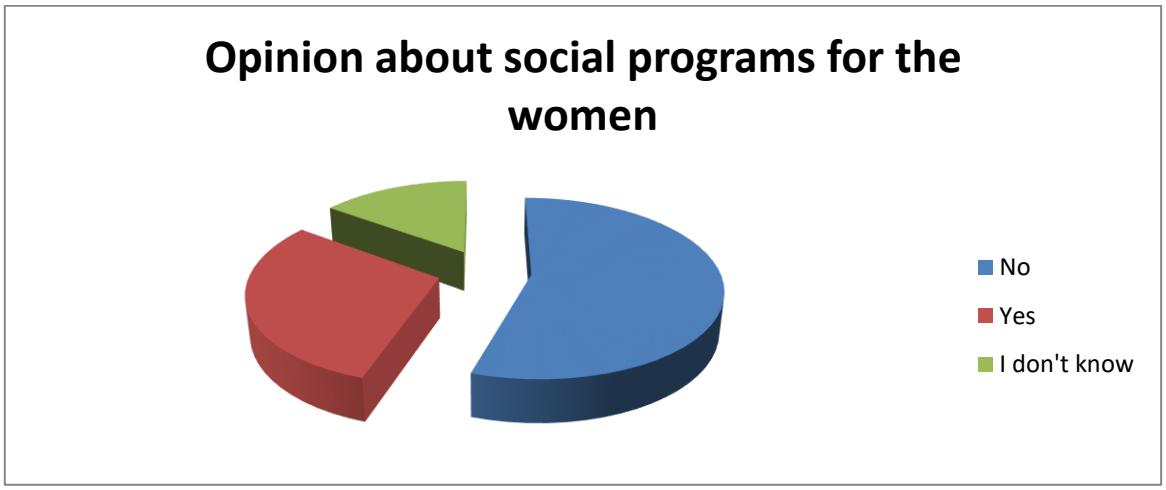
Among men, there is a significant difference in the perception of the classification of the roles that women should have in society and the perception of their placement in vulnerable groups. A higher percentage thinks it is right that the woman is part of this group, but according to the answers to the previous question, a higher percentage thinks that the woman needs to have major family and career responsibilities and to assume, basically double role, although it is framed as belonging to a vulnerable group-role that requires special protection and protection at the level of the society, by the institutions with responsibilities in the field but not only.

This difference in the perception of men as a woman has to take a double role and its fit into a vulnerable group can be justified by the fact that men regard the woman as being defensive, which is why she is considered to need additional protection on the basis of national legislation. Assuming the double role is due to the fact that in the past the woman was the homewoman, she cared for the house and the family, and now she started to occupy a higher professional level. The second role developed simultaneously with the one in the past, without considering that the woman should give up entirely or, at least, to a large extent to the first role-house and develop her -the second-oriented career.

Asked whether women are equal in their rights with men, at present, 75% of them said that not only 25% of them are considered equal to men. They stated that the main issues women think of today's society are: - verbal, physical and psychic violence, wage discrimination at the workplace, too much responsibility and must fulfill all of them successfully with family responsibilities , child care, work, friends, relatives, involvement in other social activities, etc., is considered to be an example for children because they spend more time with them, which is a more responsive and extra attention.

With regard to the problems they face, only 30% of them consider that policies and social programs implemented to help them meet their needs and needs, with 70% believing that their policies and social programs do not meet their needs.

Figure 5: Policies and social programs implemented to help women meet their needs?-women's answer



Women interviewed also responded that the following aspects should be improved in the policies and social programs implemented to solve their problems:

- facilitating post-natal post-natal integration after two years of post-natal care need special programs for professional reintegration,
- equal pay with that of men provided by legislation and punishment of private companies that violate this,
- creating optimum workplace conditions that meet their needs,
- the adaptability of jobs so as to allow them to return to work for child care and childcare less than 2 years ago: playgrounds, kindergartens, nursing homes for companies where they work, flexible programs,
- implementation of several programs on the professional integration of women,
- reasing the visibility of programs specifically created for them,
- Increasing the visibility of institutions with reputation in the field.

The last two interpreted questions confirm the third hypothesis, according to which "Equalization of women's rights with men's in society has not been achieved."

2. Interpretation of qualitative methods - semi-structured interview

Semi-structured interviews focused on a sample of 50 women aged 30-45 from Bucharest-Ilfov. Based on the interviews, the main conclusions are as follows:

Women find themselves discriminated from the point of view of the workplace,

Women believe they have multiple roles in society, the main ones being focused on family care, household chores and jobs.

They are not satisfied with their current image in society and the roles they have to fulfill,

She thinks she is attributed to the wrong label that "doing things well at home and at work," and for fear of disappointing feel mentally tired, physically, without motivation,

Career orientation has destroyed or even prevented them completely from forming a family, and vice versa, more family orientation has impeded them to form their desired career.

In the following I will give some of the quotes from the interviews:

"At 32, I have the desired career. I completed all my studies and training courses four years ago, during which I worked simultaneously in two jobs - one full-time, and one part-time in an Ong. ... but only now I have managed to get the job I would not give up for nothing. I like what I do, I work in the field of education and I find myself in this field. That cost me a family and a relationship. Thanks to the time allotted to my professional training, I have not managed to make a family. I would like this but I know they can not combine both! "O.A (32 years old)

"I do not consider myself equal in rights or in repudiation with men. For example, not with my husband. I have more responsibilities and fewer rights and I think that it is true for most serious and

responsible women today. We work in the same company on equal terms. He has a salary of 400 ron more, a service car, laptop and phone. I'm just a phone call. He is paid for hours worked overtime, I do not ... but more, I'm given work at home-just because I know how to do what others do not know. If she asks for a free day, she does not have to apply for leave, the manager being also a man, and I have already refused three times a holiday request in a month because I am indispensable in certain matters. ... At home things are alike. I have to know where all the things in the house are, what to wear children, what they eat children and husband, what everyone likes and what is not ... but he ... only time spent with children .. games and fun .. " A.G. (43-year-old)

"I consider myself a victim of the current national system of discrimination between men and women. Yes, we are part of a vulnerable group not because we would like to be so, but because that's how they made us become. They are the grandmothers and the system. Easy to hit, beat and other things, being physically weak and more emotional, they all took advantage. And the men and the laws and patrons of the companies we work for. We are the victims of a system and men's default .. repet .. not because that we would like ... Instead, what we have to do is work of 3 people not 2 or one-house, family, job .. our problems there is still time ... and so the woman lives for husband and wife or career or both, depends not on her ... in this country where violence and discrimination are made unnoticed. leaders are men! " O.G-31-year-old housewife

"Equal to new men? Yes .. we have many reponsibilities and we have many rights .. we have fewer rights and fewer to do .. the "many" and "few" words are the same ... following it is different. I gave up a family and I decided to stay with only a career because there was a lot to do on both sides and I'm not a robot, and he has much more to do than a job. I chose to do the same and divorced after just 3 years of marriage. It was not easy but obsolete .. I could not even .. if it appeared and a child would have been impossible for me because I know that even in this case would not have shared things. E.V. - 38 years old jurist

And based on the conclusions of the interviews, it can be seen that the three hypotheses formulated earlier confirm, namely: the role of woman in society is interpreted differently by women and men. There has been no equalization of women's and men's rights in society and women have higher social responsi- bilities than men.

Conclusions

It is important to see the woman's perception of the roles that she has in society, what she should have, the issues she faces, the things they want to be improved at society's level, but and men's perceptions of women's roles in today's society to tackle the gap between them. All these aspects can contribute through social policies and programs specifically designed to meet women's current needs to reduce discrimination between women and men, both socially and professionally, but also to standardize their responsibili- ties.

Without a real opinion of women about their social problems without a real picture of the roles the woman plays either in a community or at society level, both from the perspective of women and men, social programs and policies created specifically for them will not fully correspond to them and their results will not be successful.

At national level, Romania is trying to take the following measures: equalizing the rights of men and women, at least in the field of work and at the professional level, combating violence against women, reducing the gaps between women and men in professional life, but it seems these measures are neither sufficient nor well known.

The three hypotheses confirmed by the research confirm that Romania has failed to fulfill these attributions in the field. In order for this to happen, there is a need for a real opinion of the target group targeting women, but also of the opposite target group on their image-men. The differences between the two are given, as we have previously stated, to certain external factors. These factors can also be taken at national level.

Why is it necessary to analyze the perceptions of men regarding their role and image in professional and social terms? Why is it necessary to reduce the gaps in women's roles in society, what they have and what men think they should have? Because all these things will influence, even indirectly, in the next period, the birth rate at a national level - by assuming the role of the family member of the woman or not, the number of marriages, the divorce at national level, and implicitly of the children from disjointed families. Why is it necessary to improve social policies and programs that target women and women's condition in society - both professionally, socially, family? To improve its condition at society, to reduce violence and other problems it faces, to combat discrimination of all men and women and to unify the rights and responsibili- ties between women and men.

All these things are not only necessary, given the quality of Romania's democratic state, the quality of a member state of the European Union, our national "emancipation" as the country, and the overcoming of the conditions and things that correspond to a society in the past, of equal opportunities between men and women - on an equal footing in an economic and socio-cultural context.

References

- Bock Gisela, Femeia în istoria Europei. Din Evul Mediu până în zilele noastre, Iaşi, 2002
- Childs, Sarah, și Mona Lena Krook. 2008. „Critical Mass TheoryandWomen's Political Representation". Political Studies
- Jhappan, Radha. 1996. „Post-Modern RaceandGenderEssentialism or a Post-Mortem of Scholarship". Studies in Political Economy
- Kraus, L., Hughey, S., (2003). The impact of an intervention on career decision-making selfefficacy and career indecision. Journal of Vocational Behavior,
- Popescu, Liliana. 2004. Politica Sexelor,. București: Maiko.

EVALUATION MODELS APPLIED TO PUBLIC POLICIES IN ROMANIA ON THE INTEGRATION OF YOUNG PEOPLE INTO THE LABOR MARKET

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Abstract

Due to the changes imposed by the national public institutions in the field of labor market, the public policies in the field need to be correlated with the new socio-economic context. This necessity is particularly necessary in relation to those public policies aimed at integrating young people into the labor market. The integration of young people into the labor market is a national problem, for which no solution has yet been found, concrete, effective and correlated with its causes. Since 2005, Romania has taken measures to integrate young people into the labor market, but these measures do not have the desired result in practice. An effective evaluation of public policies on the integration of young people into the labor market is necessary due to the increase of their efficiency.

Another argument for improving the quality of these policies is also the identification of a new policy that is appropriate to current economic and social requirements, but also to identify the possible problems encountered in their implementation.

The main purpose of this article is to apply the CIPP model for evaluating public policies on the integration of young people into the labor market, but also to develop it in the light of changes and requirements at national level. As main objectives, the article seeks to identify and analyze the most important public policies and programs regarding the integration of young people into the labor market,evaluating them according to a framework model and drafting an evaluation report and policy proposals.

This article presents as novelty elements: analysis of public policy assessment models at national level, evaluation of public policies on the integration of young people into the labor market and drafting an evaluation report in this area. The article presents both theoretical and practical importance - it can be used for other researches in the field, but also used for better implementation of public policies on the integration of young people into the labor market at national level.

Keywords: *evaluation, public policies, young people, evaluation models, labor market integration.*

Introduction

In order to evaluate social policies or programs on the integration of young people into the labor market, we need to clarify some key concepts such as "public policies", "public policy assessment", "evaluation model" and "labor market". In terms of defining the concept of "public policies" in 1972, Dye defined public policies as "what governments choose to do or not to do" (T. Dye, 1981, p. 91). Closely related to this definition is the one given by Howlett and Ramesh who considered that public policy was "the choice made by the Government to act or not." (Howlett, M., Ramesh, M. 1995, p. 5)

Hill and Hupe are the ones who have detailed this concept by stating that public policy "is born from a process that takes place over time, which may involve intra andinter-organizational relationships and involves the existence of a key but not exclusive role of public agencies" (M. Hill, 1997, p. 81).

Also, David Easton considered that public policies represent "an authority's assignment of values to the whole of society" (M. Zulean, p. 21). And Harold Lasswell and Alexander Kaplan say this term is based on "a program for designing goals, values, and practices." (H. Lasswell, 1951, pp. 25-27). A more succinct clarification given to the term of public policy is that of Carl Friedrich, who states that "in defining the concept of public policy it is fundamental to present a goal and more objectives" (T. Dye, 1981, p. 3).

The theories outlined above make a shift from public policies - as a key concept and two of their components considered essential: the aim and objectives proposed.

An interesting approach from this point of view is that of William Jenkins who considered that public policies refer to "a set of decisions taken together by a political actor or a set of actors on the selection of objectives and means for reaching them in a specific situation in which they should have the power to make decisions "(Howlett and Ramesh, 1995, pp. 5-6). In addition to the three components already identified: purpose, objectives, action, the fourth component, the "decision", explicitly intervenes here.

"Evaluation of Public Policies" was defined by Stufflebeam and Shinkfield in 2007 as "the set of conceptual, hypothetical, pragmatic and ethical principles that aim at forming a general framework for guiding the study and practice of program evaluation" (Stufflebeam and Shinkfield, 2007, p.64).

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1. Evaluation of public policies - a necessity for successful policies

At the practical level, it was concluded that the assessment of a policy or social program must take into account elements identified before its deployment, which are specific, clearly formulated and correlated with policy actions: "how it is deployed, the results, its impact in the light objectives and decision-making process. Evaluation is also a means of identifying the lessons learned from the past and present actions in order to find decisions that improve the implementation and management of future activities "(Hanberger, p. 213).

Wiliam Dunn (1981) also outlined some fundamental features of public policy assessment. The author asserts that the evaluation of public policies or programs must be centered on value, oriented to the present and past, characterized by duality, and to show interdependence between fact and value. Starting from the four elements presented above: the purpose, objectives, principles and characteristics of the evaluation, certain evaluation criteria were formulated, each with specific questions (Wiliam Dunn, 1981, pp.405-406).

Tabel 1: Criterion for public policy evaluation. Adaptation on Wiliam Dunn, 1981.

Criterion	Specific questions	Illustrative reflection
Efficiency	Has an important result been achieved?	service delivery units
Effectiveness	What was the effort required to get an important result?	Cost units, net benefit, cost / benefit ratio
Suitability	To what extent do the effects solve the problem?	Fixed costs, predefined yield
Equity	Do the costs and benefits have a fair distribution within the groups affected by the problem?	Criterion Pareto, Rawls Criterion, Kaldor-Hicks Criterion
Conformity	Are the needs and requirements of each group satisfied by the effects of the policy?	Consistency with citizens perspective
Compliance	The effects are worth the effort, are they important?	Equity and efficiency

The success of an evaluation depends on the application of the elements outlined above, but also on the observance of certain steps that have been developed both in international practice and in practice at national level.

Fig.1 Evaluation steps. Adaptation on Wiliam Dunn, 1981.

The evaluation of public policies, from the point of view of practical applicability, must be based on a model or an evaluation method. The evaluation model is the one that gives rise to the questions to which a certain type of assessment will have to respond, and it is up to him to consider the criteria on which assessment will be conducted (Hansen, 2005).

One of the public policy assessment models is the CIPP-Context, Input, Process, Product, developed by Stufflebeam. It is based on evaluating the value of a program, its aims being: improving that program and assuming resposans. The model focuses on an assessment of policies or programs based on social systems, being adapted to those programs or social policies. (Stufflebeam and Shinkfield, 2007, pp.330-333). Within this model, Stufflebeam defines the concept of evaluation as "the systematic investigation of values that represent a particular item in the set of ideals of a society, individual, or even group." (Stufflebeam and Shinkfield, 2007, p.325). This model involves assessing the context, assessing inputs, evaluating processes and evaluating products.

Contextual Assessment - is that evaluation that focuses on a real analysis of the needs, resources and opportunities that come to help define the goal and goals of those involved in the policy implementation process. Entry assessment is based on the analysis of different types of approaches, action plans, alternatives, and is used to select resource allocation plans, planning itself and human resources allocation. Process evaluation is based on an analysis of the implementation of action plans, the purpose of which is to identify certain malfunctions or errors in the formulation or implementation of policies or the program, but also to provide relevant information to facilitate the process decision making (Stufflebeam and Shinkfield, 2007, pp. 325-327). Product evaluation is based on long-term and short-term product analysis to obtain the desired product by those directly involved in the process.

It can be concluded that this model, CIPP mode developed by Stufflebeam, is based on the following steps:

- - the degree of satisfaction of needs and needs,
- - the degree of budget and formulation adequacy to the initial policy objectives,
- - the degree of compliance with the policy or program as originally formulated,
- - Identify the degree of success or not of politics and what were the reasons behind it.

The CIPP model proposed to answer the following questions: What is to be done? How should it be done? Have the implemented actions been successful?

Within this model, Guba and Lincoln identified seven steps for the good conduct of an evaluation, but did not identify their specific processes:

1. Identify all categories that may be affected by the evaluation
2. Collecting information
3. Organization of information
4. Analyzing information
5. Reporting information
6. Administration of evaluation

The evaluation of public policies in a given field is the basis for the success of the respective policy or of the future policies in this field, because it identifies the elements that need to be corrected in the present and in the future. That is why it is important to do it in a responsive, objective, transparent and respectful way.

2. Labor market. Integration of young people from Romania into the labor market

From an economic point of view, the transition from school to work, means the process of insertion into the labor market of graduates or young people who have left the education system (the International Labor Organization). The International Labor Organization identifies as the main phases of the transition from

school to work the following: the direct-case scenario where the first experience of a young man after graduation is to be engaged in a satisfactory or permanent job, intermittent, employment temporary or self-employment, intermittent unemployment with or without employment or unemployment, and other situations where, after leaving the school, the young person travels or engages in household duties.

I will approach the definition of the concept of integrating young people into the labor market based on several theories formulated: Human Capital Theory, Theory of Asymmetry of Competences, Search and Matching Theory. Starting from the individual, the factors that determine the decisions of an individual regarding the duration and the way of their schooling are enumerated. Individual decisions are based on the desire to obtain educational diplomas and practical skills.

The theory of human capital is the first approach from the economic perspective of behavior towards education and its consequence on the market. It focuses on differences in wage and training levels. This theory shows that the process of choosing individual between the present and the future will determine the continuation of studies or, on the contrary, the choice of obtaining immediate income. Emphasis on the opportunity cost of time, time spent on education and then paid time.

Asymmetry of competencies refers to the types of imbalances between skills and competences offered and those necessary for the labor market. Among these were identified: the rarity or abundance of abilities, Vertical asymmetry refers to the situation where the level of training or qualification is lower or higher than required, Horizontal asymmetry is when the field of training or abilities and skills is inappropriate for job applications, under-qualification or over-qualification, skills obsolescence.

The theory of search and matching had the greatest impact on the theory of labor economics by developing a new approach to labor market analysis. This theory emphasizes collaboration between employees and companies, the decision making process on job creation, the theory of search and matching was also used to analyze how aggregate shocks are transmitted to the labor market and lead to cyclical fluctuations in unemployment flows, job flows and employment flows.

3. Evaluation of public policies on the integration of young people on the labor market in Romania

The model under which public policy assessment is conducted is an adaptation of the CIPP model, including the following categories: purpose and objectives - their degree of indepen- dence and the manner in which they are formulated, the degree of satisfaction of needs and needs, the degree of budget adequacy, to comply with the policy or program, as originally formulated, to identify the degree of success or not of politics and what were the reasons behind it.

The proposed assessment mode is the following: each category will be assigned a score of 1-10, 1 being the lowest and 10 the highest. So far, the minimum score that can be obtained from the evaluation is 5 (being 5 categories), and the maximum score is 50. Following the final score, the following steps will be taken:

1. If the policy obtained a score of 5-20 - being a small score, each category, obtaining a score of 1-4 means that it was unsuccessful and the degree of achievement of the goal originally proposed is a low one - motivation for which it will have to be stagnated and replaced with another policy in the field or with another program on the integration of young people into the labor market.
2. If the policy obtained a score of 21-35 - being an average score, each category, obtaining a score of 4-7 means that the policy or the program has reached its original objectives and goal in a degree but not entirely, which is why it will need to be improved and corrected where implementation difficulties are found. This policy will be continued, but to an improved extent, retouched, changing its course in accordance with the requirements and needs of the direct target group.
3. If the policy obtained a score of 36-50- being a high score, each category, getting about one score between 7-10 means that the policy or program has reached its original goals and aim at a degree very large, almost entirely, which is why it can be further implemented - if the problem for which it was formulated has not yet been resolved either if it is identified that the problem has been solved to a large extent, it may be stagnant, not because it has not been successful but because it has achieved its goal and objectives almost entirely.

3.1. Law no. 76 of 16 January 2002 (last updated on 25 January 2017).

The first policy subject to the model of evaluation presented above is that of granting private companies benefits for the employment of young unemployed graduates, by law no. 76 of 16 January 2002 (last updated on 25 January 2017).

Tabel 2. Exaplication for law no. 76 of 16 January 2002 (last updated on 25 January 2017

Purpose	Stimulating employment
Objectives	a) to prevent unemployment and to combat its social effects; b) job placement or re-employment of persons seeking employment; c) supporting the employment of persons belonging to disadvantaged categories of the population; d) ensuring equal opportunities on the labor market; e) stimulate the unemployed to take up a job; f) stimulating employers to employ people in search of a job; g) improving the employment structure by economic branches and geographical areas; h) increasing the mobility of the labor force in the conditions of the structural changes that occur in the national economy; i) the protection of people in the unemployment insurance system.
Direct beneficiaries	job-seekers, university graduates unemployed
Indirect beneficiaries	Private companies
Concrete measures	1.Specialized services provided by employment agencies or other public or private service providers 2. Stimulating employers for framing the unemployed by: a) subsidizing jobs; b) granting loans on favorable terms in order to create new jobs; c) granting facilities. 3. Subsidies for employers who employ for an indefinite period graduates of educational institutions exempted, for a period of 12 months, from the payment of the contribution due to the unemployment insurance budget, related to the graduates, and receive monthly, during this period, for each Graduate: a) 1 gross minimum gross national salary guaranteed in payment, in force at the time of employment, for graduates of the lower cycle of the high school or arts and crafts schools;

	b) 1.2 minimum basic gross wages per country for graduates of secondary education or post-secondary education; c) 1.5 basic minimum wage base salaries guaranteed in pay, in force at the time of employment, for graduates of higher education. (2) Employers employing indefinite graduates from persons with disabilities shall receive monthly, for each graduate, the amounts stipulated in para. (1) for a period of 18 months.

Tabel 3. Public policy evaluation- granting private companies benefits for the employment of young unemployed, law no. 76 of 16 January 2002 (last updated on 25 January 2017. Evaluation model adapted on CIPP model.

Main categories	Scores	Motivation
The initial policy objectives	*5*	-Increasing the employment of young unemployed aged 16-24, registered with the Public Employment Service, residing in the eligible regions (Center, South-East and South Muntenia) - to achieve this objective, direct collaboration of young unemployed and national employment agencies, to encourage them to use these institutions, to increase their trust in this institution and to increase transparency and visibility.
The degree of satisfaction of needs and needs,	3	Considering that the problem has been aggravated since 2002, the needs and requirements of the identified target group are not considered to be satisfied. The actions taken have only achieved for a short period, partly the aim and objectives proposed by facilitating private companies not by giving young people benefits or stimulating them to engage.

The adequacy of the budget	1	The implemented policy was one proposed, initially for 1 year. This policy still exists in Romania. The initial budget was exceeded 14 times for so many years after this policy had to be completed. As long as a policy has been implemented for 14 years and a law has been implemented that has not reached its goal and objectives, at the same time, financial costs can not be objectively and realistically justified. This law has continued to exist for 15 years without any positive results. On the contrary, youth unemployment is 4% higher than when it was implemented.
The degree of compliance with the policy or program as originally formulated,	3	Time has been over 14 years, which also involves overcoming the proposed initial budget. Most benefits, according to the initial formulation of the policy, were and have their private companies involved
identifying the degree of success or not, by policy, and the reasons behind it.	2	The results of this policy so far are limited to a worsening of the problem. During the 15 years of this policy there have been small decreases in unemployment among young people in Romania As long as the results do not match the purpose and objectives proposed, they can not be measured objectively and fairly.
	total points = 14	

According to the above-mentioned model, it is in the first category - according to which the implemented policy was not successful - the objectives and the aim have been achieved to a very small extent and measures are needed to replace it completely with another solution. Following the proposed evaluation model it is found that this policy exceeded the initial proposed time, and the objectives were not reached, and the proposed budget was exceeded.

3.2. "Future for Young NEETs"

Tabel 4. Exaplication for "Future for Young NEETs" program (www.fonduri-ue.ro)

*The next program evaluated according to the previous model is the "Future for Young NEETs"*Purpose	increasing the employment of young unemployed aged 16-24.
Objectives	a) financing projects aimed at increasing the integration of young people aged 16-24 on the labor market, between 15.11.2017-17.01.2018 b) Improving the skills level of young unemployed aged 16-24, c) evaluation and certification of skills acquired in a non-formal and informal system of young unemployed aged 16-24 d) encouraging entrepreneurship
Direct beneficiaries	Young unemployed aged 16-24
Indirect beneficiaries	Private companies
Concrete measures	Allocation of 57.673.377,50 million euros from U.E. and national funds to fund those projects aimed at integrating young people aged 16-24 into the labor market, especially from less developed regions (Center, South-East, South-Muntenia).

Tabel 5. *"Future for Young NEETs" program evaluation.* Evaluation model adapted on CIPP model.

Main categories	Scores	Motivation
The initial objectives of the program	*8*	-Increasing the employment of young unemployed aged 16-24, registered with the Public Employment Service, residing in the eligible regions (Center, South-East and South Muntenia) -160,000 young people benefited from professional information and counseling, profiling, and have been guided by other active measures to integrate them into the labor market

The degree of satisfaction of needs	9	Considering that the program has operated for 2 months and in the 2 months, for 160,000 young unemployed in less developed areas, active measures were taken regarding their integration into the labor market, it is considered that the program responded to - a very large measure of the needs of the identified target grou
The adequacy of the budget	8	In the two months of the implementation of the program, projects worth 57,673,377.5 million euros were financed privind integration of young unemployed aged 16-24 on the labor market. The initial budget was fully respected. The allocated budget served to achieve the objectives originally proposed. Following its allocation, 160,000 young people benefited from active measures to reduce unemployment. In this case, approximately € 360.46 was allocated for each young unemployed person.
The degree of compliance with the program as originally formulated,	9	Implementation time has not been exceeded, nor the initial budget proposed has been deposited. The program responded to the needs identified initially and respected the problems identified within the target group.
Identifying the degree of success the program had or not and what were the reasons behind it.	8	The results of the program corresponded to the originally proposed goal. 160,000 young people benefited from the program's actions. Projects worth 57,673,377.5 million euros were funded. One observation may be that it might be envisaged to take measures for the integration into the labor market of a larger number of young unemployed, given that the budget for the two months of the program was quite large.
	Total points = 42	

According to the above-mentioned model, based on the score obtained within it, it falls in the third category - according to which the program has reached its original objectives and the aim to a very high degree, almost entirely, which is why can still be implemented.

It is intended to further implement the program, not because it did not achieve the objectives for which it was initiated but only because the problem is a lasting one that persists. And in the two months of implementation of this program, no measures could be taken to combat youth unemployment and integrate them into the long-term labor market. According to EUROSTAT data, in 2012, the total number of young Romanian unemployed aged 15-24 was 16.8%, compared to 13.2% at European level. In 2015, 18.1% of all young people with this age aggravated, while in the European Union the percentage dropped to 12.1%. Following the "Youth NEETs" program, 160,000 young people benefited from active measures to integrate into the labor market, but this figure is not enough to reduce youth unemployment below the level of the EU. For this reason, the program can be further enforced, provided it respects the proposed measures and achieves the same goals.

Conclusions

Following the evaluation of the policies and social programs on the integration of young people into the labor market, the difficulties encountered during their implementation, the degree of attainment of the objectives initially set, and the degree of solving the social problem for which they were implemented can be considered. Following the evaluation, some observations may be made to improve that policy or program.

Based on the assessment made in this article, it is noted that the policy and program for the integration of young people into the labor market fall into two main categories: the policy of granting private companies benefits for young graduates is part of that unsuccessful policy category have not achieved their intended purpose and objectives initially. Recommendations on this policy, through which it can improve, would be its stagnation and its replacement with another policy.

The main problem identified by the evaluation is that the causes of youth unemployment have not been correctly identified. The main measure was to provide companies with benefits for the employment of young unemployed without taking into account: motivation and motivation of young people to engage, their professional training, youth education, socio-cultural values, after which they are guided in their careers and on the educational level, the education received, but also the availability of places within the private companies, the requirements of their posts, the degree of proportionality between the curricular area at the level of the higher education institutions and the requirements on the labor market.

In order to motivate private companies to hire young graduates, unemployed, it is also necessary to consider their training in educational institutions based on the requirements of the labor market, but also the need of private companies to create or not new jobs for young people without experience. Another observation is that according to which private legislation can be implemented in order to recapture the practice of young people during the years of study, to the requirements of the higher, or even professional, higher education institutions.

The program under evaluation is part of the successful progamme, succeeding, even in a short time, to achieve its goals. An observation made following the assessment is that integration into the labor market and taking active measures for this could be envisaged for a larger number of young people, given that the allocated budget was quite large, out of EU funds , but also national funds. Also, it may be considered a continuation of the program until the problem has been diminished.

Evaluating policies and programs on the integration of young people into the labor market is an important step towards their success, but also the success of future policies and programs, taking into account the observations made following the evaluation of those already implemented.

References

- Dunn, W.; Public Policy Analysis: An introduction; Prentice Hall; New Jersy; 1981
- Hanberger, A.; What is the policy problem? Methodological Challenges in Policy Evaluation; in Evaluation; vol.7(1); 2001
- Hill, M.; The policy process in the Modern State; Prentice Hall; 1997
- Howlett, M.; Ramesh, M; Studyinng Public Policy: Policy Cycles and Policy Subsystems; Oxford University Press; Oxford; 1995
- Lasswell, H; Las orientacions a las politicas; 1951
- Stufflebeam; Shinkfield; Evaluation Theory, Models and Applications; Jossey-Bass; San Francisco; 2007
- Zulean, M; Miroiu, A; Rădoi, M.; Analiza Politicilor Publice; Bucureşti; 2002
- www.fonduri-ue.ro.

QUALIFICATION OF ADMINISTRATIVE ACTS AS NORMATIVE AND INDIVIDUAL ACTS. THEORETICAL AND PRACTICAL ISSUES

Cristina TITIRIŞCĂ*

Abstract

The paper aims at analysing the administrative acts of a normative character and the administrative acts of an individual character, provided for in art. 2 par. (1) letter c) of the Law on the administrative contentious no. 554/2004, with its subsequent amendments and completions, from three perspectives, namely from theoretical perspectives, from the perspective of the rulings pronounced in the last years by the High Court of Cassation and Justice, but also from the perspective of the case law of the Constitutional Court of Romania. The distinction seems to us all the more important as this issue was approached by the Constitutional Court of Romania, at the beginning and towards the end of the year 2017, in the context of exercising the power provided by art. 146 letter e) from the Constitution of Romania, republished, a new attribution of the constitutional litigation court, introduced during the revision of the Fundamental Law from 2003, by which it acquired the role of a mediator in solving legal disputes of a constitutional nature between public authorities, legal disputes that might concern the content or the extent of their attributions stemming from the Constitution, which means that they are conflicts of competence, positive or negative, and which can create institutional blockages.

Keywords: *normative act, individual act, jurisprudence, Constitutional Court, characterization.*

1. Introduction

The recent case-law of the Constitutional Court of Romania, and we are referring here to the Decision no. 68 of February 27th, 2017, published in the Official Gazette of Romania, Part I, no. 181 of March 14th, 2017, as well as the Decision no.757 of November 23rd, 2017, published in the Official Gazette of Romania, Part I, no. 33 of January 15th, 2018, was a chance to, once more, bring into the attention of practitioners, as well as of the public, the subject concerning the delimitation of administrative acts into individual and normative acts, a significant issue in terms of the effects these types of acts produce, but especially in terms of the ways in which their legality can be verified.

The antecedent decisions were pronounced in the context in which subject to the attention of the Constitutional Court there were applications for resolving legal conflicts of a constitutional nature between public authorities, respectively between the Government of Romania, on the one hand, and the Public Ministry - the Prosecutor's Office attached to the High Court of Cassation and Justice - the National Anticorruption Directorate, on the other hand, requests lodged by the President of the Senate and generated by the existence, pending before the National Anticorruption Directorate, of cases in which a criminal investigation was conducted on the way a normative act was passed, respectively on the examination of the legality of a Government decision.

We consider that the current doctrine on administrative law does not insist on the jurisprudential elements concerning the classification of the administrative acts depending on the extent of their effects, limiting themselves to the defining of these categories, alongside with other criteria to prioritize the administrative acts[1].

Under these circumstances, the present paper does not have the propose to conduct an exhaustive analysis of the above stated aspects, but, starting from the theoretical aspects of the two notions, we wish to show some differences appeared in the practice of the High Court of Cassation and Justice, as well as the emphasis added in the case-law of the Constitutional Court of Romania.

2. Legal framework

The notion of "administrative act" is not enshrined at constitutional level, although the Basic Law uses it in art. 52 - Right of a person injured by a public authority[2] and in art. 126 par. (6), with reference to the control by way of the administrative contentious[3].

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[1] See, for example, Negoiţă, 1993, page 117; Iovănaş, 1997, page 21; Iorgovan, 2005, page 39; Brezoianu and Oprican, 2008, page 73; Manda, 2008, page 400; Trăilescu, 2008, page 182; Alexandru, Cărăuşan and Bucur, 2009, page 332; Apostol Tofan, 2009, page 20; Petrescu, 2009, page 312; Vedinaş, 2015, page 100.

[2] According to art. 52 par. (1) of the Constitution of Romania, republished: „Any person aggrieved in his/her legitimate rights or interests by a public authority, by means of an **administrative act** (emphasis added - C.T.) or by the failure of a public authority to solve his/her application within the lawful time limit, is entitled to the acknowledgement of his/her claimed right or legitimate interest, the annulment of the act and reparation for the damage".

[3] According to art. 126 par. (6) of the Constitution of Romania, republished: „The judicial control of **administrative acts** (emphasis added - C.T.) of the public authorities, by way of the contentious business falling within the competence of administrative courts, is guaranteed,

At infra-constitutional level, the framework regulation is given by the provisions of art. 2 par. (1) letter c) of the Law on the administrative contentious no. 554/2004[4], with the subsequent amendments and supplements, which state that the administrative act is an "unilateral act of an individual or normative nature, issued by a public authority, under a regime of public power, in order to organize the execution of the law or to the concrete execution of the law, which gives birth, changes or exits legal relations"; at the same time, the law assimilates to the administrative acts "also the contracts concluded by the public authorities, regarding the valuation of the public property, the execution of the works of public interest, the provision of public services, the public procurements", thus giving the ordinary legislator the possibility to also establish, by means of special laws, other categories of administrative contracts subject to the jurisdiction of the administrative courts.

We stress out the fact that the previous legislation[5] did not have such an explanation. The Law no. 554/2004 provides for, among other things, as a novelty, also the definition of basic concepts in matters on administrative contentious, the current definition of the administrative act being introduced by the Law no. 262/2007[6], noting that the delimitation in individual or normative acts has been foreseen since the adoption of the basic law, in 2004.

3. Elements of theory and judiciary practice

The classification of the administrative acts that are of interest to us from the perspective of this paper is the one in normative administrative acts and individual administrative acts. The doctrine of administrative law[7] is unanimous in appreciating that the normative administrative acts are addressed to everybody, and anyone might fall under their incidence at a given time, while individual administrative acts are addressed to determined natural or legal persons. Moreover, it was underlined that individual acts can never violate normative acts[8].

The High Court of Cassation and Justice determined the criteria according to which it is established that an administrative act is an individual or a normative one[9], stating that its appointment is not achieved by the "cutting" of certain provisions in that act, thus affecting the unitary character of the act, but by whole examining of its contents, from the perspective of the features of each of these discussed categories (normative acts and individual acts). An administrative act is either normative or individual, depending on the extent of the legal effects it produces as a whole, irrespective of the concrete content of a part (for example an annex) of it.

Thus, administrative normative acts contain regulations of a general, impersonal character, which produce *erga omnes* effects, while individual acts, usually, produce effects toward a person, or sometimes toward several persons, expressly mentioned in the content of these acts. The wrong placement of a document in one category or another (that is, more often, the qualification of a normative act as an individual one than vice-versa) may lead to an unlawful judgment by the court before which this issue was raised.

Only for illustration purposes, we mention that the above distinction operates in the matter of communication of administrative acts, given that the disclosure of an administrative act is made by means of publication for normative acts and by means of communication for individual acts. The most effective way of communication is handing the document, under signature, to the recipient, either directly by the issuer or through an administrative courier or mail, by registered mail, while the display of the act, attested by drafting of a display report, is the extreme alternative, applicable in the case where the addressee refuses to receive the document under signature or he/she is not found at the premises. However, the issue of the communication of individual administrative acts by display cannot be substituted or mistaken for publication, because the presumption and the obligation to know the texts published in the Official Gazette of Romania operate only against the norms of law, establishing the presumption and the obligation to know the law[10].

In fact, in the meeting of the judges of the High Court of Cassation and Justice - the Administrative and Tax Litigations Chamber from October 22nd, 2012, in application of art. 2 par. (1) letter c) of Law no. 554/2004, it was adopted the principle solution according to which "the acts issued by the heads of the central public authorities approving, for example, the organizational structure, the function status or the organization and operation rules of the institution, are

except for those regarding relations with the Parliament, as well as the military command acts. The administrative courts, judging contentious business have jurisdiction to solve the applications filed by persons aggrieved by statutory orders or, as the case may be, by provisions in statutory orders declared unconstitutional".

[4] Published in the Official Gazette of Romania, Part I, no. 1.154 of 7 December 2004.

[5] Law on the administrative contentious no. 29/1990, published in the Official Gazette of Romania, Part I, no. 122 of 8 November 1990, as subsequently amended and supplemented, currently repealed by Law no. 554/2004.

[6] Law no. 262/2007 on the modification and completion of the Law on the administrative contentious no. 554/2004, published in the Official Gazette of Romania, Part I, no. 510 of 30 July 2007.

[7] See *supra*, note no. 1.

[8] See D. Brezoianu, 2004, page 71, *apud* Apostol Tofan, *op. cit.*, page 21.

[9] High Court of Cassation and Justice (H.C.C.J.) - The Administrative and Tax Litigations Chamber, Decision no. 1718 of 26 February 2013. Source: www.scj.ro.

[10] H.C.C.J., Decision no. 1718/2013, cited above.

acts of an individual nature, being issued on the basis of the delegation attributed to the issuer by Government decision, for the enforcement and the practical implementation of the legal provisions with higher legal force, which makes that their publication in the Official Gazette is not mandatory"[11].

4. The recent jurisprudence of the Constitutional Court of Romania

As we have stated beforehand, the issue of the normative and individual administrative acts was addressed as early as during the past year by the Constitutional Court. Decisions no. 68/2017 and 757/2017 have differentiated the effects these types of acts produce if there is a pending criminal investigation on the way a normative act was passed, respectively on the examination of the legality of a Government decision.

Both decisions were made in the case of settling applications for resolving legal conflicts of a constitutional nature between public authorities, a new power of the Constitutional Court, one of great importance and complexity, introduced with the 2003 revision of the Fundamental Law. Taken from the experience of other countries, where constitutional courts also have such a role[12] , the new attribution (new by comparison with the 1991 Constitution of Romania) has increased the degree of difficulty and complexity of the Constitutional Court's mission.

The beginning of these applications took place in 2005, with the authorities involved being the President of Romania and the Parliament[13]. We note that, from the beginning, by virtue of its quality of guarantor of the supremacy of the Basic Law, the Constitutional Court behaved as an impartial and objective arbitrator, always inviting the parties to a loyal constitutional conduct, one of cooperation and mutual respect, that is the expression of the spirit of the constitutional principle of the separation and the balance of powers, which implies, among other things, that public authorities must cooperate loyally with each other, must maintain a constructive dialogue, eventually using the path of the compromise, to find solutions that best match the interests of each other, in order to avoid conflicts. Thus, by resolving the existing conflicts between different public authorities, it is intended to remove possible institutional blockages and not to solve some political divergences[14].

The Decisions of the Constitutional Court no.68/2017 and 757/2017 offered the court the opportunity of ruling on the distinction between individual and normative administrative acts, applicable in criminal matters.

As regards the constitutional conflict that was the subject of the first decision, it was generated by the action of the prosecutors of the National Anticorruption Directorate to investigate on the opportunity and the circumstances of drafting the Government Emergency Ordinance no. 13/2017 on the amending and supplementing of the Law no.286/2009 on the Criminal Code and of the Law no.135/2010 on the Code of Criminal Procedure[15]. On that occasion, the Court examined, on the one hand, the particular attribution of law-making given to the Government by the Constitution, stipulating that, in adopting the emergency ordinance, the Government exercised one of its own competences, expressly provided for by the provisions of art.115 of the Basic Law.

On the other hand, the Court held, about the original competency of the Government, as an executive authority, that it regards the organization of the execution of the laws, which are primary regulation acts, through the issuance of decisions, secondary regulation acts, which are normative or individual administrative acts, issued for the purpose of the proper administration of the execution of the primary normative framework, which requires the establishment of measures and subsequent rules to ensure its correct application. Considering that the decisions are always adopted *secundum legem* and that they ensure the application or the enforcement of laws, it follows that, in the Romanian constitutional system, the rule is that the Government does not have the right to primarily regulate social relations, but only to adopt the secondary legislation.

Furthermore, since, from a formal point of view, of the issuing authority, both secondary legislation (Government decisions) and primary legislation (simple and emergency ordinances) are administrative acts, the Court analysed the way to control them. The common law on the control of the administrative acts is represented by Law no.554/2004, as subsequently amended and supplemented, but, by way of derogation from the common rule, the Government's simple or emergency ordinances are not subject to judicial review by the courts of common law, but, by virtue of their quality as primary regulatory acts, thus equivalent to the law, they are subject to the constitutional review enshrined in the Basic Law. As such, the investigation of the legality of the Government's simple or emergency ordinances concerns exclusively the reference to the Basic Law, which enshrines the

[11] Source: www.scj.ro.

[12] Under various forms, such powers to solve the conflict are within the jurisdiction of Constitutional Courts (or Courts) in Portugal, Slovakia, Poland, Italy, Spain etc.

[13] Decision no.53/2005 on applications for resolving legal conflicts of a constitutional nature between the President of Romania and the Parliament, formulated by the President of the Chamber of Deputies and by the President of the Senate, published in the Official Gazette of Romania, Part I, no.144 of 17 February 2005.

[14] Decision no. 148/2003, published in the Official Gazette of Romania, Part I, no. 317 of 12 May 2003.

[15] Published in the Official Gazette of Romania, Part I, no. 92 of 1 February 2017, rejected by Law no. 8/2017, published in the Official Gazette of Romania, Part I, no.144 of 24 February 2017.

procedure for the adoption of this type of normative act, as well as the fundamental rights and freedoms that its content must observe, and, in accordance with the constitutional and legal provisions in force, only the Constitutional Court is empowered to adjudicate on the Government's simple or emergency ordinances, no other public authority having the material competence in this area. In this respect, the finding of non-compliance with the Constitution lacks the normative act of its legal effects, the applicable sanction concerning only the removal of the act from the active fund of the law, without being the premise of a legal liability of the persons involved in the legislative procedure or in the decisional act.

The Court concluded that no other public authority, belonging to a power other than the legislature, can control the Government's normative act from the point of view of the opportunity of the act of law-making. Assessing the appropriateness of adopting an emergency ordinance, in terms of the decision on law-making, is an exclusive prerogative of the delegated legislator, who may be censored only as expressly provided for in the Constitution, that is only through the parliamentary control exercised according to art. 115 par. (5) of the Basic Law. Only the Parliament can decide on the fate of such a normative act of the Government, by adopting a law approving or rejecting the ordinance, when, during the parliamentary debates, it has the power to censure the Government Ordinance, both in terms of legality and of opportunity. Moreover, according to art. 115 par. (8) of the Constitution, the law approving or rejecting an ordinance shall regulate, if such is the case, the necessary steps concerning the legal effects caused while the ordinance was in force.

Hence, by checking the circumstances in which the Government adopted the Emergency Ordinance no.13/2017, the Public Ministry - the Prosecutor's Office attached to the High Court of Cassation and Justice - the National Anticorruption Directorate has assumed the power to conduct a criminal inquiry in an area going beyond the legal framework, which may lead to an institutional blockage in terms of the constitutional provisions that enshrine the separation and balance of powers within the state. In the conditions under which the criminal prosecution requires research and criminal investigation on how the Government fulfilled the duties of the delegated legislature, the action of the Public Ministry becomes abusive and puts pressure on the members of the Government, which affects the sound operation of this authority as to what concerns the act of law-making, having as a result the fact that the delegated legislator would be deterred/intimidated from exercising its constitutional powers. Thus, through its conduct, the Public Ministry - the Prosecutor's Office attached to the High Court of Cassation and Justice - the National Anticorruption Directorate has acted *ultra vires*, has assumed a competence that it does not possess - the control of the way to adopt a normative act, in terms of its legality and opportunity, which affected the good functioning of an authority.

There was a different situation altogether examined in the case of the Constitutional Court's Decision no.757/2017. In this case, the President of the Senate requested the Constitutional Court to resolve a legal conflict of a constitutional nature between the Government of Romania and the Public Ministry - the Prosecutor's Office attached to the High Court of Cassation and Justice - the National Anticorruption Directorate (N.A.D.), triggered by the criminal investigation by the N.A.D. of the legality of the Government Decision no.858/2013[16], respectively of the Government Decision no.943/2013[17]. In other words, it was requested to adjudicate on that, from the point of view of the criminal liability, as regards the verification of the legality of the secondary regulatory acts issued by the Government (the decisions), the same legal regime applies as to the primary regulatory acts adopted by the Government (ordinances and emergency ordinances).

This time, however, the Court held that the two Decisions of the Government are administrative acts of authority, of an individual nature. As such, in view of the dichotomy existing between the normative acts (the laws, the ordinances, the emergency ordinances and the normative decisions of the Government) and the individual acts (the decision of the Government with an individual nature), there can be no parallel between the two situations, in terms of criminal responsibility, especially since only the administrative acts of an individual nature can produce benefits, advantages or aids, as provided by the criminal law, so that the criminal investigative body has the competence to investigate the acts/facts of criminal significance, committed in relation to the issuance of the individual administrative act.

As such, insofar as the investigation on the legality of the individual administrative act is a matter prior and incidental to the prosecution and to the trial of the fact of which the person is accused, both the prosecution and the trial by a court in criminal proceedings may be carried out without the violation of art. 52 and art.126 par. (6) of the Constitution, all the more so since the criminal law provides for sufficient filters to ensure that criminal prosecution is not abusively/randomly/subjectively initiated, issues that concern the way in which the case is investigated, with sufficient mechanisms/procedures to remedy its possible deficiencies.

The Court emphasized that it is obvious that, in terms of the opportunity of issuing the individual administrative act, the Public Ministry does not have the power to prosecute, but it has the power to investigate the criminal actions committed in connection with its issuance. Since there is no

[16] Published in the Official Gazette of Romania, Part I, no. 692 of 13 November 2013.
[17] Published in the Official Gazette of Romania, Part I, no. 792 of 17 December 2013.

mechanism to control the opportunity of issuing the administrative act, if the law allows for a specific administrative operation to be left to the margin of appreciation of the administrative body, there can be no question of censoring the opportunity of its appreciation. It is for the court to ascertain whether the charge in criminal matters concerns acts/facts related to the opportunity or to the circumstances of the issuing of the individual administrative act.

5. Conclusions

The regulation of the administrative contentious by Law no. 554/2004 brought beneficial changes to the earlier legal framework, one of the most important being the one that covers the fundamental concepts used in this specific field, among whom it can also be found the notion of "administrative act", with its subdivisions: "a normative administrative act" and "an individual administrative act". However, the meaning of these syntagma is further developed in the judicial practice, whether we are talking about common law courts or about the Constitutional Court, by the judge called upon to apply the legal provisions to specific cases.

References

- Alexandru, Ioan, Cărăuşan, Mihaela and Sorin Bucur, 2009, *Drept administrativ*, Third edition revised and added, Bucharest: Universul Juridic
- Apostol Tofan, Dana, 2009, *Drept administrativ*, vol. II, Second edition, Bucharest: C.H. Beck
- Brezoianu, Dumitru, 2004, *Drept administrativ român*, Bucharest: All Beck
- Brezoianu, Dumitru and Mariana Oprican, 2008, *Administraţia publică în România*, Bucharest: C.H. Beck
- Iorgovan, Antonie, 2005, *Tratat de drept administrativ*, vol. II, Fourth edition, Bucharest: All Beck
- Iovănaş, Ilie, 1997, *Drept administrativ*, Arad: Servo-Sat
- Manda, Corneliu, 2008, *Drept administrativ. Tratat elementar*, Fifth edition, revised and added, Bucharest: Universul Juridic
- Negoiţă, Alexandru, 1993, *Drept administrativ şi ştiinţa administraţiei*, Bucharest: Atlas Lex
- Petrescu, Rodica Narcisa, 2009, *Drept administrativ*, Bucharest: C.H. Beck
- Trăilescu, Anton, 2008, *Drept administrativ*, Third edition, Bucharest: C.H. Beck
- Vedinaş, Verginia, 2015, *Drept administrativ*, Ninth edition, revised and added, Bucharest: Universul Juridic

GOVERNANCE AND LEGITIMACY. PAST IN PRESENT

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Abstract

Governance and legitimacy were two issues that generated long-standing political disputes in Europe. If legitimacy was grounded on the theory of divine rights during the Middle Ages, the idea of representation challenged the whole political system. Kings were interested in preservation of their political power as it was acquired during the earlier centuries meanwhile the parliaments were trying to become not a consultative body, but a legislative body. As a consequence, whenever the spirit of reconciliation of the great political actors lacked, the road to institutional conflict was opened. Sometimes the institutional conflict transformed itself in a civil war as it happened in seventeenth century England. Unfortunately, history proved that many times the constitution didn't managed to solve the problem. Even though today such a matter has been solved in some democracies in other states, the two concepts have often blocked the good functioning of the central administration. As a special case the Organic Statutes of the Romanian Principalities were designed to set rules for at least some decades. Unfortunately, their authors were able to settle the rules regarding the prince as central authority and the National Assembly. The purpose of this article is to establish the conflicting moments between the two concepts under different constitutional regimes and how they have been solved in the modern history of Romania.

Keywords: *governance, central public adiministration, legitimacy, govern, parliament, president, king, constitution.*

1. Introduction

As we can suppose, political institutions, like any other institutions, have their own history and their own succession of stages that has given them their present form.

There is no need to go back a long way in history to find that in Europe as in other regions of the world the monarch, regardless of his official title - king, emperor, tzar etc. - concentrated the entire political power.

In the common imagination, his legitimacy came directly from God, and the idea of his election was accepted only in exceptional cases, without such a choice being considered otherwise than as a manifestation of the divine will.

As we know, a series of events - rather accidental - in England's history, starting with the conception of Magna Charta in 1215, have subverted the divine nature of the monarch as the key institution of premodern society.

Therefore, in the early modern times, the idea of divine monarchy led to a famous civil war in England, and after the few years of political strain the only possible solution, even if that was a contradiction in conceptual terms, was the constitutional monarchy.

On a practical level, although the return of the Stuarts gave stability to the kingdom and society and the increased parliamentary role had dramatically eroded the royal power, the relations between the institutions were not yet well defined.

Of course, the head of the state was still the representative of the divinity on earth, but he had to lead in collaboration with the parliament representing the nation.

Weakness and inappropriateness for the exercise of the political power of the new Hanoverian dynasty has made these relationships, starting with the 18th century, crystallize and fit into what we call today the rule of law, representative government, and where appropriate parliamentary monarchy.

Obviously, the king was considered the head of the state and, presumed to represent the state and the nation, he could not be mistaken, but his ministers could.

As a result, the government gradually ceased - and we are considering a long transition period of at least 100 years - to be an administrative structure under the king's subordination. Formally, typical of the English constitutional system, they would be appointed by the king to date, but his authority would be replaced by a role of representativeness, a formal role.

The government would only apparently belong to the king; in fact, he would be a representative government of the parliament and the ministers would answer to the latter and not to the king, as the medieval monarchies did.

Unfortunately, this institutional framework, which, as we anticipated, contains some obvious contradictions, although it has provided the coherence of English political life to date, was the result of an at least secular experience.

At the time of the French revolution of 1789 or at least in 1814-1815, upon the return of the Bourbonians to France, the delimitation of the attributions between the institutions on the one hand and the delimitation of the symbolic attributions on the other was far from being concluded.

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As a result, the French Charter and other monarchical constitutions of the 19th century, although trying to follow the principles of British constitutional life as faithful as possible, were only a mere reflection of a process in full swing.

Whenever the spirit of reconciliation of the great political actors lacked, the road to institutional conflict was opened.

2. Structurile politice şi blocajul guvernării

At the beginning of the nineteenth century, the political regime of the two principalities could be defined as a centralized one being based on a bureaucracy with aristocratic origins. Apparently, the prince had all political power, but the dramatic degradation of the relations with the Ottoman Empire decreased meaningfully his authority.

In fact, an authentic abyss appeared between the appearance of the institution and reality.

In early 1830s, the entry into force of both Organic Statutes could be an historic moment when the political institutions of the two Principalities modernized.

The authors of the text and the representatives of Russian Empire – as Protecting Power – as well pursued the weakening of the central authority, even the ruler had to be, at least theoretically, elected for life.

Strengthening or maintaining a strong central authority primarily affected the interests of landing oligarchs, who saw their power of influence limited, and secondly, Russia's interests, because a centralized structure could be the premise of political consolidation and as a consequence the path to independence was open.

Therefore, the relationship between executive and legislative power had from the start a major structural weakness.

The Organic Statutes imposed, for the first time, the principle of separation of powers, conferring the status of legislative power to the National Assembly. By doing so, the central power bears a strong, firmly established blow.

The prince was granted only the right to propose draft laws to the National Assembly, which may adopt, modify or reject them.

However, the prince had the right to reject any normative act adopted by the Assembly.

Apparently, the acceptance of the principle of separation of powers is a distinctive sign of modernity, but it is no less true that the reorganization of the state as a whole, even in a conservative formula, calls for a sustained and rapid legislative activity or, precisely this natural necessity contradicts the text of Organic Statutes which no longer allowed the central authority to intervene, even with the prior consent of the Assembly.

Practically, the limitation of the powers conferred on the ruler prevents the generalized principles of a mercantilist nature which the Regulation proclaims in the field of customs policy or industrial development.

In addition to this, the provisions had not clarified the relationship between the two powers.

On the contrary, they permitted a potential institutional conflict.

Since the prince was the head of state and the ministers were responsible only before him, being appointed or revoked only by him, any initiative of the ruler or the Assembly could lead to an institutional blockage without exiting.

The ruler did not have a decorative role as a limited constitutional monarch but had both a head of state and a head of government. Its policies could not be effectively censored by the Assembly and its dismissal could only be achieved through the concordant intervention of the suzerain and the guarantor.

Although the People's Assembly had been designed as an aristocratic legislature, lacking the power to replace ministers, it was strong enough to obstruct the ruler's activity.

Given the political context, the Ruler could either rule by suspending the Assembly - as Bibescu would do between March 1844 and December 1846 - or use his powers in organizing the elections - a procedure used by the same Ruler - in order to register the opponents in several electoral colleges so their share would be much reduced.

It is quite plausible that, in the absence of the revolutionary movement of 1848, the opposition between the executive and the legislature would degenerate into clashes that would put an end to the rule of law.

The lack of functionality of mechanisms for exerting the political power is not the only flaw in the Organic Regulation.

Driven by the same desire to carry out a reform of the statute institutions, the Regulation authors included provisions of a fiscal nature in a text of constitutional act value, in the context of the fact that the subsequent amendment of the Regulation was almost impossible. Therefore, the rigidity of the Regulation, under the conditions of predictable economic and social developments, would become the main factor undermining its own authority.

Unfortunately, the subsequent regulations failed to provide functionality to institutions so they could contribute effectively to public policy making.

As far as the legislative mechanism is concerned, the institutional conflict would reactivate during Cuza's period, as the Assembly had the right to debate, voting on bills submitted by the prince, and to make amendments (Article 20), while the prince permanently refused (Article 14) the promulgation of a law amended by the Assembly. Once the prince was elected, his ministers could only be removed under difficult circumstances.

Therefore, any project proposed by the prince, through his minister, could be rejected by the Assembly, and at the same time, the amendment of a

bill could be rejected by the prince, who had the capacity to thus block the will of the Assembly.

The land reform project has accurately demonstrated this path. First, it was amended according to the interests of the great landowners who dominated the assemblies that it became contrary to the principles of the Paris Convention, determining Cuza not to ratify it, and then it was resumed by the Kogălniceanu government, with the latter receiving an impeachment vote from the Assembly dissatisfied with the text of the project. Since the prince was elected for life (Article 10) and the mandate of the members of the Assembly was for seven years, the blockage could not be theoretically clarified, unless new elections were held upon that term, elections that would actually grant the prince a majority. In such a nevertheless predictable context, while electoral law obviously benefited the great landowners, the reform stipulated under the Paris Convention could not be achieved and Cuza, in order to break this institutional conflict, had no option that followed the letter of the Convention.

Therefore, the coup d'état, as suggested by Napoleon III, and accepted by the other powers, was ultimately the only way to settle the institutional conflict.

In 1866, when Carol de Hohenzollern was elected ruler, it seemed that the adoption of a new constitution could outline an institutional framework that would strengthen the liberal regime reborn after Cuza's abdication.

In fact, the most disputed reforms had already been achieved, and access to public life of larger segments of the population was no longer regarded by land oligarchy as a threat to its own socio-economic status.

The executive power was entrusted to the prince, who named or revoked the ministers, but any change in the governmental structure could not be discretionary, assuming implicitly an agreement of the legislative body.

Furthermore, the prince could refuse to sanction a law.

Although the pressure of modernization during Cuza's era had diminished, the 1866 Constitution would raise the same problems and could not resolve the conflict between the ruler and the Parliament.

A potential conflict between the institutions continued to exist, being much more visible at the time of voting for the approval of budgets. The broadening of the voting right, accepted by the conservatives, had, first of all, induced a change in the structure of the electoral body. As a result, the formation of a majority would become something impossible.

Finally, after five years of successive governments, unstable and ineffective, between government and representative, Carol I would choose the first option.

This choice implied the formal preservation of the 1866 Constitution - and not its abrogation as requested by the conservative sectors through the Iași Petition – which resulted in the actual modification of the institutional mechanism, by artificially promoting what was later called the 'governmental rotation', a system balanced by the monarch, whereby the two historical parties successively took over the leadership, ensuring relatively stable governments.

The system was opposed to the Western one, considering that the British or Belgian monarch appointed as Prime Minister the leader of the party that had won the elections, whereas in the Romanian system, Carol I first appointed the Prime Minister and then the latter would organize the elections because, most of the time he would be in front of a hostile legislative body.

Obtaining victory in elections would not only become a goal, but also a duty to legitimize the choice of the monarch and the results, which more or less corresponded to the voters' will, would become legitimate by the recognition of the system on behalf of the monarch.

Later, in the twentieth century, although the system had been perpetuated, both conservatives and liberals recognized its shortcomings. In the Romania of small colleges, the national-liberal Duca stated,

The governments chose the Chambers, not the other way around, and when a government came to power, it had all the odds to succeed as resounding as possible. The partial elections or the elections for a two-term legislature were harder, because the parties in power would create dissatisfaction, would bring in deceipt or get the opposition started[1].

In a flatter way of speaking, Constantin Argetoianu considered the system of justice

A dictatorial regime characterized by the omnipotence of the prime ministers and party leaders (...), whom we have signaled as many times as our democracy has fired up to the idea of our evolution towards a possible enthronement of a confessed dictatorship instead of an unspoken one[2] .

Therefore, if we try to determine when the political power acted autonomously to modernize social and economic structures, we would probably choose 1863-1865, 1880-1887 and probably 1896-1897.

Basically, for the most part of the nineteenth century, deficient constitutional mechanisms have prevented the achievement of governance, and the system of «governmental rotation», despite artificially-created stability sometimes, has proven to be a major hindrance to the development of a public conscience.

During the period following the events of 1989, when Romania's political life returned to a democratic framework, the hypothesis of institutional conflicts diminished.

[1] Duca, *Memorii*, vol. I, 15.
[2] Argetoianu, *Însemnări zilnice,* vol. I, 400.

On the one hand, the parliamentary and presidential elections that took place at the same time led to the same party gaining power either, whether we consider the National Salvation Front (subsequently the Democratic Front of National Salvation) in 1990, 1992 and 2000 respectively, or we think about the coalition of the opposition parties in 1996 and 2004 respectively.

Accordingly, in such a context the potential tensions were rather internal and solved within the governing party or coalition, even though sometimes this affected the proper course of the governance itself.

On the other hand, the new constitution, approved by referendum in 1991, gave a rather representative role to the president, allowing the government and the parliament to exercise almost unhindered the power prerogatives.

Therefore, according to art. 80 of the Constitution (text which establishes the role of the president) the President of Romania represents the Romanian state and is the guarantor of national independence, unity and territorial integrity of the country.

In the same direction, the President of Romania observes the compliance of the Constitution and the proper functioning of public authorities. To this purpose, the President acts as a mediator between the powers of the state, as well as between the state and society.

We hereby observe that the head of the state phrase is not used and the president, although he is the supreme representative of the public administration, does not have a substantial role.

However, concluding that the president has only a decorative role is wrong, because some prerogatives that the previous monarchs had, have been conferred to the president even if in a rather diminished manner.

Consequently, as it was logical, the president appoints the candidate for the position of prime minister and, according to Article 87, can take part in the Government sessions where issues of national interest concerning foreign policy, country defense, public order are debated and, at the request of the Prime Minister, in other situations.

Obviously, the President of Romania presides over the meetings of the Government in which he participates.

Similar to a monarchical constitution, such as that of 1866 or 1923, any law is sent, for promulgation, to the President of Romania.

The promulgation of the law is made within 20 days of receipt.

However, before the promulgation, the President may ask the Parliament, once, to review the law.

When the President asked for the law to be re-examined or, if its constitutionality was requested for review, the promulgation of the law shall be made no later than 10 days after the receipt of the law adopted after the re-examination or upon receipt of the Constitutional Court's decision confirming its constitutionality.

Basically, this time too the constitution settled a possible conflict between the executive and the legislature in favor of the latter.

A far as the potential conflict between the government and the parliament is concerned, it can only be arranged by a vote of no confidence as regulated by Art.112.

Therefore, the Chamber of Deputies and the Senate, in a joint sitting, can withdraw the confidence given to the Government by adopting a motion of censure, with the vote of the majority of deputies and senators.

The vote of no confidence may be initiated by at least one quarter of the total number of deputies and senators and is communicated to the Government at the date of submission.

The vote of no confidence is debated three days after it was presented in a joint sitting of the two Chambers.

If the vote of no confidence has been rejected, the deputies and senators who have signed it may no longer initiate a new motion of censure, during the same session, unless the Government assumes responsibility according to Article 113.

As a result, the provisions of the current Constitution present some misunderstandings and a certain contradiction at the level of representativeness.

On the one hand, the president is elected by the direct vote of all citizens, which is a defining rule for presidential republics (e.g. France).

On the other hand, his attributions are much more limited than those of a president from such a system.

However, it seems obvious - like in the 1990s - that most citizens want to have the right to choose directly the president of the republic and that, after the last presidential and parliamentary elections, they see in the president a balance between the power of the government and parliament.

Nonetheless, the balance of powers also means institutional conflicts, and institutional conflicts must not be overlooked, especially as long as they are permanently found in the great Western democracies.

Consequently, as was the case several times in recent history when the parliamentary majority was not of the same political color as the president (e.g. establishing and identifying the Romanian representative at the European Council), the decisions in these situations will be taken by the Constitutional Court.

Of course, the ongoing relocation of institutional conflicts in front of a court that, by definition, is not a common courtroom is not an excellent way to resolve such a dispute.

However, if we consider the practices in this matter, at least between 1866 and 1938, we will notice that the implementation of the constitutional norms will be achieved in the medium and long term for them too, even if some court decisions are and will undoubtedly be controversial.

After all, the way in which such a conflict is settled also demonstrates the degree of understanding of the rules of the democratic game.

References

- Argetoianu, Constantin. *Însemnări zilnice*. Bucharest : Machiavelli, 1998-2008
- Duca, I. G. *Memorii*. Bucharest: Expres, 1992-1994
- Muraru, Ioan and Iancu, Gheorghe. *Constituțiile române: texte, note, prezentare comparativă*. Bucharest: Monitorul Oficial, 1995
- Negulescu, Paul and Alexianu George (ed.). Regulamentele organice ale Valahiei si Moldovei: textele puse în aplicare la 1 iulie 1831 în Valahia si la 1 ianuarie 1832 în Moldova. Bucharest: Eminescu, 1944
- Sbârnă, Gheorghe (ed.). *Constituțiile României: studii*. Târgoviste : Cetatea de Scaun, 2012

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